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Intersection of police work, the *Charter* and criminal law in Canada.

By Brian Forrester

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- Youthful First Offender
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Abstract:

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This article was written to review three cases in the area of criminal law and to bring reflection to the *Charter of Rights and Freedoms*. In this analysis there are two criminal cases involving the accused being found with drugs and a loaded firearm. In the third case, the accused's purse and vehicle were searched and methamphetamine was found. The themes canvassed are expectation of privacy, reasonable grounds to detain, the reliability of the evidence, the repute of the justice system and whether or not the evidence should be excluded under section 24(2). The final two cases reviewed in this article are fairly recent judicial decisions and highlight the application and continued relevance of the *R v. Grant* section 24(2) analysis in our Courts today.

Brian Forrester is a former lawyer. He currently is a resident of Alberta.

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What is the *Canadian Charter of Rights and Freedoms* and how is it relevant? The best way to illustrate the fundamental importance of the *Charter* is to see specific examples and cases where the *Charter* was applied. The specific fact patterns bring to life the principles enshrined in the *Charter*.

One of the areas in the *Charter* that isn't well understood by many are the principles related to search and seizure and police work.

Search and seizure is a topic that isn't well understood. However, when you go to a dinner party or event – do you expect your purse to be searched? The answer is probably no. You don't expect your purse or bag to be searched when you go to a dinner party or event. The reason is that you have a reasonable expectation of privacy for yourself, and your purse.

The effects of the *Charter* are apparent in our everyday lives, without us being aware of it.
One of the best ways to become comfortable with the application of the *Charter* is to examine a few cases with specific fact-patterns. In this article we are going to look at three cases. The cases are the following:

- *R v. Grant*, 2009 SCC 32
- *R v. Dasilva*, 2018 ONSC 3349
- *R v. Zakarie*, 2018 ONSC 2905

By looking at the cases, we can see how the individual facts of each case fit together with the principles of the *Charter*. In particular, we can review how the *Charter* is being applied in two current and recent cases: *Dasilva* and *Zakarie*.

By looking at these three cases we will also see how difficult it is to sometimes predict the outcome of a contested *Charter* case. But by looking at these cases, we hope to take some of the "guess work" out of police work, and to provide a strong basis for good police procedures.

***R v. Grant*, 2009 SCC 32**
Background
The first case we are going to look at is *R v. Grant*, 2009 SCC 32. We are going to look at the facts of the case, the result of the case and the comments of the judiciary in the case. We will review the decisions at the various Court levels as the case made its way through the appeals process.

In this *Grant* case, the Accused was walking down the street on November 17, 2003 and was approached by three officers. When questioned on the street by the officer, he admitted he had a "small bag of weed" and a firearm. The accused was arrested and charged.

At Trial, the Accused was convicted of five firearms offences, namely:

- Possession of a loaded, prohibited firearm - s.95(1)) of the *Criminal Code*
- Possession of a firearm for the purpose of transferring it (s. 100(1))
- Carrying a concealed weapon (s.90(1))
- Possession of a firearm knowing that the serial number had been removed (s. 108(1)).

On December 1, 2004 the convictions were entered and the Accused was sentenced on December 22, 2004. Note that the conviction for Unauthorized possession of a firearm (s. 92) was stayed.

On June 2, 2006 the Ontario Court of Appeal issued their judgment and upheld the convictions.

Application for leave was granted on June 21, 2007 to the Supreme Court of Canada (the highest Court level in Canada). Essentially the Supreme Court of Canada is the final Court of jurisdiction, and the last Court to which you can appeal your conviction in criminal law.

On July 17, 2009 the Supreme Court of Canada issued their decision on the *R v. Grant* case. The result was not favourable for Mr. Grant, the Appellant. The Supreme Court of Canada dismissed the appeal on four convictions but allowed the appeal on the single weapons trafficking charge.

It took over five years for this criminal case to make its way through the Appeals process. This is a reminder of how important it is to have good police procedures in place.

Grant Case: Trial Analysis – *Ontario Court of Justice*
This is a difficult case. The accused was found with a loaded revolver. It tests the limits of Section 8 and section 24(2) of the Charter.

At Trial, the Judge dismissed the motion to exclude the evidence and did not find a search pursuant to section 8. At Trial, the accused was convicted of five firearms offences and sentenced to 18 months imprisonment, that was reduced to 12 months due to pre-trial custody.

To discuss this a bit further, at Trial – a motion was made to exclude the firearm evidence. The Trial judge dismissed this motion and the firearm was allowed into evidence. This was probably the correct decision in light of the circumstances.

More troubling, was the Trial Judge's finding that a search did not take place. On the facts, the Accused was walking down the street and then questioned by three officers, one of whom was in uniform. This led to the Accused saying that he had a small bag of weed and a firearm.

Grant Case: Appellate Analysis – *Appeal from Firearms Convictions and from Sentence*
In the Ontario Court of Appeal, the firearms convictions were upheld, though one of the firearms convictions was stayed by the Crown – leaving four firearms convictions. The Court of Appeal also chose not to interfere with the sentencing of 18 months, as the sentence was not "demonstrably unfit" for the offences. The appellant was given six (6) months credit for 92 days in pre-trial custody.

The Appeal Court concluded by admitted the evidence, on the grounds it wouldn't bring justice into disrepute.[1]

Interestingly enough – one of the grounds of appeal to the Court of Appeal was the following question: "Did the trial judge err in concluding that the police's questioning did not amount to a search?" This confirms our concerns with the finding that there was no 'search' of the Accused in the circumstances.

The issues on Appeal in the Court of Appeal on the *Grant* case included the following:
1. Did the trial judge err in concluding that the police's questioning did not amount to a search?

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1 *R v. Grant* 81 O.R. (3d) 1, [2006] OJ No 2179 (QL) (Court of Appeal.), para 67

2. Did the trial judge err in concluding that the appellant was not detained? And if he was detained, was he detained before or after admitting to carrying marijuana?

3. If the appellant's constitutional rights were violated, should the revolver have been excluded from evidence under s. 24(2) of the Charter?

4. If the appellant was wrongly convicted, he asks that his sentence be reduced.

The Court of Appeal stated as follows, at paragraph 29, *per* Laskin J.A.: "I have found this appeal to be a difficult case and a close case. Each side has put forward meritorious arguments."

The accused Appellant alleged that the police's questioning amounted to a search and the search began when the police asked him whether he was carrying anything he shouldn't have. The Court of Appeal concluded that the police did not conduct an unreasonable search of the appellant. There was found not to be a section 8 *Charter* violation.

The Court of Appeal framed the interaction as a search incidental to arrest, and characterized the questions asked by police to have been much more general than in other cases. This means the Court of Appeal found no breach of s. 8 of the *Charter*. However, the Court of Appeal did find a breach of section 9 of the *Charter* (arbitrary detention).[2]

This finding at Trial that there was no search of the Accused (therefore avoiding the implications of section 8 of the *Charter*) was repeated by the Court of Appeal. However, there was a finding at the Court of Appeal level that there was an arbitrary detention, contrary to section 9 of the *Charter.*

The Court of Appeal stated as follows, at paragraph 43, *per* Laskin J.A.: "The appellant has established the necessary causal and temporal link between the police's seizure of the loaded revolver and the infringement of his *Charter* rights."

Having found a Charter breach, the next step is to look at the section 24(2) analysis, this is where the Court determines whether evidence should be excluded, in the event of a *Charter* breach.

The best synopsis of the Court of Appeal reasons is found in comments made respect to the sentence of the Accused. Here the Court of Appeal said as follows: "The appellant was carrying a loaded weapon in the middle of the day on a public street near high schools that were experiencing problems with violence." [3]

It could be explained that the section 24(2) analysis of the Court of Appeal was made in the greater context of being in an area near high schools that were experiencing problems with violence. This perspective is confirmed in the following quote: "The officers were engaged in proactive policing intending to deter or prevent crime in a school neighbourhood "hot spot"." [4]

Once the Court of Appeal had determined that the Accused was arrested in what was described as a 'hot spot' in an area near high schools that were experiencing problems with violence, the rest of the Court of Appeal analysis under section 24(2) can be better put into perspective. In other words, the Accused's rights

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2 *Grant*, above note 1 (C.A.) at para 30
3 *Grant*, above note 1 (C.A.) at para 82
4 *Grant*, above note 1 (C.A.) at para 62

were read very narrowly – given that he was arrested in a 'hot spot' and found with a loaded revolver. The following are a series of quotes from the Court of Appeal decision.

The Court of Appeal stated that "Section 24(2) reflects the interplay between the interests of the individual accused and the interests of the community. …increasing levels of gun violence in our communities threaten everyone's personal freedom." [5]

The Court continued as follows, in paragraph 66, *per* Laskin J.A.:

> "In this case, where the police did not grossly overstep the bounds of legitimate questioning, acted in good faith, used no force, and were patrolling one of Toronto's high-crime areas, I think that the repute of the justice system would suffer if the evidence were excluded." [6]

In this case, the evidence was a loaded revolver, and characterized as reliable evidence.[7] The Court stated, at paragraph 54, *per* Laskin J.A.: "Its admission would not adversely affect the truth-seeking function of the trial."[8] The Court concluded that "…reliability concerns are absent."[9]

"…the present case is not a flagrant case of police abuse. The police asked a fairly innocuous set of questions. They did not accompany these questions with any overt physical threat. They overstepped the bounds of legitimate questioning, but not grossly so." [10]

"The appellant had a lesser expectation of privacy in a public area than he did, for example, in his home. The detention was quite brief. The questioning was minimally intrusive. The police did not physically restrain the appellant until they arrested him after he confessed to carrying the loaded revolver." [11]

"The officers were engaged in proactive policing intending to deter or prevent crime in a school neighbourhood "hot spot".[12]

The Court held that factors favouring admission were as follows, at paragraph 64, *per* Laskin J.A.:

- Possession of a loaded firearm in a public place
- Appellant was carrying the gun in the vicinity of several schools
- The evidence was crucial to the Crown's case
- The evidence was entirely reliable

The Court quoted from *R v. Belnavis* (1996), 29 O.R. (3d) 321 (Ont CA) *per* Doherty J.A., at paragraph 45:

> "The exclusion of reliable evidence essential to the prosecution of a significant criminal charge must, in the long term, have some adverse effect on the administration of justice."[13]

The Court must look at whether admission of evidence "would exact too heavy a toll on the long-term integrity of the justice system." [14] The Court continued, "We have no evidence to suggest that the

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5 *Grant*, above note 1 (C.A.) at para 66
6 *Grant*, above note 1 (C.A.) at para 66
7 *Grant,* above note 1 (C.A.) at para 54
8 *Grant*, above note 1 (C.A.) at para 54
9 *Grant*, above note 1 (C.A.) at para 54
10 *Grant*, above note 1 (C.A.) at para 58
11 *Grant*, above note 1 (C.A.) at para 61
12 *Grant,* above note 1 (C.A.) at para 62
13 *Grant,* above note 1 (C.A.) at para 64
14 *Grant,* above note 1 (C.A.) at para 65

constitutional breaches were wilful or flagrant, or that they reflected institutional indifference to individual rights." [15]

So that concludes the analysis of the unanimous Court of Appeal decision. Next is the Application for Leave to Appeal to the Supreme Court of Canada.

Grant Case: Leave to Appeal to Supreme Court of Canada
This case was granted Leave to Appeal to the Supreme Court of Canada on June 21, 2007. It is not surprising that Leave to Appeal was granted given the important factors and themes in the case.
The application for leave to appeal was granted with no order as to costs.

Analysis of Supreme Court of Canada Decision in *R v. Grant*, 2009 SCC 32 (CanLII)
The Supreme Court of Canada allowed the appeal on the weapons trafficking charge but dismissed the appeal on the other four convictions. The decision of the Court was issued on July 17, 2009, over five years after the initial arrest date.

This is a difficult case. The accused was found with a loaded revolver. It tests the limits of section 8 and section 24(2) of the *Charter*.

As was discussed in the previous section, the Court of Appeal found there was no search of the Accused, and therefore no breach of section 8 of the *Charter*. It is of little surprise that the decision was appealed to the Supreme Court of Canada, and that leave to appeal was granted by the Court.

The Supreme Court of Canada only hears the most important of cases, so to be granted leave to appeal, a case must be noteworthy and important and relevant to jurisprudence.

After analysis, the Supreme Court of Canada upheld four convictions. The reasons to review are those of McLachlin C.J. and Charron J. as the majority reasoning of the Court. These reasons were concurred by three other members of the Court for a total of five Judges. The Coram of the Court was seven judges. Therefore, the reasons of McLachlin C.J. and Charron J. were the majority reasoning of the Court in this case.

When you review a lengthy decision of the Supreme Court of Canada, always check that you are first reading the majority reasons – rather than dissenting reasons. This helps to provide you with framework in the analysis before delving into any dissenting reasons.

The first comment on the majority reasoning in this case, is that there were several Intervenors in the case. The facts of this case were such that there were four Interveners, namely the following:

- Director of Public Prosecutions of Canada
- Attorney General of British Columbia
- Canadian Civil Liberties Association and
- Criminal Lawyers' Association (Ontario)

15 *Grant,* above note 1 (C.A.) at para 65

In analysis the SCC focused on Mr. Grant's rights under s. 9 and s. 10(b) of the *Charter*, rather than under s.8. The Court glosses over section 8 of the *Charter*. The focus in the reasons was on whether he was "detained" and whether or not the evidence should be excluded, under section 24(2) of the *Charter*.

The conversation the Appellant had with the officers included this excerpt, at paragraph 7, written by McLachlin C.J. and Charron J.:

> Q. Do you have other drugs on you?
>
> A. No, I just have the weed, that's it.
>
> Q. Well, what is it that you have?
>
> A. I have a firearm.[16]

"At this point, the officers arrested and searched the appellant, seizing the marijuana and a loaded revolver. They then advised Mr. Grant of his right to counsel and took him to the police station".[17]
This Supreme Court of Canada decision describes the encounter as a search "incidental" to arrest. It really tests the limits of section 8 of the *Charter*.

The Court went then into an extensive analysis of ss. 9 and 10(b), and then 24(2) of the *Charter*. In addition, <u>the Court issued a new "revised" analysis framework for section 24(2)</u>.[18] The three factors to review under the <u>revised analysis</u> are the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused and society's interest in the adjudication of the case on its merits.

Factor 1: Seriousness of the *Charter*-infringing state conduct. In this section the Court does not want to be seen to be condoning police deviation from the rule of law, and the need to "dissociate themselves from the fruits of that unlawful conduct".[19]

The Court stated as follows, at paragraph 74, *per* McLachlin C.J. and Charron J.:

> "…admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute." [20]

The Court stated as follows, at paragraph 75, *per* McLachlin C.J. and Charron J.: "It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence." [21]

Factor 2: Impact on the *Charter*-Protected Interests of the Accused. In this section, the Court will look at whether the *Charter* breach was "fleeting and technical" to "profoundly intrusive". [22]

The Court stated as follows at paragraph 78, *per* McLachlin C.J. and Charron J.:

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16 *R. v. Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353 (S.C.C.) at para 7
17 *Grant*, above note 16 (S.C.C.) at para 8
18 *Grant*, above note 16 (S.C.C.) at para 67 Heading
19 *Grant*, above note 16 (S.C.C.) at para 72
20 *Grant*, above note 16 (S.C.C.) at para 74
21 *Grant,* above note 16 (S.C.C.) at para 75
22 *Grant,* above note 16 (S.C.C.) at para 76

> "Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not." [23]

This is important jurisprudence in respect of section 8 of the *Charter*. With this factor in the section 24(2) analysis, the Court is going to look at whether the breach was "fleeting and technical" or "profoundly intrusive". The Court is going to look at the protected interests of privacy, and more broadly, human dignity. A search that impacts the protected interests of privacy and human dignity is going to be more closely analyzed than one which was fleeting and technical.

Factor 3: Society's Interest in an Adjudication on the Merits. This final part of the section 24(2) analysis looks at the "truth-seeking function" of a Trial, and the effect of not including evidence at Trial. This is referred to as the third branch of the test, or the "third line of inquiry".[24]

The Court stated as follows, at paragraph 83, *per* McLachlin C.J. and Charron J.: "Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution."[25]

The majority in the Supreme Court of Canada then went on to discuss four different types of evidence and to discuss admissibility in light of the <u>new revised framework analysis</u> under section 24(2) of the *Charter*:

a) Statements by the Accused
b) Bodily Evidence
c) Non-Bodily Physical Evidence
d) Derivative Evidence

The Court went on to say as follows, at paragraph 116, *per* McLachlin C.J. and Charron J.:

> "The class of evidence that presents the greatest difficulty is evidence that combines aspects of both statements and physical evidence — physical evidence discovered as a result of an unlawfully obtained statement. The cases refer to this evidence as derivative evidence. This is the type of evidence at issue in this case."[26]

"Section 24(2) of the *Charter* implicitly overruled the common law practice of always admitting reliable derivative evidence. Instead, the judge is required to consider whether admission of derivative evidence obtained through a *Charter* breach would bring the administration of justice into disrepute."[27] This is a <u>key principle</u> that is enshrined in section 24(2) of the *Charter*.

> "The weighing process and balancing of these concerns is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision. As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the

23 *Grant*, above note 16 (S.C.C.) at para 78
24 *Grant*, above note 16 (S.C.C.) at para 79
25 *Grant,* above note 16 (S.C.C.) at para 83
26 *Grant*, above note 16 (S.C.C.) at para 116
27 *Grant*, above note 16 (S.C.C.) at para 118

> other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable."[28]

The Court then dealt with the concern head-on that the police may engage in *Charter*-breaching behaviour to elicit reliable derivative evidence, e.g. a loaded revolver. The Court stated as follows, at paragraph 128, *per* McLachlin C.J. and Charron J.:

> "The s. 24(2) judge must remain sensitive to the concern that a more flexible rule may encourage police to improperly obtain statements that they know will be inadmissible, in order to find derivative evidence which they believe may be admissible."[29]

The Supreme Court of Canada agreed that this was a close case. These are always difficult cases, and it is not surprising that the matter went to the Supreme Court of Canada. But on the facts of this Grant case - the Court did admit the revolver into evidence. This tension in the law also explains the fairly large number of Interveners at the SCC hearing.

The Court stated as follows, as paragraph 131, *per* McLachlin C.J. and Charron J.:

> At the outset, it is necessary to consider whether the gun was "obtained in a manner" that violated Mr. Grant's *Charter* rights: see *R.* v. *Strachan*, [1988] 2 S.C.R. 980, and *R.* v. *Goldhart*, [1996] 2 S.C.R. 463. As explained above, we have concluded that Mr. Grant's rights under ss. 9 and 10(b) of the *Charter* were breached. The discovery of the gun was both temporally and causally connected to these infringements. It follows that the gun was obtained as a result of a *Charter* breach.

The gun was characterized as "derivative evidence".[30]

Going into the three-stage section 24(2) analysis on the facts of this *Grant* case, the Supreme Court of Canada stated as follows at paragraph 133, in respect of the first step of the analysis:

> We consider first the seriousness of the improper police conduct that led to the discovery of the gun. The police conduct here, while not in conformity with the *Charter*, was not abusive. There was no suggestion that Mr. Grant was the target of racial profiling or other discriminatory police practices. The officers went too far in detaining the accused and asking him questions. However, the point at which an encounter becomes a detention is not always clear and is something with which courts have struggled. Though we have concluded that the police were in error in detaining the appellant when they did, the mistake is an understandable one. Having been under a mistaken view that they had not detained the appellant, the officers' failure to advise him of his right to counsel was similarly erroneous but understandable. It therefore cannot be characterized as having been in bad faith. Given that the police conduct in committing the *Charter* breach was neither deliberate nor egregious, we conclude that the effect of admitting the evidence would not greatly undermine public confidence in the rule of law. We add that the Court's decision in this case will be to render similar conduct less justifiable going forward. While police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is.[31]

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28 *Grant*, above note 16 (S.C.C.) at para 127
29 *Grant*, above note 16 (S.C.C.) at para 128
30 *Grant*, above note 16 (S.C.C.) at para 132
31 *Grant*, above note 16 (S.C.C.) at para 133

Going onto the second step of the analysis, the Supreme Court of Canada stated as follows at paragraph 138, *per* McLachlin C.J. and Charron J.: "Considering all these matters, we conclude that the impact of the infringement of Mr. Grant's rights under ss. 9 and 10(b) of the *Charter* was significant."

Lastly in respect of the third step of the analysis, the majority of the Supreme Court of Canada stated as follows at paragraph 139 in respect of the *Grant* case:

> The third and final concern is the effect of admitting the gun on the public interest in having a case adjudicated on its merits. The gun is highly reliable evidence. It is essential to a determination on the merits. The Crown also argues that the seriousness of the offence weighs in favour of admitting the evidence of the gun, so that the matter may be decided on its merits, asserting that gun crime is a societal scourge, that offences of this nature raise major public safety concerns and that the gun is the main evidence in the case. On the other hand, Mr. Grant argues that the seriousness of the offence makes it all the more important that his rights be respected. In the result, we do not find this factor to be of much assistance.[32]

After balancing the three factors together – the Court indicated that this was a 'close case', but they concluded that the gun <u>should</u> be admitted into evidence. The majority of the Supreme Court of Canada stated as follows at paragraph 140, *per* McLachlin C.J. and Charron J.:

> To sum up, the police conduct was not egregious. The impact of the *Charter* breach on the accused's protected interests was significant, although not at the most serious end of the scale. Finally, the value of the evidence is considerable. These effects must be balanced in determining whether admitting the gun would put the administration of justice into disrepute. <u>We agree with Laskin J.A. that this is a close case</u>. The balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision. However, weighing all these concerns, in our opinion <u>the courts below did not err in concluding that the admission of the gun into evidence would not, on balance, bring the administration of justice into disrepute</u>. The significant impact of the breach on Mr. Grant's *Charter*-protected rights weighs strongly in favour of excluding the gun, while the public interest in the adjudication of the case on its merits weighs strongly in favour of its admission. Unlike the situation in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, the police officers here were operating in circumstances of considerable legal uncertainty. In our view, this tips the balance in favour of admission, suggesting that the repute of the justice system would not suffer from allowing the gun to be admitted in evidence against the appellant.[33] (emphasis added)

In the final result, the Court only entered an acquittal on the trafficking charge and upheld the convictions on all the other counts. Therefore, the bulk of the Accused's appeal to the Supreme Court of Canada was dismissed.

So, this difficult case, this close case, resulted in a new analysis under section 24(2) of the *Charter*. How does this impact police procedure? It is a good case to be familiar with – as it shows the tension in the law as it balances the rights of the Accused and the interest of Society in having a fair trial on reliable evidence.

So, what is the final result in the *Grant* case? It really turned on the facts. In the fact of this case, Mr. Grant was walking in a neighbourhood hot spot, with high schools in the vicinity that were experiencing problems with violence. As so often is the case, the facts are a critical part of the analysis – just as important as the analysis of the law.

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32 *Grant*, above note 16 (S.C.C.) at para 139
33 *Grant*, above note 16 (S.C.C.) at para 140

These cases are what make 'good law'. Make sure to involve Interveners on these "close cases" that really test the limits of our jurisprudence. The Supreme Court of Canada may not mention the arguments or factums of the Interveners, but their presence is a very important part of the judicial process. It allows for evidence that explains the problems in the jurisprudence. In this case, all this attention resulted in a new section 24(2) analysis.

By looking at the cases, we can see how the individual facts of each case fit together with the principles of the *Charter*.

By looking at these three cases we will also see how difficult it is to sometimes predict the outcome of a contested *Charter* case. But by looking at these cases, we hope to take some of the "guess work" out of police work, and to provide a strong basis for good police procedures.

We now move on to the second case of our analysis. It is a methamphetamines case called *Dasilva*.

R* v *Dasilva,* 2018 ONSC 3349 – *Decision released May 29, 2018

Background

This was a case where the Accused was sleeping in her vehicle. The police were called to the scene and they blocked her vehicle in while they went to speak with her. Once awake, she appeared alert and not under the influence of drugs or alcohol. After waking her up, the police searched her open purse that was at her feet. Her purse was open with a plastic sandwich bag visible and a $20 bill protruding.

Inside the purse, the police found 4.5 grams of methamphetamine. After searching her vehicle, the police found a further 1.5 grams of meth. In total, the Crown was seeking to admit 6 grams of methamphetamine into evidence.

The police arrested the Accused and charged her with possession of methamphetamine for the purposes of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act* (the "CDSA").

There was a two-day hearing at the Ontario Superior Court of Justice. It was a blended *Voir Dire* and Trial.

The Defence was seeking to exclude the evidence seized from the search of her purse and the search of the motor vehicle, alleging breaches of sections 7, 8 and 9 of the *Charter*. The Defence was seeking to exclude this evidence under section 24(2) of the *Charter*.

There are different perspectives on this case. We know that methamphetamines are a significant problem in our community, and our first instinct may be to support criminal charges. However, in this case, the Crown and police were choosing to pursue a trafficking charge, rather than a simple possession charge. So that is troubling. Why was the Accused charged with trafficking, rather than simple possession? It is telling, that this case many have gone the other way – if it had been a simple possession charge. We just don't know. But it was over-reach to charge the Accused with trafficking – with the amount of 6 grams of methamphetamine.

A hard-core meth addict may consume 3 grams at once. So, it is impossible to say that 6 grams would constitute a trafficking charge – beyond a reasonable doubt. These criminal charges must be proven in a Court of law – at a standard of "beyond a reasonable doubt".

Trial Analysis
The first thing to note about this case is that the Court did find a breach of section 8 of the *Charter*. In other words, the Court found a breach of section 8 was found to have taken place.

Equally significant about this case is that the Court excluded the evidence from the search of the accused's purse and vehicle. The Accused was then found not guilty of the charge of possession of methamphetamine for the purposes of trafficking.

The decision of the Court was issued on May 29, 2018. To give some perspective, this *Dasilva* case was decided approximately nine years after the Supreme Court of Canada's decision in the *Grant* case.

As the Accused was sleeping in her vehicle in the driver's seat, someone made the 911 call. It was 5:30pm in the afternoon in the parking lot. Two separate officers were sent to the "check welfare" call. EMS was also dispatched. The vehicle engine was not running, and its windows were rolled up.

The officers gained entrance to the vehicle through the unlocked passenger door. The Accused was snoring loudly. The vehicle was cluttered with clothing, containers and boxes. There was no odour of alcohol and the Accused awoke with a start, after the officer shook her awake.

She was asked to provide identification and she did so. She was asked for vehicle registration and insurance and she provided both. She was cooperative.[34]

The officer searched the purse located at her feet. The 4.5 grams of methamphetamine was found in a vial in the purse.[35]

The Accused was then arrested and charged with possession for the purposes of trafficking. The vehicle was then searched incident to arrest and a further 1.5 grams of methamphetamine was found.[36]

The Defence alleged that sections 7, 8 and 9 of the *Charter* were violated upon the searches of her purse and vehicle.[37]

The Court went on to an analysis of whether the search was unlawful and a breach of the accused's s. 8 *Charter* right.

An Investigative Detention?
One of the first questions the Court looked at was whether or not the search was lawful because it was conducted pursuant to a common law "investigative detention".[38]

The Crown conceded that the search of the Accused's purse and vehicle were searches pursuant to section 8 of the *Charter*.[39]

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34 *R v. Dasilva*, 2018 ONSC 3349 (Ont.S.C.) at para 11
35 *Dasilva,* above note 34 (Ont.S.C.) at para 12
36 *Dasilva*, above note 34 (Ont.S.C.) at para 14
37 *Dasilva*, above note 34 (Ont.S.C.) at para 15
38 *Dasilva,* above note 34 (Ont.S.C.) at para 19
39 *Dasilva,* above note 34 (Ont.S.C.) at para 18

> "There were no objectively reasonable grounds to detain the accused in these circumstances. The circumstances did not create a threat to the safety of Ms. Dasilva, the police or the public. Sleeping at the wheel of her vehicle which was parked on private property without the engine running is not criminal activity, nor does it have a scent of criminality. The 911 call was placed out of concern for Ms. Dasilva's welfare." [40]

> "While it may be standard protocol to dispatch both police and ambulance when a "check welfare" call is received, merely having been dispatched does not automatically support an investigative detention in all cases. The nature of the call dictates the duty and role of police and the extent to which an investigative detention may be justified in the totality of the circumstances, if at all." [41]

A Check Welfare Call
The second question the Trial Court looked at was whether the search was justifiable in furtherance of investigating the "check welfare" 911 call.

There Court reviewed the nature of the call to 911, at paragraph 34, *per* Mitchell J.:

> "The Crown argues that PC Pocrnich was justified in continuing his investigation into the health and safety of Ms. Dasilva including a search of her purse in order to determine with certainty that she was not in medical distress. PC Pocrnich testified that his search was grounded in his concern for Ms. Dasilva and not as part of any suspected criminal activity. He testified that he believed the contents of her purse might hold the key to understanding the reason for her falling asleep in a parked car in a parking lot of a retail plaza mid-day. He speculated it might contain an EpiPen if her random sleeping was caused by an allergic reaction. He speculated it might contain medication which may have caused her drowsiness. He speculated she might be a diabetic." [42]

> "PC Pocrnich did not ask Ms. Dasilva for her consent to search her purse nor did he ask if there was anything in the purse that she needed. He could not recall asking her if she needed medical assistance. Surely, the least intrusive means of determining whether Ms. Dasilva was in medical distress was to simply ask her. She was awake, coherent, cooperative and responsive."[43]

The Court concluded as follows:

> "It defies reason that the police, who have no formal medical training, could be permitted to exercise their common law search powers in respect of an individual's personal property without asking permission, for the sole purpose of assessing that individual's medical condition, but emergency medical personnel with formal medical training could not do so and moreover could only assess and provide medical treatment with the consent of the individual."[44]

The Court was adamant that there was no reasonable justification for the search of the Accused's purse. And without the search of the purse, no arrest would have been made – and no search of the vehicle would have taken place.

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40 *Dasilva*, above note 34 (Ont.S.C.) at para 26
41 *Dasilva,* above note 34 (Ont.S.C.) at para 26
42 *Dasilva*, above note 34 (Ont.S.C.) at para 34
43 *Dasilva*, above note 34 (Ont.S.C.) at para 36
44 *Dasilva,* above note 34 (Ont.S.C.) at para 38

> "There was no reasonable justification for the search of Ms. Dasilva's purse. Without the search of her purse no arrest would have been made and no vehicle search would have taken place. Without the search of the purse and the vehicle, no drugs would have been seized and Ms. Dasilva would have been free to go about her way."[45]

On the facts of this case, the Court did find a breach of the Accused's section 8 of the *Charter*.[46] Having found this breach, then Court moved onto an analysis pursuant to section 24(2) of the *Charter*.

The Court in *Dasilva* specified that it was going to review the three factors enunciated in *R v. Grant*, 2009 SCC 32 of the Supreme Court of Canada. The three factors being the seriousness of the State conduct in violating the *Charter*, the impact and extent of the violation of the *Charter* interests of the Accused, and lastly the societal interest in the adjudication of the case on its merits.

The Trial Court summarized the section 24(2) analysis to be done as follows, at paragraph 42, *per* Mitchell J.:

> I must now decide whether to exclude the evidence seized from Ms. Dasilva's purse and vehicle, having regard to the three factors enunciated in *R. v. Grant*[8]. They are:
>
> (a) the seriousness of the State conduct violating the *Charter*, including the nature of the police conduct that led to the discovery of the evidence, whereby:
>
> (i) the more severe, deliberate or reckless the State conduct is, the greater the need will be for the court to dissociate itself from the conduct by excluding the evidence, so as to preserve public confidence in the justice system and ensure conformity to the rule of the law;
>
> (ii) an inadvertent, trivial or minor violation, the existence of good faith or exigency circumstances, such as the need to prevent destruction of evidence, will favour the admission of the evidence;
>
> (b) the impact and extent of the violation on the *Charter* interests of the accused, including whether there is a serious incursion on the accused's interests or whether the impact was merely trivial;
>
> (c) the societal interest in the adjudication of the case on its merits, including whether the truth-seeking function of the criminal trial process would be better served by admitting or excluding the evidence, having regard to:
>
> (i) the reliability of the evidence and the extent to which it is undermined by the breach(es);
> (ii) the importance of the evidence to the Crown's case; and
> (iii) the notion that the discoverability of the evidence is no longer a determinative factor.[47]

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45 *Dasilva*, above note 34 (Ont.S.C.) at para 39
46 *Dasilva*, above note 34 (Ont.S.C.) at paras 27 and 40
47 Dasilva, above note 34 (Ont.S.C.) at para 42

The importance of the *Grant* case is summarized here in the list of issues to be examined, before coming to a conclusion under section 24(2) of the *Charter*. Should the evidence be excluded at Trial, or not? That is the question to be answered. This analysis listed above is the analytical framework to be used. After nine years, the revised *Grant* analysis is still being used by the Courts to come to a decision in those difficult cases under section 24(2) of the *Charter*.

The Trial Court in *Dasilva* went on to discuss the level of expectation of privacy the Accused would have in her purse and in her vehicle. At paragraph 46, *per* Mitchell J.:

> "Ms. Dasilva had a significant expectation of privacy in her purse and, to a lesser degree, in her vehicle. Although this expectation of privacy was not at the level associated with her person or her residence, Ms. Dasilva had the right to be left alone once she was roused and she had confirmed her welfare to police."[48]

It is interesting in this case that the Accused was found to have a higher degree of privacy in her purse than in her vehicle. Do vehicles have a lesser degree of privacy than purses? It is difficult to say. But on the facts of this case, it was found that the Accused had a higher degree of privacy in her purse, than in her vehicle.

The Court held as follows: "I find that the police acted recklessly and with blatant disregard for Ms. Dasilva's *Charte*r rights."[49]

Would the Court have come to a difference conclusion had the Accused be charged with simple possession, rather than a trafficking charge? We just don't know. We have to take the facts of the case, as they are – without speculating as to the result if the facts were different. So, on the facts of this case, the Court held that the police conduct was reckless and with blatant disregard for her *Charter* rights.

Another way to look at this case, is that the officers acted to ensure the safety of the Accused but were overzealous in how they went about it. Even if they wish to search every bag, suitcase, purse, and vehicle – the police cannot. And this case is a good reminder as to the limits of police in these sorts of situations. Perhaps the officer was looking for an Epi-pen or a medical reason for the Accused to be sleeping in her vehicle. But the reality is that there are limits to looking in someone's purse and for searching their vehicle – and some questions are going to remain unanswered.

The Trial Court found the Accused 'not guilty' of the single count on the Indictment – possession for the purpose of trafficking methamphetamine after a two-day hearing.

We now move on to the third and last case of our analysis. It is an interesting case called *Zakarie.*

R v. Zakarie*, 2018 ONSC 2905 – *Decision released May 22, 2018

Background

The last case we are going to look at is the *R v. Zakarie* case. It is a 2018 trial decision of the Ontario Superior Court. The decision was released on May 22, 2018 - after a 10-day blended Trial and *Voir Dire.*

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48 *Dasilva,* above note 34 (Ont.S.C.) at para 46
49 *Dasilva*, above note 34 (Ont.S.C.) at para 47

This is a case that involves police questioning and a loaded firearm.[50] So in some ways it is similar to the first case we looked at *R v. Grant*. In the *Grant* case, the Accused was found to have marijuana and a loaded revolver. The Accused in *Grant* was found guilty on firearm offences by the Supreme Court of Canada.

However, rather than being questioned on the public street in a 'hot spot' near high schools with problems with violence – this *Zakarie* case involved being questioned by police officers in the stairwell of an apartment building.

In this *Zakarie* case, the Accused was found to have crack cocaine, a loaded firearm, marijuana, powder cocaine and currency ($860). He was charged with 11 Counts (drug offences and weapons offences).

After a 10-day Trial at Superior Court in this case, the Accused was found "not guilty" on all 11 Counts and acquittals were entered accordingly. The result in this *Zakarie* case was that acquittals were entered on all seven firearms offences and on the four drug-related offences.

So why was Mr. Grant with the marijuana and loaded revolver found 'guilty', when Mr. Zakarie was found with a loaded firearm and multiple drugs and currency found 'not guilty'? It is helpful to review the facts to further illustrate the case and the differences between these two cases.

This *Zakarie* case is a good example of how an arbitrary detention and denial of "right to counsel, without delay" - can render inadmissible all the physical evidence and inculpatory statements by the accused in a criminal case. In other words, when an accused is arbitrarily detained and denied "right to counsel, without delay" - the *Charter* is invoked. The *Charter* breaches can render all the physical evidence and inculpatory statements by the accused – inadmissible.

Trial Decision

The Accused in the *Zakarie* case was located by police in a stairwell of an apartment building. He said he was visiting his grandfather and he had a fob access to the building. The date was January 21, 2015.

The officers stated that they smelled marijuana in the stairwell and the smell got stronger the closer they were to Mr. Zakarie. He was arrested for possession of marijuana. He was then searched. Upon being searched, the accused was found to have a loaded firearm, marijuana, powder cocaine and currency (two wads of Canadian cash).

The accused was given his right to counsel caution while seated in the police car. He was able to make contact with his lawyer, approximately seven hours later at about 10pm.

The Accused was charged with seven firearms offences:

- possession of a prohibited weapon (count 1),
- possession of a loaded firearm (count 2),
- carry firearm in careless manner (count 3),
- carry concealed weapon (count 4);
- possession of firearm with defaced serial number (count 5);
- carry ammunition in careless manner (count 6);
- possession of a firearm for purpose dangerous to the public (count 7)

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50 *R v.Zakarie*,2018 ONSC 2905 (Ont.S.C.) at para 62

The Accused was also charged with four drug-related offences:

- possession of proceeds of crime ($860.00) (count 8);
- possession of cocaine (count 9);
- possession of cocaine for the purpose of trafficking (count 10);
- possession of marijuana (count 11)

This case was part of a larger police program to address crime in the building. Management of the apartment building had requested police assistance to deal with "…people hanging around the building dealing and using drugs, carrying firearms and hiding contraband in the underground garage and stairwells."[51]

The police specifically set up "Project Daycare" to address these problems at the apartment building.[52] On the day in question, four officers were tasked with checking the stairwells of the building. Two officers went down one stairwell and two other officers went down the other stairwell.[53]

At the 3rd floor landing, the officers signaled to those in another stairwell to come and assist. They had encountered the accused in the stairwell. In compliance with the *Trespass to Property Act*, R.S.O. 1990, c. T.21 the accused could have been asked to leave the property. Interestingly, the Court stated that an arrest under the *Trespass to Property Act* is limited to a maximum $2000 fine, and does not entitle a search of the trespasser or seizure of items in the person's possession.[54] Though the *Trespass to Property_Act* was on the minds of the police when the accused was stopped in the stairwell, the police did not pursue any charges under the *Trespass the Property Act*.

Officers Pablo and Nuygen testified Mr. Zakarie was arrested for possession of marijuana and he was placed in handcuffs in the stairwell.[55] Upon a search of the accused, a firearm .38 calibre handgun with five bullets loaded in the chamber was tucked into the waistband of his pants. [56]

The Trial proceeded as a judge-along trial and it was a blended *Voir Dire* and Trial. A *Voir Dire* is a Court proceeding where the judge is determining admissibility of evidence (including *Charter* breach allegations). The decision on a *Voir Dire* as to the admissibility or the exclusion of the evidence can determine what evidence is presented and heard at the Criminal Trial. So, in this case, it was a blended *Voir Dire* and criminal trial.

The Accused alleged the following *Charter* breaches, namely:

- sections 8 (search and seizure),
- s. 9 (arbitrary detention),
- s. 10 (a) (prompt reasons for detention) and
- s. 10(b) (right to counsel)

Should a *Charter* breach be found, the analysis then turned to what evidence was admissible or should be excluded pursuant to section 24(2) of the *Charter*. [57]

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51 *Zakarie*, above note 50 (Ont.S.C.) at para 5
52 *Zakarie*, above note 50 (Ont.S.C.) at para 5
53 *Zakarie*, above note 50 (Ont.S.C.) at paras 6 and 7
54 *Zakarie*, above note 50 (Ont.S.C.) at para 17
55 *Zakarie*, above note 50 (Ont.S.C.) at para 52
56 *Zakarie*, above note 50 (Ont.S.C.) at para 62
57 *Zakarie*, above note 50 (Ont.S.C.) at para 10

Looking at reasonable searches, the Court stated the following, at paragraph 27, *per* Allen J.:

> A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable: [*R. v. Collins*, [1987] 1 S.C.R. 265, at para. 24, (S.C.C.)]. Absent a warrant a police search is presumed to be unreasonable. When a search is warrantless the Crown has the burden of showing that the search was on a balance of probabilities reasonable: [*R. v. Collins*, at para. 22]. [58]

The Court further stated, at paragraph 28, *per* Allen J.:

> Searches incident to an arrest are an established exception to the general rule that warrantless searches are *prima facie* unreasonable: [*R. v. Golden*, [2001] 3 S.C.R. 679, at para. 84, (S.C.C.)]. A search incident to an arrest may be conducted: to guarantee the safety of the police and the public; to prevent the escape of a suspect; to obtain evidence against a suspect; and to prevent the destruction of evidence: [*Cloutier c. Langlois* (1990), 53 C.C.C. (3d) 257 (S.C.C.) and *R. v. Belnavis* (1997), 118 C.C.C. (3d) 405 (S.C.C.)]. It follows that an arrest itself must be lawful for the police to have the authority to conduct a search incident to the arrest. [59]

Pursuant to the evidence of Officer Pablo, due to the smell of marijuana and the accused's admission that he smoked marijuana, he was placed under arrest for possession of marijuana. [60]

Subsequently, the Accused was searched. A firearm was tucked into the front waistband of his pants. "The firearm was a .38 calibre handgun with five bullets loaded in its chamber." [61]

The Accused may have been read his rights to counsel at about 3:15pm for possession of marijuana in the stairwell of the apartment building, but the evidence isn't clear. [62] He was placed in the back of the squad car at about 3:38pm. [63]

The Court stated the following, at paragraphs 76 and 77, per Allen J.:

> Officer Nuygen read Mr. Zakarie his rights to counsel and caution in the squad car at about 3:42 p.m. A videotape of Officer Nuygen giving the rights and caution in the squad car was played in court. After reading from his memo book, Officer Nuygen took the time to explain the rights and caution in simpler terms. Mr. Zakarie indicated that he understood his rights. Officer Nuygen testified that he believed Mr. Zakarie understood his rights.[64]
>
> But there is a further problem. On the recording Officer Nuygen advised Mr. Zakarie that he was under arrest for possession of crack and a firearm. Officer Nuygen was asked to explain the inconsistency between that evidence and his previous evidence that Officer Pablo arrested Mr. Zakarie for possession of marijuana.[65]

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58 *Zakarie,* above note 50 (Ont.S.C.) at para 27
59 *Zakarie,* above note 50 (Ont.S.C.) at para 28
60 *Zakarie,* above note 50 (Ont.S.C.) at para 52
61 *Zakarie,* above note 50 (Ont.S.C.) at para 62
62 *Zakarie,* above note 50 (Ont.S.C.) at para 139
63 *Zakarie,* above note 50 (Ont.S.C.) at para 75
64 *Zakarie*, above note 50 (Ont.S.C.) at para 76
65 *Zakarie,* above note 50 (Ont.S.C.) at para 77

The accused was not able to speak with his lawyer until just before 10pm.[66] Mr. Zakarie was arrested at 3:10pm that day.[67]

The case then diverged into a discussion and analysis of the discrepancies in the officers' evidence. The Court had significant concerns with veracity of some of the officers' evidence.[68] For this reason alone, this case can be distinguished from the *Grant* case. Having concerns with the officers' testimony and recollection of the facts is enough to set this *Zakarie* case apart from the *Grant* case.

In these sorts of situations and discrepancies, it becomes more and more significant what notes were made in the officers' memo books. Such notes are made contemporaneously by officers and could be seen as more reliable than memory recollection three (3) years later at trial. Examples of notes in the officers' memo books would be whether there was the smell of weed, and when the accused was read his rights to counsel caution. Also, the absence of a note in an officer's memo book can sometimes be equally significant, e.g. there is no notation in the officer's memo book about having read the rights to counsel caution to the accused.

In any event, the Court found that the officers did not have reasonable grounds to arrest the accused. " I find the arrest was unlawful and the evidence inadmissible on that ground".[69] The Court found that it was an arbitrary detention contrary to section 9 of the *Charter*.[70]

The Court then went on to the analysis of the search of the accused, incidental to his arrest. In para 123, the Court stated as follows, *per* Allen J.:

> A warrantless search is presumed to be unreasonable. With such a search the Crown has the burden of showing that the search was reasonable. A search incident to an arrest may be conducted in restricted circumstances. The safety of the officers, the possible escape of the suspect and the possible destruction of evidence can justify a search.[71]

The Court concluded that the search of the accused was unreasonable and unlawful.[72] The Court held the physical evidence be excluded, namely the marijuana, currency, powder cocaine, crack cocaine and loaded firearm, due to the *Charter* breaches and what was described as "substandard" police work.[73]

The Court nonetheless then went on to a section 24(2) analysis using the factors set out in *R v. Grant*:

(a) Seriousness of the *Charter*-infringing state conduct

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66 *Zakarie*, above note 50 (Ont.S.C) at para 84
67 *Zakarie,* above note 50 (Ont.S.C.) at para 145
68 *Zakarie*, above note 50 (Ont.S.C.) at para 106
69 *Zakarie*, above note 50 (Ont.S.C.) at para 122
70 *Zakarie,* above note 50 (Ont.S.C.) at para 115
71 *Zakarie*, above note 50 (Ont.S.C.) at para 123
72 *Zakarie*, above note 50 (Ont.S.C.) at para 134
73 *Zakarie*, above note 50 (Ont.S.C.) at paras 149 and 150

(b) The impact of the breach on *Charter*-protected interests of the accused; and
(c) Society's interest in the adjudication of the case on its merits

While looking at the first factor in the *R v. Grant* test under section 24(2) of the *Charter*, the Court had this to say at paragraph 155, *per* Allen J.:

> I find on the first inquiry, the police violations cumulatively fall on the more serious end of the spectrum. I do not find that each individual violation on its own should command the level of censure the plurality of the violations should attract.[74]

The Court continued at paragraph 158, *per* Allen J.:

> The Crown concedes a violation as a result of Mr. Zakarie not having the opportunity to speak to counsel for almost seven hours, from 3:10 p.m. when he was arrested until 10:00 p.m. when he spoke to Mr. Alawi from the station. This is not a minor infraction of the *Charter*.[75]

The Court stated as follows, at paragraph 162, per Allen J.: "Overall, I find the police conduct to be <u>willful and flagrant</u>. In combination these were not minor or technical errors. "[76] (emphasis added)

After balancing the three factors in *R. v. Grant*, the Court concluded that the <u>evidence should be excluded</u> under section 24(2) of the *Charter*.

In paragraph 176, the Court stated as follows:

> I weighed the three inquiries. I conclude, given the extent of the *Charter* violations, that the long-term interest of the administration of justice would <u>not</u> be served by admitting the evidence in this case.[77] (emphasis added)

So, the Court concluded that the long-term interests of the administration of justice would be best served by excluding the evidence in question. The accused was then found 'not guilty' on the 11 counts on the Indictment and acquittals were entered. [78]

That concludes our analysis of the *Zakarie* case. With the benefit of hindsight, what conclusions can be drawn?

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74 *Zakarie*, above note 50 (Ont.S.C.) at para 155
75 *Zakarie,* above note 50 (Ont.S.C.) at para 158
76 *Zakarie*, above note 50 (Ont.S.C.) at para 162
77 *Zakarie*, above note 50 (Ont.S.C.) at para 176
78 *Zakarie,* above note 50 (Ont.S.C.) at para 180

The first comment to make is that each case is unique on its set of facts – and the facts are incontrovertible. Cases have similarities and the question becomes whether there are enough similarities in the facts to be able to draw conclusions about the legal themes that emerge in these cases.

Some read cases looking for the "ratio" of the case – that is the legal principle enshrined in each case. This is a helpful analytical tool, but the differences in the facts of each case must also be weighed during the analysis.

In *Zakarie*, the Court stated as follows at paragraph 86: "Such analyses are very much fact-driven based in the particular circumstances of the case."[79]

A better result in the *Zakarie* case would have been to drop the four drug charges, and to simply proceed to Trial on a few weapons-related charges. There would have been a greater likelihood of conviction if Crown had dropped the drug charges. Sometimes the practicality of securing a conviction on important charges - supercedes the administrative preference of convictions on all possible charges.

There are public safety concerns with loaded handguns on the streets and in our neighbourhoods. When a trespasser is on the property of an apartment building – it is admirable that the police were there to intercept the armed trespasser.

This is a difficult case. It is unknown if this trial case is going to be appealed to the Ontario Court of Appeal, but it is the type of case that may be appealed.

Conclusion –intersection of police work, the *Charter* and criminal law in Canada.

This concludes our review of the three cases. We have illustrated some of the sections in the *Charter* and how it is relevant in our society.

The best way to illustrate the fundamental importance of the *Charter* is to see specific examples and cases where the *Charter* was applied. The specific fact patterns bring to life the principles enshrined in the *Charter*.

So, the effects of the *Charter* are apparent in our everyday lives, without us being aware of it.

By looking at the cases, we can see how the individual facts of each case fit together with the principles of the *Charter*. By looking at these three cases we will also see how difficult it is to sometimes predict the outcome of a contested *Charter* case. But by looking at these cases, we hope to take some of the "guess work" out of police work, and to provide a strong basis for good police procedures.

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79 *Zakarie*, above note 50 (Ont.S.C.) at para 86