

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Côté,2011 SCC 46, [2011] 3 S.C.R. 215 | **Date:** 20111014  **Docket:** 33645 |

**Between:**

**Armande Côté**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Criminal Lawyers’ Association (Ontario)**

Intervener

**Official English Translation:** Reasons of Deschamps J.

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 90)  **Dissenting Reasons:**  (paras. 91 to 119) | Cromwell J. (McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ. concurring)  Deschamps J. |

R. *v.* Côté, 2011 SCC 46, [2011] 3 S.C.R. 215

Armande Côté *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Criminal Lawyers’ Association (Ontario) *Intervener*

**Indexed as:** R. ***v.*** Côté

2011 SCC 46

File No.: 33645.

2011:  March 15; 2011:  October 14.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for quebec

*Constitutional law — Charter of Rights — Enforcement — Exclusion of evidence — Accused charged with second degree murder — Search of accused’s home conducted by police without valid warrants — Trial judge finding that police had not acted in good faith and demonstrated blatant disregard for accused’s Charter rights throughout investigation — Trial judge concluding that admission of evidence in face of extraordinarily troubling police misconduct, even when decision would lead to acquittal of serious crime, would bring administration of justice into disrepute — Whether Court of Appeal erred in intervening on bases that police had not deliberately acted in abusive manner and that offence was serious — Whether Court of Appeal erred in intervening on basis that evidence could have been obtained legally by warrant without accused’s participation — Canadian Charter of Rights and Freedoms, s. 24(2).*

Around 9 p.m. on July 22, 2006, C called 9‑1‑1 to report that her spouse, H, had been injured. The attending physician at the hospital established that H was suffering from head injuries and confirmed the presence of a metal object in H’s skull, and communicated this information to the police. The police attended at C’s home around midnight. The lights of the house were off and the house was calm. C answered the door in her pyjamas. The police explained that they were there to find out what happened and to make sure the premises were safe, but they did not tell C that they believed that H was suffering from a gunshot wound. The police, accompanied by C, inspected the interior and the exterior of the residence, as well as a gazebo. The police questioned C about the presence of firearms in the house. She confirmed the presence of two firearms but could only locate one, to which she led the police. The police later obtained warrants which were executed at C’s residence. A .22 calibre rifle, of the same calibre as the bullet recovered from H’s skull, was located by the police.

C was brought to the police station around 3 a.m. but not until 5:23 a.m. was she given a warning as an important witness in the attempted murder of H and advised of her right to counsel. After being warned, C spoke with a lawyer and invoked her right to silence. She then described the events to the police and was placed under arrest for attempted murder. She was cautioned again, advised of her right to counsel, and spoke with a lawyer again. After being placed under arrest, C was interrogated by the police throughout the day. C exhibited extreme anxiety about having the interrogation room closed, seemed to be exhausted and on several occasions told the interrogator that she had had enough, did not want to talk anymore or wanted to go lie down. C’s interrogation ended at 8 p.m. on July 23, when she was advised of H’s death and charged with second degree murder.

C applied to the trial judge to exclude the evidence against her. The trial judge concluded that the police embarked on a systematic violation of C’s rights from the time they first entered onto her property until the end of her interrogation. The trial judge held that the police’s entry on C’s property, and the search of her house, property and gazebo constituted unreasonable searches and seizures contrary to s. 8 of the *Charter*. He held that the police detained C without telling her why in violation of s. 10(*a*) of the *Charter*, and that the police violated C’s right to obtain the assistance of a lawyer and to be advised of that right, in violation of s. 10(*b*) of the *Charter*. He also held that the police violated C’s right to silence as protected by s. 7 of the *Charter* and obtained a statement that was not voluntary. The trial judge also found that the investigators had misled a judicial officer to obtain warrants. The trial judge excluded all of the evidence pursuant to s. 24(2) of the *Charter*, finding that its admission would bring the administration of justice into disrepute, and C was acquitted of the charge. The Court of Appeal found that the trial judge was right to exclude C’s statements to police. However, it concluded that the trial judge had erred by excluding the observations the police made of the exterior of C’s home before the warrants were issued as well as the physical evidence obtained at C’s home in execution of the warrants. It ordered a new trial.

*Held* (Deschamps J. dissenting): The appeal should be allowed and the acquittal restored.

*Per* McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ.: The standard of review of a trial judge’s s. 24(2) determination of what would bring the administration of justice into disrepute having regard to all of the circumstances is as follows: where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review.

This Court established a revised approach to the exclusion of evidence under s. 24(2) in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. This Court held that three avenues of inquiry were relevant to an assessment of whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute: (1) an evaluation of the seriousness of the state conduct; (2) the seriousness of the impact of the *Charter* violation on the *Charter*‑protected interests of the accused; and (3) society’s interest in an adjudication on the merits. After considering these factors, a court must then balance the assessments under each of these avenues of inquiry in making its s. 24(2) determination to determine whether admission of the evidence would bring the administration of justice into disrepute.

The Court of Appeal erred in intervening on the basis that the police had not deliberately acted in an abusive manner. By its re-characterization of the evidence which departed from express findings by the trial judge which were not tainted by any clear and determinative error, the Court of Appeal exceeded its role. The Court of Appeal also erred in reweighing the impact of the seriousness of the offence. This consideration was fully addressed by the trial judge who was aware of the seriousness of the offence and of the consequences of excluding the evidence.

Furthermore, the Court of Appeal erred by placing undue weight on the “discoverability” of the evidence in its s. 24(2) analysis. Its principal basis for appellate intervention was that the physical evidence could have been obtained legally by warrant, without C’s participation. Discoverability is a relevant factor under the current s. 24(2) analysis, however, it is not determinative. A finding of discoverability does not necessarily lead to admission of evidence. In appropriate cases, discoverability may be relevant to the first two branches of the *Grant* analysis.

In the case at bar, with respect to the first branch of the analysis, it is clear that the trial judge considered the officers’ misconduct to be very serious. The collection of the evidence pursuant to the warrants was an extension of the earlier, unlawful warrantless searches. The fact that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found, but did not do so, significantly aggravated the seriousness of their misconduct. The police misconduct in obtaining the warrants further aggravated the seriousness of the *Charter*-infringing state conduct. With respect to the second branch of the analysis, the absence of prior judicial authorization constitutes a significant infringement of privacy. Having regard to all of the circumstances, the impact of the police misconduct on C’s right to privacy was serious: the unauthorized search occurred in her home in the middle of the night while she was detained and the search was not brief. The breach implicated her liberty, her dignity as well as her privacy interests. Thus, the absence of prior authorization for the search was a serious affront to her reasonable expectation of privacy.

In this case, the trial judge drew the line where the police had continually shown systemic disregard for the law and the Constitution. The trial judge did not err in concluding that the courts must not tolerate this sort of behaviour by those sworn to uphold the law. He took the only course open to him in order to prevent the administration of justice from falling into further disrepute by condoning this disturbing and aberrant police behaviour.

*Per* Deschamps J. (dissenting): The application of the three‑stage test proposed in *R. v. Grant* leads to the conclusion that the physical evidence should not have been excluded. At the first stage of the analysis — that of the seriousness of the *Charter*‑infringing state conduct — the police officers’ conduct revealed a serious disregard for C’s constitutional rights. Not only did the officers not concern themselves with obtaining either a warrant or C’s informed consent before conducting their initial search, they also attempted to conceal the constitutional violations of C’s rights.

At the second stage — that of the impact of the *Charter* breach on the *Charter‑*protected interests of the accused — it is clear that the trial judge did not evaluate the actual impact of the breach. The main interest affected by the unlawful police search was C’s expectation of privacy. In this regard, it is not enough to find that the search resulted in an invasion of privacy, as it is also necessary to determine the impact of the failure to obtain prior authorization on C’s expectation. To do this, the situation here must be compared with the one that would have prevailed had the search been authorized in advance. It is more specifically the difference in seriousness between the two situations that reveals the extent to which the breach actually undermined the protected interests. In this case, a warrant could have been issued at the start of the investigation and the resulting invasion of C’s privacy would, in practice, have been identical to the one that resulted from the warrantless search. Moreover, C did not have the highest expectation of privacy. She was the first and only person to whom the police officers could speak to find out what had happened in the moments before her spouse was taken away by ambulance. Therefore, the visit from the police could hardly be said to have been unexpected.

As for the third stage of the analysis — that of determining whether the search for truth would be better served by admitting the evidence or by excluding it — the evidence in question was reliable physical evidence, and its admission was likely to be of crucial importance to the truth‑seeking function and to the conduct of the trial, since the exclusion of the statements made to the police by C meant that it was the only remaining evidence.

After completing all three stages of the analysis, it is necessary to balance the factors that weigh in favour of and against excluding the evidence. Here, the police misconduct, considered as a whole, is serious and the courts must dissociate themselves from it. However, it is possible to do so in respect of the constitutional violations in this case without excluding all the evidence. There are cases of impacts on expectations of privacy that are much more serious. Moreover, where reliable and important evidence exists, society’s interest in the search for truth stands out. On the whole, it is the exclusion of the physical evidence that would bring the administration of justice into disrepute.

**Cases Cited**

By Cromwell J.

**Applied:**  *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; **referred to:**  *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. Tricker* (1995), 21 O.R. (3d) 575; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, rev’g 2008 ONCA 85, 89 O.R. (3d) 161; *R. v. Beaulieu*, 2010 SCC 7, [2010] 1 S.C.R. 248; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Greffe*, [1990] 1 S.C.R. 755.

By Deschamps J. (dissenting)

*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Stillman*, [1997] 1 S.C.R. 607; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 7, 8, 10, 24.

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 488.

APPEAL from a judgment of the Quebec Court of Appeal (Dalphond, Duval Hesler and Gagnon JJ.A.), 2010 QCCA 303, 74 C.R. (6th) 130, SOQUIJ AZ-50609169, [2010] Q.J. No. 1162 (QL), 2010 CarswellQue 15137, setting aside the acquittal entered by Cournoyer J., 2008 QCCS 3749, SOQUIJ AZ-50509743, [2008] J.Q. no 7951 (QL), 2008 CarswellQue 7931, and ordering a new trial. Appeal allowed, Deschamps J. dissenting.

Carole Gladu, Josée Veilleux and Karine Guay, for the appellant.

Magalie Cimon and Pierre Goulet, for the respondent.

Frank Addario and Kelly Doctor, for the intervener.

The judgment of McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

Cromwell J. —

I. Introduction

1. Evidence obtained in a manner that violates rights guaranteed by the *Canadian Charter of Rights and Freedoms* must be excluded if, having regard to all of the circumstances, its admission would bring the administration of justice into disrepute: s. 24(2). This case raises in stark terms how this requirement applies when the court is faced with serious and systematic disregard for *Charter* rights by the police during the investigation of a serious crime.
2. On the appellant’s trial for second degree murder, the trial judge, after a five-day hearing, concluded that the police investigators over several hours had violated virtually every *Charter* right accorded to a suspect in a criminal investigation. These violations, he held, were not the result of isolated errors of judgment on the part of the police investigators, but rather were part of a larger pattern of disregard of the appellant’s *Charter* rights. The seriousness of this misconduct was aggravated by the facts that the investigators had misled a judicial officer in order to obtain search warrants and that, as witnesses at trial, they had refused to admit obvious facts, offered improbable hypotheses and tried to justify their actions on untenable grounds. The trial judge found that to admit the evidence in the face of this extraordinarily troubling police misconduct, even when his decision would lead to an acquittal of a serious crime, would bring the administration of justice into disrepute. He therefore ordered its exclusion. In response to this ruling, the Crown stated that it had no other evidence and the appellant was acquitted of the charge.
3. The Crown appealed to the Court of Appeal which held that some of the evidence which the trial judge had excluded should have been admitted. The court therefore set aside the trial judge’s decision in part and ordered a new trial. On Ms. Côté’s further appeal to this Court, the issue is whether the Court of Appeal erred in law in doing so.
4. In my respectful view, the appeal must succeed and the decision of the trial judge to exclude the evidence restored. The trial judge drew the line where the police had continually shown systematic disregard for the law and the Constitution. The trial judge did not err in concluding that the courts must not tolerate this sort of behaviour by those sworn to uphold the law. He took the only course open to him in order to prevent the administration of justice from falling into further disrepute by condoning this disturbing and aberrant police behaviour.

II. Facts, Proceedings and Issues

A. *Evidence and Decision at Trial, 2008 QCCS 3749 (CanLII)*

(1) Overview

1. The appellant applied to the trial judge to exclude evidence which she claimed had been obtained in a manner that infringed her rights under the *Charter.* The appellant also sought exclusion of her statements to the police on the basis that they had not been made voluntarily. The trial judge essentially agreed with the appellant, finding that the police violated the appellant’s rights and misconducted themselves in several respects.
2. The trial judge concluded that the police embarked on a systematic violation of Ms. Côté’s rights when they entered onto her property at approximately 12:15 a.m. on July 23, 2006, and these violations extended until 8:00 p.m. that evening when her interrogation ended. First, the police officers’ entry on the appellant’s property, their authorization to enter her home, the search of her house, the peripheral search of the property and the search of her gazebo constituted unreasonable searches and seizures contrary to s. 8 of the *Charter*. Second, within a few moments of their arrival, the police detained the appellant without telling her why, in violation of s. 10(*a*) of the *Charter*.Third, at that point, and later on in their dealings with the appellant, the police violated her right to obtain the assistance of a lawyer and to be advised of that right, both in violation of s. 10(*b*) of the *Charter*. Fourth, the police violated the appellant’s right to silence as protected by s. 7 of the *Charter* and fifth, through their improper questioning, obtained a statement that was not voluntary. In addition, the trial judge found that the investigators had misled a judicial officer to obtain search warrants and had been evasive and unbelievable witnesses at trial. After balancing society’s interest in discovering the truth against its interest in maintaining the integrity of the administration of justice, the trial judge excluded all of the evidence, finding that its admission would bring the administration of justice into disrepute.

(2)Evidence and Reasons

1. On July 22, 2006, a little before 9:00 p.m., Ms. Côté called 9-1-1 to report that her spouse, André Hogue, had been injured. Mr. Hogue was transported to the Hôtel-Dieu hospital in Sorel and attended to by Dr. Nicolas Elazhary. Dr. Elazhary established that Mr. Hogue had a wound in the back of his head and concluded that he was suffering from head and possibly throat injuries. An X-ray revealed an intracerebral hematoma and a metal image compatible with a projectile. Dr. Elazhary communicated this information to Sergeant François Monetta of the Sûreté du Québec (Tracy Detachment) at 11:08 p.m. Shortly thereafter, Sergeant Monetta sent Constable Alain Hogue to the hospital to speak with Dr. Elazhary. At 11:28 p.m. Dr. Elazhary confirmed the presence of a metal object in the victim’s skull and Constable Hogue relayed this information to Sergeant Monetta. At 11:38 p.m. Sergeant Monetta contacted Constable Jean-François Fortier in the Nicolet Detachment of the Sûreté du Québec and communicated the information he had about the victim and the incident, including the observations made by Dr. Elazhary. Thus, from at least 11:38 p.m., before officers arrived at Ms. Côté’s residence, the police knew that they were in all likelihood dealing with a bullet wound to the back of the head. They were also aware that the victim had been transported to the hospital from the appellant’s address earlier that evening.
2. The appellant contacted Dr. Elazhary around 11:30 p.m. She told him that she had left Mr. Hogue beside the gazebo and that when she returned he was lying on the ground. Dr. Elazhary informed the appellant that Mr. Hogue was suffering from head trauma but did not mention the discovery of the bullet wound.

(a) *Investigation of 9-1-1 Call*

1. Around 12:15 a.m. patrolling officers Tremblay and Mathieu attended at the appellant’s home. All of the lights were off and the house appeared to be calm. Believing the main entrance to be at the rear of the house, the officers went around the back, entered the solarium and rang the doorbell. The appellant answered the door in her pyjamas. The officers explained that they were there to find out what had happened earlier that evening and to make sure the premises were safe. However, the trial judge was of the view that their explanations did not reflect their true intentions. The trial judge held that

[translation] [a]s unpleasant as this might be for a judge, the court did not believe Constables Tremblay, Mathieu and Fortier. They unfortunately failed to display the candour and honesty that are to be expected of police officers responsible for law enforcement. [para. 126]

The officers asked to enter the house and, without responding, the appellant stepped aside. She accompanied the officers as they inspected the interior and exterior of the residence. They did not tell the appellant that they believed that her spouse was suffering from a gunshot wound.

1. The trial judge found that the violation of the appellant’s rights began shortly after the police arrived at her home, when they entered onto her property. The police relied on their power to investigate the 9-1-1 call, and, in particular, to locate the caller, determine his or her reasons for making the call, and provide the required assistance, but the trial judge found that the legitimate ambit of that power to investigate had expired earlier that evening and could not justify their investigation as it unfolded at the appellant’s residence: see *R. v. Godoy*,[1999] 1 S.C.R. 311, at para. 22. In the trial judge’s view, the police went to the appellant’s house with the intention of conducting a criminal investigation, so they could not claim that, at 12:15 a.m., they were responding to a 9-1-1 call placed at 8:51 p.m. He found it telling that, while seeking the appellant’s consent to look around her home, the police had deliberately chosen not to inform her about the gunshot wound to her spouse’s head. The trial judge concluded that the police thought the appellant was a suspect in an attempted murder and were not responding to a call for assistance. The trial judge also found it incredible that the police tried to justify their intervention on the basis of ensuring Ms. Côté’s safety. If the police had been genuinely concerned for the appellant’s safety, he determined that they would not have had her accompany them as they searched the house.
2. The trial judge explained that even if the parameters set out in *Godoy* were respected during the initial police intervention, this power does not authorize police to search the premises or otherwise intrude on a resident’s privacy or property. He concluded that the power recognized in *Godoy* did not authorize the searches of the appellant’s house and property and these searches were thus unlawful.

(b) *Invitation to Knock and Approach*

1. The Crown also sought to justify the police intervention on the basis of the implied invitation to knock and approach the door for a lawful purpose as set out in *R. v. Evans*, [1996] 1 S.C.R. 8. This refers to the idea that “the occupier of a dwelling gives implied licence to any member of the public, including a police officer, on legitimate business to come on to the property” (*Evans*,at para. 13, *per* Sopinka J., citing *R. v. Tricker* (1995), 21 O.R. (3d) 575 (C.A.), at p. 579). The trial judge held that in shutting off the lights in her residence, the appellant had retracted the public and police’s implicit invitation to knock and approach. Even if shutting off the lights did not retract this implied invitation, the trial judge found that the police had exceeded the permission accorded by the implied invitation to knock and approach for a lawful purpose. This permission was exceeded because the police had expressly contemplated the possibility of recovering evidence against the appellant when they went to her home, illustrated by the fact that the police deliberately withheld from the appellant the fact that Mr. Hogue had been wounded by a bullet. Given this intention, the police exceeded the implied permission to approach and knock. Therefore, the search was not legally justified on this basis.

(c) *Appellant’s Consent to Enter Her Residence*

1. The trial judge also found that the police’s failure to provide the appellant with the information they possessed about the nature of her spouse’s injuries vitiated her consent to enter her home. It also did not conform to the requirements set out in the jurisprudence for obtaining consent for a warrantless search. The warrantless searches could therefore not be justified on the basis of the appellant’s consent.

(d) *Urgency*

1. Finally, the trial judge found that the evidence did not establish urgency. There was no concern for the police or the public’s safety, nor was there a concern that some of the evidence would be destroyed. Accordingly, the police officers’ entry onto the appellant’s property and the warrantless search of her home could not be justified on the basis of urgency.

(e) *First Search of House and Property*

1. After Constables Tremblay and Mathieu entered the appellant’s home, she accompanied them as they inspected the interior of the residence. Constable Tremblay then checked the exterior of the house and found that the door to the gazebo was broken and that there appeared to be blood inside the gazebo. Constable Mathieu, accompanied by the appellant, joined Constable Tremblay outside to make sure everything was in order. Constable Mathieu noticed holes in the gazebo’s mosquito screen and in the solarium window. The trial judge found that both of these searches were illegal.
2. At 12:27 a.m. Constable Tremblay went back to the police cruiser and relayed his observations to Constable Fortier. Constable Mathieu went back inside the house with the appellant. At 12:55 a.m. Constable Tremblay joined the appellant and Constable Mathieu inside the residence and questioned the appellant about the presence of firearms in the house. Ms. Côté gave some information about the night’s events during this encounter. She confirmed the presence of two firearms but could only locate one. She led the officers to her bedroom closet where she showed them a firearm case that she said contained a firearm. Constable Tremblay did not handle the case but assumed that it contained a firearm.

(f) *Detention*

1. The trial judge held that the appellant’s detention commenced shortly after Constables Tremblay and Mathieu arrived at her residence. He found that she was detained at 12:27 a.m. when the officers observed holes in the solarium’s window and in the gazebo’s mosquito screen, failed to tell Ms. Côté about the projectile in Mr. Hogue’s head and Constable Mathieu began making surveillance notes with respect to the appellant’s behaviour and movements.
2. The trial judge found that the police officers had quickly established that Ms. Côté was the only suspect in the attempted murder of Mr. Hogue, which is why they hid from her the fact that they knew about the gunshot wound. The trial judge held that keeping this information from her was a strategic choice to prevent Ms. Côté from being on her guard. The trial judge found that the questions posed and verifications undertaken clearly demonstrated that the goal of the investigation was not to acquire information, but rather to clarify the appellant’s participation in the crime. He had the impression that the police officers did not want to admit certain facts because they were afraid that their admissions would lead the court to conclude that Ms. Côté was detained within the meaning of s. 10 of the *Charter* and that she should have been appropriately cautioned. Specifically, he found Constable Mathieu’s claim — that if Ms. Côté had wanted to leave, he would have had no choice but to let her go — to be unbelievable. Accordingly, the trial judge found that Ms. Côté’s right under s. 10(*a*) of the *Charter* to be informed promptly of the reasons for her detention was violated until she was warned as an [translation] “important witness” at 5:23 a.m. (para. 229). He also found that her rights under s. 10(*b*) to retain and instruct counsel upon detention and to be advised of that right were violated.
3. At 2:20 a.m. Constable Tremblay spoke to Detective Christian Houle who told him that it would be preferable to bring Ms. Côté to the police station so that she could make a statement given that she was an important person with respect to the incident. At 2:34 a.m. Constables Tremblay and Mathieu took the appellant to the Nicolet police station, giving her the explanation provided by Detective Houle. She remained in the company of Constable Mathieu from her arrival at the police station at 2:54 a.m. until around 4:00 a.m. On a number of occasions, the appellant asked why she was there, why these steps were being taken and why she was not left at home. She was told that she was an important witness, she was more familiar with her spouse than the police were and it was important for the police to figure out what had happened to Mr. Hogue. At 4:10 a.m. the appellant was asked to write down her version of the evening’s events. At 5:23 a.m. Detective Sylvain Bellemare gave the appellant her first warning as an important witness in the attempted murder of André Hogue.
4. To briefly recap, the appellant’s detention began at 12:27 a.m. but the police failed to caution her until 5:23 a.m. and at that point, they only cautioned her as an important witness rather than as a suspect. This violated her s. 10(*a*) and (*b*) rights. The trial judge was very troubled by the fact that throughout their interactions with the appellant, the police constantly minimized her actual legal situation to her and kept her ignorant of the information essential to the exercise of her constitutional rights. He found that they had deliberately failed to caution her correctly and he found this behaviour to be illustrative of a constant and systematic attitude evident throughout their interactions with Ms. Côté.

(g) *Establishment of Security Perimeter and Warrantless Search of Property*

1. After the appellant was questioned, Constable Mathieu stayed inside the house with her while Constable Tremblay established a security perimeter around the property at 1:15 a.m. At 2:05 a.m. Constables Fortier and Kelly Bellerive arrived on the scene and walked around the property with Constable Tremblay. The trial judge found this to be a warrantless search that violated the appellant’s s. 8 rights.

(h) *Enlargement of Security Perimeter*

1. At 3:10 a.m. Detective Sergeant Luc Briand asked Constable Fortier to enlarge the security perimeter established earlier by Constable Tremblay. Between 3:30 and 3:45 a.m. Constable Fortier expanded the perimeter and took advantage of this opportunity to further search the property. During this search, Constable Fortier observed at least one hole in the gazebo’s mosquito screen with the fibres pointing inwards towards the gazebo; a small hole in the interior window of the solarium; a large hole in the exterior window of the solarium; powder residue on the interior of the solarium window; two small holes in the solarium’s mosquito screen; and shards of glass on the ground underneath the solarium window. The trial judge found that this constituted an unauthorized perimeter search.

(i) *Issuance of Telewarrants*

1. At 5:15 a.m. Detective Sergeant Briand drafted requests for telewarrants (a telewarrant for the recording of the 9-1-1 call, a general telewarrant and a search and seizure telewarrant) indicating that he had reasonable and probable grounds to believe that a criminal act, specifically attempted murder with a firearm, had occurred on the night of July 22 at the appellant’s home. He indicated that he had reasonable and probable grounds to believe that the shot had been fired from inside the residence.
2. The trial judge noted that Detective Sergeant Briand had failed to fully and frankly disclose all material facts in the Information to Obtain a Search Warrant (“ITO”). For instance, para. 5 of the ITO was misleading because it suggested that some of the observations regarding the solarium and gazebo had been made inadvertently, thereby concealing the fact that Constable Fortier had already made a number of those observations during an earlier unconstitutional search with Constable Tremblay. The trial judge was also troubled by the fact that Detective Sergeant Briand failed to mention the illegal search conducted by Constables Tremblay and Mathieu earlier that evening and the fact that they had refrained from disclosing the bullet wound to Ms. Côté.
3. The general telewarrant and the search and seizure telewarrant were executed on July 23, 2006 at 10:35 a.m. at the appellant’s house by Detective Sergeant Briand and Constable Alain Gaucher. While searching the house they located a .10 calibre gun in a case in the bedroom closet and a .22 calibre rifle, not in a case in a basement closet. The trial judge noted that the gun found in the basement closet was the same calibre as the bullet recovered from the victim’s skull.
4. The trial judge held that the general telewarrant and the search and seizure telewarrant were invalid. He found that the police must have identified a problem in Constables Tremblay, Mathieu and Fortier’s interventions and sought the warrants to remedy the unconstitutional conduct. He concluded that the warrants were invalid because if the unconstitutionally obtained information was excised from the ITO, the remaining information (paras. 1-3 and 8) did not constitute “some evidence that might reasonably be believed on the basis of which the authorization could have issued” (para. 266, citing *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 51). He also held that the warrants were invalid on the basis of non-disclosure of relevant information as well as the inclusion of deliberately misleading information, such as the wording in para. 5 of the ITO that suggested that Constable Fortier had inadvertently made certain observations while extending the security perimeter when in fact he had made most of those observations earlier while unconstitutionally searching the property with Constable Tremblay. Relying on *R. v. Grant*,[1993] 3 S.C.R. 223, at pp. 254-55 (“*Grant 1993*”), the trial judge concluded that the entire search process was tainted by the warrantless perimeter searches which violated s. 8.

(j) *First Police Warning*

1. As mentioned above, the appellant was cautioned and advised of her right to counsel at 5:23 a.m. by Detective Bellemare. This was the first time she was so advised even though she had been detained since 12:27 a.m. At that, she was only cautioned as an “important witness” in the attempted murder of André Hogue. Detective Bellemare used a standard police warning form but struck out the words [translation] “arrested or detained” and replaced them with “witness” (evidence of Detective Bellemare, A.R., vol. V, at p. 192). It is notable that the police cautioned the appellant as an important witness at 5:23 a.m. when they had sworn an ITO at 5:15 a.m. stating that they had reasonable and probable grounds to believe that attempted murder had been committed. Given the information that the police possessed at 5:23 a.m., the trial judge found it inexplicable that they only warned Ms. Côté as an important witness. After being warned, she spoke with a lawyer and invoked her right to silence. She then described the day’s events to Detective Bellemare and at 5:56 a.m. was placed under arrest for attempted murder. She was cautioned again, advised of her right to counsel and spoke with a lawyer for a second time.

(k) *Interrogation*

1. After the appellant was placed under arrest for attempted murder at 5:56 a.m., she was transferred to a different police station. After sleeping an hour and eating, she was interrogated first by Detective Bellemare and later by Detective Pierre Samson. At the outset of her interrogation, the appellant exhibited extreme anxiety about having the interrogation room door closed and appeared claustrophobic. She also seemed to be exhausted and on several occasions told the interrogator that she had had enough, she did not want to talk anymore or she wanted to go lie down. She reaffirmed her right to silence over 20 times after consulting various lawyers. At 8:00 p.m. she was advised of Mr. Hogue’s death and placed under arrest for murder. This ended her interrogation.
2. The trial judge concluded that the appellant’s right to silence had been systematically violated. He noted that she had been wakened in the middle of the night in the absence of any sort of urgency, the police had deliberately put off warning her appropriately and she was exhausted, claustrophobic and had exercised her right to silence on numerous occasions.
3. He also faulted the police for having denigrated the work of defence counsel, telling the appellant that she had more life experience than her lawyer and that she was the only person who could help herself. The investigator also counselled her on exercising her right to silence. He told her that if she had planned the murder, like a member of an organized gang would have, he would advise her to remain silent because she would be in serious trouble in that kind of situation. However, given that her situation was very different, the investigator suggested that she need not remain silent. The investigator also suggested that if she had committed an armed robbery he would advise her to remain silent, but again, her circumstances were quite different. In light of this specific behaviour, the whole of the police investigation and the general context of a systematic violation of Ms. Côté’s constitutional rights, the trial judge was not convinced beyond a reasonable doubt that the videotaped statement was made freely and voluntarily.

(l) *Police Testimony at Trial*

1. The trial judge made strong, unfavourable findings about the credibility of the police officers’ testimony at trial. He did not believe Constables Tremblay, Mathieu and Fortier, characterizing their evidence as lacking in frankness and sincerity. He found that these officers tried to present their intervention at the appellant’s house as routine, a simple follow-up to the 9-1-1 call and a verification of the premises, which downplayed their knowledge that Mr. Hogue had likely suffered a bullet wound to the back of the head and that they were conducting a criminal investigation. He also noted that police witnesses refused to admit obvious facts and offered improbable hypotheses to the court. The trial judge had the impression that the officers did this because they did not want him to conclude that Ms. Côté was detained and should have been properly cautioned. As mentioned above, the trial judge found Constable Mathieu’s assertion that Ms. Côté was not detained and could have left the police station at any point to be implausible. He found the officers’ evidence that the appellant had not been told about the possible gunshot wound because it had not yet been confirmed to be equally unbelievable. Generally, he found that the officers’ attitude during their testimony, primarily Constable Tremblay but also Constables Mathieu and Fortier, established that they did not want to admit that one investigative avenue implicated Ms. Côté in the attempted murder of Mr. Hogue.
2. The trial judge also found that police witnesses tried to downplay the importance of certain evidence. Specifically, they tried to minimize the importance of the information transmitted to them from Dr. Elazhary, illustrated by the fact that Constable Mathieu maintained that the appellant was not detained and was free to leave at any time. The police officers also downplayed the issue of whether the holes in the window of the solarium were bullet holes and claimed that it was important to investigate whether a shot could have come from the river behind the gazebo when this hypothesis was inconsistent with the evidence they had already found. He concluded that the frankness and sincerity that is expected of police officers charged with applying the law was unfortunately lacking in this case.

(m) *Serious and Systematic Violation of Charter Rights*

1. The trial judge was troubled by the police conduct throughout the investigation; he found that it demonstrated a blatant disregard for the appellant’s *Charter* rights. He found that the breaches of the appellant’s rights with respect to search and seizure were extremely serious, [translation] “flagrant and systematic” (para. 337). They were not, in his view, the product of isolated errors in judgment on the part of the police, but rather were part of a larger pattern of disregard of the rights guaranteed by the *Charter*. He found that the police had not acted in good faith.

(n) *Exclusion of the Evidence*

1. Balancing the interests of the state in discovering the truth and the integrity of the administration of justice, the trial judge found that no other result than exclusion of the evidence would prevent further discrediting of the administration of justice. He therefore concluded that the admission of the evidence would bring the administration of justice into disrepute and excluded the oral and written statements given by the appellant, the evidence obtained as a result of the warranted searches at the appellant’s home and the observations made by police officers with respect to the exterior of the house before the warrants were issued. In making his decision, he emphasized that the crime in question was serious, that there was a strong societal interest in adjudicating the charge on its merits and recognized that his decision was particularly difficult because it led to the appellant’s acquittal.

B. *Court of Appeal, 2010 QCCA 303 (CanLII)*

1. The Court of Appeal found that the trial judge was right to exclude the appellant’s statements to police as the police seriously undermined the advice given by Ms. Côté’s lawyers in obtaining those statements and this behaviour could not be sanctioned by a court. The Crown conceded, by and large, that the police had committed a number of violations, and that they were serious. It also conceded that the videotaped statements ought to be excluded. However, the court concluded that the trial judge had erred by excluding the observations police made of the exterior of the appellant’s home before the warrants were issued as well as the physical evidence obtained at the appellant’s home in execution of the two telewarrants.
2. The Court of Appeal explained that the only issue before it was the admissibility of reliable derivative evidence. In *R. v.* *Grant*,2009 SCC 32, [2009] 2 S.C.R. 353, this Court referred to derivative evidence as “physical evidence discovered as a result of an unlawfully obtained statement” (para. 116). The Court of Appeal seemed to characterize *all* of the physical evidence obtained at the scene as derivative evidence in this sense. The Court of Appeal noted that the trial judge had not had the benefit of this Court’s decisions in *Grant* and *R. v. Harrison*, 2009 SCC 34,[2009] 2 S.C.R. 494, and that these decisions had changed the law in this area. In *Grant*,the Court stated that in determining whether to exclude evidence under s. 24(2) of the *Charter*,a court must assess and weigh the following three 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 the merits (para. 71). The Court of Appeal explained that while derivative evidence was often excluded where an accused’s constitutional rights were seriously violated, *Grant* now required the judge “to consider whether admission of derivative evidence obtained through a *Charter* breach would bring the administration of justice into disrepute” (para. 33, citing *Grant*, at para. 118). The Court of Appeal examined the three factors relevant to the s. 24(2) determination, as set out in *Grant*.
3. With respect to the first factor (the seriousness of the *Charter*-infringing state conduct), the Court of Appeal acknowledged the trial judge’s finding that the *Charter* violations were serious and that the police had systematically violated Ms. Côté’s *Charter* rights. However, it concluded that the police officers had not deliberately acted in an abusive manner.
4. Regarding the second factor (the effect of the violation on the accused’s rights), it found that the accused had been seriously affected by a series of police errors. However, the Court of Appeal highlighted the fact that the evidence could have been discovered lawfully without the appellant’s participation because the police could have obtained a search warrant. It held that a warrant would have been issued on the basis of the 9-1-1 call and the finding of a bullet in the deceased’s head which had entered from the rear, thus eliminating any possibility of suicide. Relying on *Grant*,at para. 122, the Court of Appeal noted that discoverability “retains a useful role . . . in assessing the actual impact of the breach on the protected interests of the accused” because the possibility of independent discovery of derivative evidence would mitigate the impact of a *Charter* violation on an accused person (para. 43). The discoverability of the evidence was therefore relevant to the analysis of the second factor. The Court of Appeal held that the admission of the physical evidence would not affect the fairness of the trial or bring the administration of justice into disrepute because the evidence and observations could have otherwise been discovered had the police obtained a warrant when they had grounds to do so.
5. With respect to the third factor (society’s interest in the resolution of the charge on its merits), the court explained that the physical evidence which the trial judge had excluded (e.g. the hole in the gazebo’s mosquito screen, the holes in the solarium window, the traces of blood and the firearm registered in the victim’s name) was essential to the Crown’s case as it included all of the evidence from the scene. The Court of Appeal also underlined that the evidence was reliable. The court found that society’s interest in having an adjudication on the merits was extremely important given the seriousness of the alleged crime.
6. The Court of Appeal took the view that the *exclusion* of the physical evidence, rather than its inclusion, would bring the administration of justice into disrepute. In the Court of Appeal’s opinion, all of the physical evidence from the scene would have been discovered without the appellant’s assistance, the crime was very serious and the police officers had not deliberately acted in an abusive manner. The court explained that while the police officers’ respect for the appellant’s constitutional rights had been somewhat fragmented and that the trial judge had not found them to be credible witnesses, they did not intend to act prejudicially (*pas eu d’“attitude attentatoire”*) (para. 47). Accordingly, the court held that the physical evidence and observations made at the appellant’s home should not have been excluded and it allowed the appeal and ordered a new trial.

C. *Issues*

1. The appellant challenges the Court of Appeal’s decision to admit the physical evidence and the evidence concerning the police observations at her home. The Crown concedes, as it must, that the police committed serious breaches of the appellant’s constitutional and legal rights. The Crown also does not contest the trial judge’s decision to exclude the appellant’s statements made to police. However, the Crown supports the Court of Appeal’s decision to admit the police observations and the physical evidence obtained at the appellant’s home.
2. The Court of Appeal intervened principally on the basis that the evidence observed or collected at the scene could have been discovered lawfully without the appellant’s participation. The Court of Appeal also justified its intervention by suggesting that the police had not deliberately acted in an abusive manner and by emphasizing the seriousness of the offence. It relied on these considerations in re-balancing the relevant lines of inquiry under s. 24(2) and in concluding that the repute of the administration of justice required the admission of some of the evidence. The appeal thus raises two main issues:

1. Did the Court of Appeal err in intervening on the bases that the police had not deliberately acted in an abusive manner and that the offence was serious?

2. Did the Court of Appeal err in intervening on the basis that the evidence was “discoverable”?

III. Analysis

1. Before discussing the main issues in this case, I will briefly set out the standard of review and the factors relevant to a s. 24(2) determination, as described in *Grant* and its companion cases.

A. *Standard of Review*

1. The standard of review of a trial judge’s s. 24(2) determination of what would bring the administration of justice into disrepute having regard to all of the circumstances is not controversial. It was set out by this Court in *Grant* and recently affirmed in *R. v. Beaulieu*, 2010 SCC 7,[2010] 1 S.C.R. 248.Where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review (*Grant*,at para. 86, and *Beaulieu*,at para. 5).

B. *The Grant Analysis*

1. This Court established a revised approach to the exclusion of evidence under s. 24(2) in *Grant*. It explained that s. 24(2) was generally concerned with “whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence” (para. 68). As noted earlier, this Court held that three avenues of inquiry were relevant to an assessment of whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute. A court’s role when addressing an application to exclude evidence under s. 24(2) is to balance the assessments under each of these lines of inquiry and determine, based on all of the circumstances, whether the admission of the evidence would bring the administration of justice into disrepute.
2. In setting out this new framework, this Court made it clear that while these lines of inquiry did not precisely track the categories of considerations set out in the earlier jurisprudence, they did capture the factors relevant to the s. 24(2) determination that had been set out in the earlier cases. In *Beaulieu*,Charron J., writing for the Court, emphasized this point, noting that *Grant* did not change the relevant factors in the s. 24(2) analysis.
3. The first line of inquiry involves an evaluation of the seriousness of the state conduct. The more serious the state conduct constituting the *Charter* breach, the greater the need for courts to distance themselves from that conduct by excluding evidence linked to the conduct. The second line of inquiry deals with the seriousness of the impact of the *Charter* violation on the *Charter*-protected interests of the accused. The impact may range from that resulting from a minor technical breach to that following a profoundly intrusive violation. The more serious the impact on the accused’s constitutional rights, the more the admission of the evidence is likely to bring the administration of justice into disrepute. The third line of inquiry is concerned with society’s interest in an adjudication on the merits. It asks whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the evidence. The reliability of the evidence and its importance to the prosecution’s case are key factors. Admitting unreliable evidence will not serve the accused’s fair trial interests nor the public’s desire to uncover the truth. On the other hand, excluding reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public’s perspective. The importance of the evidence to the Crown’s case is corollary to the inquiry into reliability. Admitting evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the whole of the prosecution’s case, but excluding highly reliable evidence may more negatively affect the truth-seeking function of the criminal law process where the effect is to “gut” the prosecution’s case.
4. After considering these factors, a court must then balance the assessments under each of these avenues of inquiry in making its s. 24(2) determination. There is no “overarching rule” that governs how a court must strike this balance (*Grant*,at para. 86). Rather, “[t]he evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute” (*Harrison*, atpara. 36). No one consideration should be permitted to consistently trump other considerations. For instance, as this Court explained in *Harrison*,the seriousness of the offence and the reliability of the evidence should not be permitted to “overwhelm” the s. 24(2) analysis because this “would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law ‘the ends justify the means’” (para. 40, citing 2008 ONCA 85, 89 O.R. (3d) 161, at para. 150, *per* Cronk J.A., dissenting). In all cases, courts must assess the long-term repute of the administration of justice.

C. *First Issue*

1. I turn to the first of the two issues raised on appeal: Did the Court of Appeal err in intervening on the bases that the police had not deliberately acted in an abusive manner and that the offence was serious?
2. As explained above, the Court of Appeal found that the trial judge had erred in excluding thephysical evidence located at the scene. It based its conclusion, in part, on the fact that the police did not intend to act prejudicially nor had they deliberately acted in an abusive manner. It also based this conclusion on the fact that the offence in question was serious. In my respectful view, appellate intervention was not warranted on either of these grounds.

(1) Re-characterization of Police Conduct

1. The Court of Appeal found that the police did not intend to act prejudicially nor had they deliberately acted in an abusive manner. This constituted a re-characterization of the evidence that was not open to the Court of Appeal. The trial judge made numerous findings to the contrary, specifically that the *Charter* violations were extremely serious, the police had not acted in good faith, the police had demonstrated a continuous and systematic disregard for the appellant’s *Charter*-protected rights and had persisted in their misconduct by misleading a judicial officer in obtaining search warrants, by failing to be frank and sincere in their testimony and by trying to justify their actions on untenable grounds. The Court of Appeal, respectfully, exceeded its role by its re-characterization of the evidence which departed from express findings by the trial judge which are not tainted by any clear and determinative error. TheCourt of Appeal should not have substituted itsownview of the police conduct for that of the trial judge.
2. The respondent spent a considerable portion of its written argument trying to persuade this Court that the trial judge’s findings about the nature of the police conduct were unreasonable. The respondent submits that the trial judge went too far in his criticism of the police. More specifically, the respondent submits that it was unreasonable for the trial judge to conclude that the *Charter* violations committed by the police were flagrant without considering the dynamic and evolving nature of the situation. It also submits that the trial judge erred in failing to conclude that the police were faced with a situation of urgency that required immediate action from the patrolling officers. I would not accede to these attempts to reverse the trial judge’s findings of fact. A trial judge’s findings of fact on a *voir dire* concerning the admissibility of evidence must be respected unless they are tainted by clear and determinative error. The trial judge made clear findings that from virtually the moment that the police arrived at the appellant’s residence, they believed that she was a suspect; he concluded that the police *knew* that the person they were meeting was susceptible to being involved in the death of Mr. Hogue. I also note that the trial judge made a clear finding that the officers were not exercising their investigative powers arising from the 9-1-1 call when they came to Ms. Côté’s house. Rather, he found that their purpose was to conduct a criminal investigation by speaking with an obvious suspect. The trial judge made these clear findings of fact based on his first-hand assessment of the officers’ credibility by observing their testimony in court. There is no basis disclosed for interfering with the trial judge’s numerous conclusions with respect to the police conduct and I thus decline to interfere with his findings.

(2) Seriousness of the Offence

1. The Court of Appeal also emphasized that the offence in question was serious in grounding its conclusion that the trial judge was wrong to exclude the physical evidence obtained from the appellant’s residence. This relates to the third branch of the *Grant* analysis that deals with society’s interest in an adjudication on the merits. Under this branch, relevant, reliable evidence that is crucial to the prosecution’s case will often point towards admission, though these considerations will have to be balanced against other relevant factors. The seriousness of the offence, however, has the potential to “cut both ways” and will not always weigh in favour of admission (*Grant*,at para. 84). While society has a greater interest in seeing a serious offence prosecuted, it has an equivalent interest in ensuring that the judicial system is above reproach, particularly when the stakes are high for the accused person.
2. The Court of Appeal thus erred in reweighing the impact of the seriousness of the offence. This consideration was fully addressed by the trial judge who was painfully aware of the seriousness of the offence and of the consequences of excluding the evidence. At para. 339 of his reasons, the trial judge acknowledged the seriousness of the offence, and at para. 340, he noted that the more serious the offence, the greater the likelihood that the administration of justice would be brought into disrepute by its exclusion, especially where the evidence was essential to a conviction. It is clear that the trial judge took this factor into account in his s. 24(2) determination and the Court of Appeal was therefore unjustified in simply assigning it greater importance.
3. The respondent submits that the trial judge erred in failing to consider the reliability of the evidence and that this affected his weighing under the third factor of the s. 24(2) analysis. While I acknowledge that the trial judge did not expressly state that the evidence was reliable, he was of course fully aware of the nature of the evidence that was the subject of his order of exclusion. The evidence was reliable in the sense that it was objective and material and this would certainly have been obvious to the trial judge, who described all of the evidence at length in his reasons. The respondent’s argument also overlooks the fact that the trial judge’s decision predates this Court’s judgment in *Grant* and thus may have been couched in different terms. I do not accept the respondent’s submission that the trial judge failed to consider the reliability of the evidence and that this affected his s. 24(2) determination.
4. To conclude, the Court of Appeal erred in interfering with the trial judge’s s. 24(2) determination on the basis that the police did not deliberately act abusively; they did, as the trial judge found. It should also not have interfered with the trial judge’s s. 24(2) determination by assigning greater importance to the seriousness of the offence when the trial judge was fully aware of and properly weighed this factor. The Court of Appeal should not have simply substituted its weighing of these factors for that of the trial judge given that he clearly considered them according to correct legal principles.

D. *Second Issue*

1. I now turn to the second of the two issues raised on appeal: Did the Court of Appeal err in intervening on the basis that the evidence was “discoverable”?

(1) The Court of Appeal’s Reliance on Discoverability

1. As noted, the Court of Appeal was also convinced that the physical evidence (all of which it described as [translation] “derivative evidence”) should not have been excluded because it could have been obtained legally by warrant, without the appellant’s participation (para. 33). Indeed, as I read the court’s reasons, this was the principal basis for its appellate intervention. The Court of Appeal’s emphasis on the discoverability of the evidence affected its weighing of the s. 24(2) factors, in particular the second one concerning the impact of the violation on the accused’s rights. The court was of the view that the impact of the violations was attenuated because the evidence could have been lawfully obtained and, accordingly, its admission would not affect trial fairness nor bring the administration of justice into disrepute.
2. The trial judge was alive to this issue. He commented at para. 347 of his reasons that it was possible, even probable, that the police could have pursued their investigation effectively and in a constitutional manner had they respected simple and elementary principles governing their actions.
3. Analysis of the Court of Appeal’s treatment of discoverability requires that the following questions be answered:

(a) Did the development of the law in *Grant* and its companion cases justify appellate intervention?

(b) What is the principle of discoverability and how does it affect the s. 24(2) analysis under *Grant* and its companion cases?

(c) Did the Court of Appeal err in its treatment of discoverability in the s. 24(2) analysis in this case?

1. I will address these questions in turn.

(a) *Did the Development of the Law in Grant and Its Companion Cases Justify Appellate Intervention?*

1. The Court of Appeal was of the view that *Grant* and its companion cases, decided after the trial judge’s ruling, had changed the law with respect to the admission of reliable derivative evidence. By “derivative evidence”, the Court of Appeal meant physical evidence discovered as a result of an unlawfully obtained statement. In its broader sense, evidence is “derivative” when it is discovered as a result of other unconstitutionally obtained evidence. Under the trial fairness rationale in *R. v.* *Collins*,[1987] 1 S.C.R. 265, derivative evidence obtained as a result of unconstitutional conscription, that is, compelled self-incrimination at the behest of the state of the accused against him or herself, was generally excluded — because of its presumed impact on trial fairness — unless it would have been independently discovered. The Court of Appeal noted that now, as a result of *Grant* and its companion cases, the admissibility of such evidence is to be assessed on the same basis as all other evidence by asking whether its admission would bring the administration of justice into disrepute. The Court of Appeal seemed to suggest that because derivative evidence of a conscriptive nature was more likely to have been excluded under the pre-*Grant* framework, it was necessary to redo the s. 24(2) analysis using the revised *Grant* approach.
2. The fundamental difficulty with the court’s reasoning, in my respectful view, is this: the trial judge did not refer to the fact that this was conscriptive evidence, nor did he suggest that the case for exclusion was stronger because of that. It is therefore difficult for me to see how the trial judge showed any concern that the evidence ought to be excluded because it was conscriptive. Thus, the trial judge did not place any weight on the conscriptive character of the evidence and it did not appear to affect his analysis in any way. In any event, the Court of Appeal erred by characterizing all of the evidence as being derivative of an unlawfully obtained statement when in fact very little of it was. Only the two guns potentially constitute “derivative” evidence in the narrow sense described by the Court of Appeal, as the appellant had informed Constables Tremblay and Mathieu of their presence in the house. Although she only showed police the gun located in the bedroom, she nevertheless told them that a second gun existed. More importantly, I am of the view that the Court of Appeal erred in its analysis of the doctrine of discoverability as it applies in this case.

(b) *What Is the Principle of Discoverability and How Does It Affect the Section 24(2) Analysis Under Grant and Its Companion Cases?*

1. The principle of discoverability was developed under the *Collins/Stillman* framework of analysisand has traditionally been applied to derivative evidence obtained as a result of the breach of an accused’s right against self-incrimination: see *Collins*, and *R. v. Stillman*, [1997] 1 S.C.R. 607. According to the *Collins* trial fairness rationale, admitting evidence derived from unconstitutional self-incrimination not only further undermined the accused’s right not to be conscripted against him or herself, but it also could be seen as undermining the fairness of the accused’s trial at which, of course, he or she is presumed innocent and is not a compellable witness. The fact that the evidence could have been discovered without the accused’s participation — in other words that it was discoverable — was considered relevant and often determinative to the s. 24(2) analysis because that fact attenuated the impact of the unconstitutional actions on the accused’s right against self-incrimination and his or her fair trial rights. The state would have been able to collect the evidence without the accused’s participation, and the fact that the evidence would have been discovered without infringing the accused’s right against self-incrimination weakens the causal link between the *Charter* breach and obtaining the evidence.
2. In *Grant*,this Court established a more flexible, multi-factored approach to the exclusion of evidence under s. 24(2). The earlier *Collins/Stillman* framework had been criticized for being too categorical; exclusion seemed to be virtually automatic if the evidence was found to be conscriptive and not otherwise discoverable. However, *Grant* affirmed that discoverability remains relevant to the s. 24(2) analysis, explaining as follows:

Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength of the causal connection between the *Charter*-infringing self-incrimination and the resultant evidence. The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused’s underlying interest against self-incrimination. The converse, of course, is also true. On the other hand, in cases where it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the s. 24(2) inquiry. [para. 122]

1. The concept of discoverability has been used in relation to derivative evidence to indicate that the police could have obtained the same evidence without unconstitutionally conscripting the accused or that the evidence would have inevitably been discovered without reference to that conscription: *Stillman*,at para. 107; *R. v. Colarusso*,[1994] 1 S.C.R. 20, at p. 77. However, I will use the term “discoverability” to refer to situations where unconstitutionally obtained evidence of any nature could have been obtained by lawful means had the police chosen to adopt them. Viewed in this fashion, discoverability has, in appropriate circumstances, a useful role to play in the s. 24(2) analysis where the interest at stake is one other than self-incrimination.
2. In the pre-*Grant* case law,the fact that unconstitutionally obtained evidence, even though not conscriptive, could have been obtained by constitutional means was considered in the s. 24(2) analysis. Discoverability had two main effects on the analysis: first, the fact that the evidence could have been obtained properly in some circumstances tended to make the *Charter* breach more serious, particularly, for example, in cases in which the police simply ignored the requirement of prior authorization for a search. On the other hand, in some circumstances, the fact that the police actually had reasonable and probable grounds to search, although they did not obtain a warrant, tended to lessen the seriousness of the breach.
3. *R. v. Buhay*, 2003 SCC 30,[2003] 1 S.C.R. 631, is a good example of how discoverability can, in simple language, cut both ways. There, the police searched a locker. One officer said that the idea of getting a warrant did not even cross his mind, while another said he did not consider obtaining a warrant because he thought he lacked sufficient grounds. The Court endorsed the conclusion of the trial judge that the officer who failed even to consider getting a warrant had demonstrated a “casual attitude” towards the appellant’s *Charter* rights and that the other officer’s decision to proceed with the search because he thought he did not have sufficient grounds to obtain a warrant suggested a blatant disregard for the appellant’s rights which was fatal to a claim of good faith: paras. 60-61. On the other hand, this Court acknowledged that the officer probably did in fact have sufficient grounds to obtain a warrant and that the existence in fact of reasonable and probable grounds to conduct the search has on many occasions been considered as lessening the seriousness of the violation. In the end, the Court accepted that the trial judge had reasonably concluded that the breach was serious and that his assessment should not have been interfered with on appeal: see generally paras. 52-56.
4. Discoverability remains a relevant factor under the current s. 24(2) analysis. *R. v. Nolet*, 2010 SCC 24,[2010] 1 S.C.R. 851, is an example. Binnie J., writing for the Court, found that the fact that non-bodily physical evidence obtained in breach of an accused’s s. 8 right would otherwise have been discovered was one of the points favouring the admissibility rather than the exclusion of the evidence.
5. While discoverability may still play a useful role in the s. 24(2) analysis, it is not determinative. A finding of discoverability should not be seen as necessarily leading to admission of evidence. Nor should courts engage in speculation. As stated in *Grant*,where it cannot be determined with any confidence whether evidence would have been discovered in the absence of the *Charter* breach, discoverability will have no impact on the s. 24(2) inquiry. I will describe how, in appropriate cases, discoverability may be relevant to the first two branches of the *Grant* analysis.
6. I turn to the first branch of the *Grant* test which is concerned with the seriousness of the *Charter*-infringing state conduct. If thepolice officers could have conducted the search legally but failed to turn their minds to obtaining a warrant or proceeded under the view that they could not have demonstrated to a judicial officer that they had reasonable and probable grounds, the seriousness of the state conduct is heightened. As in *Buhay*, a casual attitude towards, or a deliberate flouting of, *Charter* rights will generally aggravate the seriousness of the *Charter*-infringing state conduct. On the other hand, the facts that the police exhibited good faith and/or had a legitimate reason for not seeking prior judicial authorization of the search will likely lessen the seriousness of the *Charter*-infringing state conduct.
7. We come now to the effect of discoverability on the second branch of the *Grant* test — the impact on the *Charter-*protected interests of the accused. Section 8 of the *Charter* protects an individual’s reasonable expectation of privacy. That reasonable expectation of privacy must take account of the fact that searches may occur when a judicial officer is satisfied that there are reasonable and probable grounds and authorizes the search before it is carried out. If the search could not have occurred legally, it is considerably more intrusive of the individual’s reasonable expectation of privacy. On the other hand, the fact that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found at the place of the search will tend to lessen the impact of the illegal search on the accused’s privacy and dignity interests protected by the *Charter.*
8. This is not to say, however, that in such circumstances there is no infringement of an accused’s privacy interests. A reasonable expectation of privacy protected under s. 8 of the *Charter* includes not only that proper grounds exist but also the requirement of prior judicial authorization. Thus the absence of a warrant when one was legally required constitutes an infringement of an accused’s privacy. The intrusiveness of such an unauthorized search will be assessed according to the level of privacy that could have reasonably been expected in the given set of circumstances. The greater the expectation of privacy, the more intrusive the unauthorized search will have been. The seriousness of the impact on the accused’s *Charter*-protected interests will not always mirror the seriousness of the breach, i.e. the *Charter-*infringing state conduct. For instance, where the police acted in good faith in obtaining a warrant that was found on review not to disclose reasonable and probable grounds to believe that a crime had been committed and that there was evidence to be found at the place of the search, the seriousness of the *Charter*-infringing state conduct is reduced but the impact of the search on the accused’s *Charter-*protected interests is greater because the search could not have occurred legally.
9. The lawful discoverability of evidence may thus be a relevant consideration when a court must determine whether to exclude evidence pursuant to s. 24(2) of the *Charter*. When relevant, courts should assess the effect of the discoverability of the evidence under the first and second *Grant* lines of inquiry in light of all of the circumstances.

(c) *Did the Court of Appeal Err in Its Treatment of Discoverability in the Section 24(2) Analysis in This Case?*

1. The Court of Appeal found that all of the physical evidence gathered on the premises, such as the observations of the perforations in the mosquito screen and solarium window, the gunpowder residue on the solarium window and the gun registered in the name of the victim, would have been discovered without the appellant’s help. Duval Hesler J.A. held that the 9-1-1 call and the gunshot projectiles lodged in the back of the victim’s head would have been sufficient to obtain a valid search warrant even before the first of the warrantless peripheral searches. Relying on *Grant*,she stated that if the derivative evidence could have been discovered independently, the effect of the violation on the accused would be lessened and this would affect the second element of the s. 24(2) inquiry. She then relied, in part, on the discoverability of the evidence to ground her conclusion that the exclusion of the evidence in this case would bring the administration of justice into disrepute.
2. The finding of discoverability in this case rests on the Court of Appeal’s conclusion that the police could have obtained a warrant to search the premises very early in the investigation based on finding Mr. Hogue at the residence with what was likely a bullet in the back of his head and the 9-1-1 call from the residence. While I agree with this conclusion, I part company with the Court of Appeal about the significance of this factor for the s. 24(2) analysis in this case.
3. Before turning to the issue of discoverability in this case, I should briefly comment on what role, if any, the validity or invalidity of the telewarrants obtained by the police played in the trial judge’s s. 24(2) analysis. In my view, whether or not those warrants were valid had little or no impact on the analysis here.
4. The trial judge found that the warrants which the police ultimately obtained were unlawful. In his view, when the unconstitutionally obtained material was excised from the ITO, what remained was insufficient. The Court of Appeal did not address this conclusion directly, noting simply that the grounds to obtain a warrant existed much earlier, which would have permitted the police to obtain all of the observations and physical evidence legally. In this Court, the Crown argued that the trial judge’s ruling about the validity of the warrants was in error. However, even if the warrants were valid, this could have little if any effect on the trial judge’s decision to exclude the physical evidence. The trial judge relied on the fact that the totality of the search process was tainted by the unconstitutional searches that preceded the issuance of the warrants.
5. This finding is consistent with well-established case law. *Grant 1993* provides a good example of how illegal warrantless searches can taint a subsequent search that is otherwise lawful. In that case, the information obtained through the warrantless perimeter search was used to support the police’s application for search warrants. This Court held that once the illegally obtained information was excised from the affidavits presented to the issuing justice, the information that remained was sufficient to issue the warrants. While this Court held that the warrants were valid, it found that the illegal searches “were nevertheless an integral component in a series of investigative tactics which led to the unearthing of the evidence in question”. It was thus “unrealistic to view the perimeter searches as severable from the total investigatory process which culminated in discovery of the impugned evidence” (p. 255). Similarly, in the case at bar, given the trial judge’s findings of fact that the police misconduct was continual and systematic from the outset of the investigation, the question of exclusion must not be approached in a compartmentalized fashion.
6. I now turn to the impact of discoverability on the exclusion of evidence in this case.
7. With respect to the first branch of the analysis, it is clear that the trial judge considered the officers’ misconduct to be very serious. Like in *Grant 1993*, the collection of the evidence in this case was simply an extension of the earlier warrantless searches conducted by Constables Tremblay, Mathieu and Fortier; there was clearly a connection between the earlier breaches and the evidence obtained pursuant to the warrants. Moreover, by the time the warrants were obtained in this case, there had been multiple, serious and deliberate breaches of the appellant’s rights. As mentioned earlier, the trial judge found it shocking that the police had not sought a search warrant earlier that evening or obtained the appellant’s free and informed consent to enter her home. He was also troubled by the fact that the police had constantly minimized, to the appellant, her true legal situation and found this disregard for her *Charter* rights to be part of a systematic attitude evident throughout their dealings with Ms. Côté. He also found that obtaining the evidence pursuant to the warranted searches was part of a larger pattern of disregard for Ms. Côté’s *Charter-*protected rights. Given that this evidence was tainted by the earlier *Charter* breaches that involved serious police misconduct, it is obvious that nothing turned on the trial judge’s conclusion with respect to the validity of the warrants.
8. The fact that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found at the place of the search but did not do so, in the circumstances of this case, significantly aggravated the seriousness of their misconduct. The trial judge found that no police officer seemed preoccupied with the absence of a search warrant (a warrant was not even prepared until over five hours after the initial police intervention) or the inherent limits recognized by courts for proceeding without a warrant. The trial judge was particularly troubled by the fact that the search occurred during the night, at a very late hour, and in a dwelling house, typically a place where individuals have the greatest expectation of privacy.
9. The police misconduct in obtaining the warrants further aggravated the seriousness of the *Charter*-infringing state conduct. The trial judge concluded that the warrants were actually sought as an ill-conceived scheme to attempt to remedy the unconstitutionality of the prior searches and that the police had misled the issuing judicial officer by failing to make full and frank disclosure of their earlier, unconstitutional conduct.
10. The fact that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found at the place of the search is also relevant to the impact of the breach on the *Charter-*protected interests of the accused. If a search warrant could have been validly issued at the time the search was conducted (putting aside issues about whether the search was conducted reasonably), the intrusiveness of the illegal search arises from the fact that it was not authorized in advance by a judicial officer. This, on its own, tends to reduce the impact of this breach on the appellant’s *Charter*-protected reasonable expectation of privacy. However, the absence of prior judicial authorization still constitutes a significant infringement of privacy. Indeed, it must not be forgotten that the purpose of the *Charter*’s protection against unreasonable searches is to prevent them before they occur, not to sort them out from reasonable intrusions on an *ex post facto* analysis: *R. v. Feeney*,[1997] 2 S.C.R. 13, at para. 45. Thus, prior authorization is directly related to, and forms part of, an individual’s reasonable expectation of privacy.
11. Having regard to all of the circumstances, the impact of the police misconduct on the appellant’s right to privacy was serious: the unauthorized search occurred in her home, a place where citizens have a very high expectation of privacy, and the search was not brief (*Grant*,at para. 113). The officers arrived at the appellant’s home at 12:13 a.m. and the appellant only departed for the police station at 2:34 a.m. The appellant, dressed in her pyjamas, accompanied the police as they illegally searched the interior and exterior of her house in the middle of the night for not an insignificant amount of time during which she was detained without interruption. The breach was thus not “transient or trivial in its impact” and implicated her liberty, her dignity as well as her privacy interests (*Harrison*,at para. 28; *Grant*,at para. 113). The appellant certainly had a reasonable expectation of not being subjected to such an intrusive search, without lawful authorization in the middle of the night, and several hours after her spouse had been transported to the hospital. Thus, the absence of prior authorization for a search of this nature was a serious affront to her reasonable expectation of privacy.
12. In my respectful view, the Court of Appeal was wrong to conclude that the trial judge erred in his appreciation of the seriousness of the impact onthe *Charter-*protected interests of the accused. Even though the searches could have been conducted lawfully, this fact would not have changed the conclusion that the second branch of the *Grant* analysismilitated in favour of exclusion, in light of the numerous other factors highlighting the serious impact on the appellant’s privacy and dignity interests.
13. In the result, the Court of Appeal erred in attaching great weight to the fact that the evidence was discoverable because it could have been obtained lawfully. In my view, the trial judge’s assessment was not tainted by any error of law that is relevant to his ultimate conclusion or by any unreasonable finding of fact. There was therefore no basis to interfere on appeal with the trial judge’s weighing of the various factors.
14. The trial judge analysed the admissibility of Ms. Côté’s statements and the material evidence separately. With respect to both, he found that the violations of the appellant’s rights were systematic and deliberate and that the police were less than candid even under oath in court in order to minimize the extent of their misconduct. While the misleading character of in-court police testimony does not form part of the *Charter* breach itself, it is a relevant factor under the first branch of the s. 24(2) analysis as a court must dissociate itself from such behaviour: *Harrison*,at para. 26. The trial judge was fully aware that proper investigative methods could have produced the same evidence, that the evidence was reliable and that the alleged offence was extremely serious. He also weighed the important societal interest in having the appellant’s guilt or innocence determined on the merits. He emphasized that the violations of the appellant’s rights were the result of “a larger pattern of disregard for the appellant’s *Charter* rights” (para. 346, citing *R. v. Greffe*, [1990] 1 S.C.R. 755, at p. 796) and this sort of disregard by the police for a suspect’s rights was carried through to their misleading evidence to obtain the warrants and by their conduct as witnesses before the court.

IV. Conclusion

1. To sum up, the trial judge’s decision to exclude the observations made by police at the appellant’s home and the physical evidence collected pursuant to the warrants was owed deference. With respect, the Court of Appeal misconceived of its appellate role when it substituted its view of the police conduct for the trial judge’s and when it placed undue emphasis on the seriousness of the offence. The Court of Appeal’s holding that the police had not deliberately acted in an abusive manner was contrary to the trial judge’s numerous findings of deliberate and systematic police misconduct. Its emphasis on the seriousness of the offence was also misplaced given that the trial judge had acknowledged that the offence was serious and that the seriousness of the offence had been held not to be a determinative factor. The Court of Appeal also erred in placing undue weight on the “discoverability” of the evidence in its s. 24(2) analysis. While I agree with the Court of Appeal that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found at the place of the search, this fact would not have affected the s. 24(2) analysis in all of the circumstances of this case. Both the police misconduct and its impact on the accused’s *Charter-*protected interests were very serious, even taking discoverability into account. The trial judge was obviously and justly concerned about the continuous, deliberate and flagrant breaches of the appellant’s *Charter* rights and this consideration played an important role in his balancing of the factors under s. 24(2). He also properly took into account the strong societal interest in having a serious criminal charge determined on its merits. His conclusion was not tainted by any error of law relevant to the ultimate conclusion and, accordingly, it should not have been set aside on appeal.

V. Disposition

1. I would allow the appeal and restore the acquittal entered at trial.

English version of the reasons delivered by

1. Deschamps J. (dissenting) — I have read Cromwell J.’s reasons. He would restore the Superior Court’s judgment (2008 QCCS 3749 (CanLII)), which in his view contains no error that would justify the Court of Appeal’s decision to intervene. On the basis of the test from *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, I agree with the Court of Appeal (2010 QCCA 303 (CanLII)) that the evidence obtained without the appellant’s participation — which I will call “the physical evidence” — should not have been excluded. I would therefore dismiss the appeal.
2. There is only one point on which my colleague Cromwell J. expressly agrees with the Court of Appeal: the police could have obtained a search warrant very early in their investigation. However, he attaches no significance to this fact because, in his view, the trial judge’s conclusions on the exclusion of the evidence were not based on the invalidity of the warrants. With respect, I believe that there are two separate issues here: first, the consequences of the trial judge’s failure to consider the possibility that a warrant could have been issued at the very beginning of the investigation; and, second, the consequences of the invalidity of the warrants issued later in the investigation. At no point in his analysis did the trial judge consider whether the physical evidence could have been discovered if a warrant had been obtained very early in the investigation. In my opinion, it is this finding by the Court of Appeal that is relevant.
3. The trial judge rendered judgment before the decision in *Grant*, in which this Court revised the test from *R. v. Collins*, [1987] 1 S.C.R. 265, and *R. v. Stillman*, [1997] 1 S.C.R. 607. Although this fact would not, considered in isolation, justify reviewing a decision to exclude evidence, it is nonetheless appropriate to ask whether the judge considered all the factors on which such a decision must be based. In the case at bar, it is clear that he failed to do so.

I. Relevant Facts With Respect to the Issuance of a Warrant Very Early in the Investigation

1. At 11:38 p.m. on July 22, 2006, Constable Jean‑François Fortier received a telephone call from Sergeant François Monetta, who told him that a man with injuries to the back of his head had been taken to hospital by ambulance and that an X‑ray had revealed that there was a bullet in the man’s head. Sergeant Monetta gave Constable Fortier the injured man’s name and the address of the residence from which he had been taken by ambulance after his spouse had found him injured there.
2. On receiving that information, Constable Fortier, as the head of the team of four police officers on duty that night for the area in which the residence in question was located, asked Constables Tremblay and Mathieu to go to the scene to investigate.
3. The officers arrived there at 12:13 a.m. They began by observing the house. It was not lit and there were no signs of activity. They parked at a certain distance from the house and walked up to it. They rang the doorbell and a woman opened the door. It was Ms. Côté. The officers explained that they were from the Sûreté du Québec and that they were there to find out what had happened that evening and to make sure that the premises were safe.
4. After inspecting the interior of the residence and determining that no one other than Ms. Côté was there, Constable Tremblay went outside. He entered the gazebo, where he saw blood, or what looked like blood. Constable Mathieu and Ms. Côté joined him there. Constable Mathieu then went back inside the residence, where he noticed a hole in the glass of one of the solarium’s windows. Constable Tremblay then went to the patrol car and relayed these observations to Constable Fortier. It was 12:27 a.m.
5. I do not question the trial judge’s decision to reject the prosecution’s argument that the officers’ purpose in searching the house was to make sure the occupants were safe. My review of the facts is based strictly on the trial judge’s findings of fact and is intended to highlight the information the officers had before they arrived at Ms. Côté’s residence and when they discovered the key pieces of physical evidence.
6. It seems to me that the Court of Appeal’s conclusion that a warrant could have been issued very early in the investigation is inescapable. The police were informed that a person had sustained a serious injury to the back of the head and that the injury had probably been caused by a firearm. It could not have resulted from illness, nor could it have been self‑inflicted given the bullet’s point of entry into the skull. In addition, the police knew the address of the residence from which the injured person had been taken by ambulance. In light of these facts, they had to discharge their duty to investigate and gather evidence related to the incident. It was therefore possible for the police to have reasonable and probable grounds to believe that evidence of an offence could be found at the place from which the victim had been taken by ambulance. Furthermore, the nature of the injury and the fact that the victim had been found on the ground could have given them reasonable and probable grounds to believe that the warrant had to be executed by night, since residue, prints and fresh tracks could have been eliminated or altered if the start of the investigation had been delayed (s. 488 of the *Criminal Code*, R.S.C. 1985, c. C‑46). The Court of Appeal analysed the situation as follows (at para. 44):

[translation] In a case such as this one, all the [physical] evidence gathered on the premises — including the holes in the gazebo window screen, the hole in the solarium window, the gunshot residue on the inside of the solarium window, the firearm registered in the victim’s name and found in his home — would have been discovered without any contribution from the accused. To obtain a valid warrant to search the premises where the incident occurred, it would have been sufficient to refer to the 9‑1‑1 call and the bullet fragments that penetrated the victim’s head from the back, eliminating the possibility of suicide and militating in favour of a serious indictable offence. It is difficult to imagine that a justice of the peace would have refused to issue a warrant in light of such assertions, if only for the purpose of obtaining an appropriate expert assessment of the scene and to perform checks that were obviously relevant, regardless of any suspicion against the accused. Consequently, in this case, the flaws detected by the trial judge in the affidavit used to obtain the general search . . . warrant are not decisive factors.

1. To determine how to deal with the physical evidence, the Court of Appeal could not simply rely on the trial judge’s overall assessment. It had no choice but to conduct the review the trial judge had failed to conduct. In my opinion, the Court of Appeal was right to conclude that the physical evidence should not have been excluded, although the way I apply *Grant* differs somewhat from the way the Court of Appeal applied it.

II. Application of the *Grant* Test

1. In *Grant*, the Court established a three‑stage test for determining whether evidence is admissible under s. 24(2) of the *Canadian Charter of Rights and Freedoms*. At the first stage, a court must consider the seriousness of the *Charter*‑infringing state conduct and “assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct” (para. 72).
2. At the second stage, the inquiry “focusses on the seriousness of the impact of the *Charter* breach on the *Charter‑*protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed” (para. 76). It is important to determine the extent of the violation’s impact on the interests protected by the infringed right.
3. At the third stage, having regard to the fact that “[s]ociety generally expects that a criminal allegation will be adjudicated on its merits”, the court must “[ask] whether the truth‑seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion” (para. 79). The reliability of the evidence and its importance to the prosecution’s case are factors to be considered, and all relevant circumstances must be taken into account.
4. In determining whether the maintenance of confidence in the administration of justice would be better served by admitting the physical evidence or by excluding it, the court must balance the implications that are identified at the different stages.
5. At the first stage of the analysis, I accept the trial judge’s conclusion that the police officers’ conduct revealed a serious disregard for Ms. Côté’s constitutional rights. The judge noted that the officers did not concern themselves with obtaining either a warrant or Ms. Côté’s informed consent before conducting their initial search.  The judge seems to have believed that Ms. Côté’s rights would not have been violated had experienced officers been assigned to the investigation. In some cases, the fact that an agent of the state is inexperienced may be a sign that rights have not been intentionally violated, which means that the infringement resulting from the officers’ conduct would be less serious. In the instant case, however, the officers’ inexperience cannot serve as an excuse, since, according to the judge, they should have known the applicable rules. Also relevant is the judge’s observation that the officers’ conduct was aggravated by their attempt to conceal the constitutional violations of Ms. Côté’s rights by raising arguments he held to be unfounded. The police conduct in this case was such that the courts must dissociate themselves from it.
6. At the second stage, it is clear that the trial judge did not evaluate the actual impact of the breach.  The main interest affected by the unlawful police search was Ms. Côté’s expectation of privacy. What must be determined is the impact on it of the failure to obtain prior authorization. To do this, the situation here must be compared with the one that would have prevailed had the search been authorized in advance. It is therefore not enough to find that the search resulted in an invasion of privacy. While that is of course relevant, it is more specifically the difference in seriousness between the intrusion that actually occurred and the one that would have occurred had a warrant been issued that reveals the “extent to which the breach actually undermined the interests protected”(*Grant*, at para. 76). This is the corollary of the previous findings that a warrant could have been obtained at the very beginning of the investigation and that this would have led the police to discover the physical evidence.
7. However limited the warrant may have been, it would at the very least have authorized an examination of the gazebo and the area surrounding it. The warrant would therefore have authorized a search of both the outside and part of the inside of the house. As a result, if it is accepted that the warrant could have been issued at the start of the investigation, it must also be accepted that the resulting invasion of Ms. Côté’s privacy would, in practice, have been identical to the one that resulted from the warrantless search.
8. I therefore agree with Cromwell J. that the impact of the infringement of the right to privacy is limited to the fact that the search was not authorized by a judicial officer (para. 84). However, it seems to me that his assessment of that impact contradicts the conceptual approach that follows from this premise. To determine the seriousness of the impact of the breach, my colleague considers facts that would have existed even if the search had been authorized. That does not reveal the extent to which the expectation of privacy was actually undermined by the failure to obtain prior authorization for the search.
9. All persons are entitled to expect the state to respect their rights, and a court cannot do anything that suggests that their rights have no value. Even where a breach has no practical consequences, the court must play a declaratory role in vindicating constitutional rights. It is this role that must be borne in mind where a duly authorized search would have had the same practical consequences (see, in the analogous context of s. 24(1) of the *Charter*, *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28). In the instant case, the protected right is the legitimate expectation of any person not to be subjected to a warrantless search.  The standpoint from which a court assesses the impact of a breach of protected rights is therefore very different where the intrusion would have been identical had the search been authorized by a warrant. The interest that remains to be protected is what the Court in *Ward* referred to as “[v]indication, in the sense of affirming constitutional values” (para. 28).
10. Protection of a person’s expectation of privacy is a fundamental requirement in the Canadian constitutional system. For this reason — and to reflect the actual scope of this expectation — it is particularly appropriate to take a nuanced approach when assessing it.  The higher the expectation of privacy, the more clearly the constitutional right that protects it must be affirmed. Conversely, the lower the expectation of privacy, the lower the need for affirmation.
11. In the case at bar, Ms. Côté was the person who called 9‑1‑1 and provided her address.  She was the person who contacted the doctor and told him that she had found her spouse in the gazebo. She was the first and only person to whom the police officers could speak to find out what had happened in the moments before her spouse was taken away by ambulance. Therefore, the visit from the police could hardly be said to have been unexpected. In short, not only would the intrusion have been the same with or without a warrant, but Ms. Côté did not have the highest expectation of privacy. As a result, the relevant factors at the second stage of the analysis do not weigh in favour of excluding the physical evidence.
12. At the stage of the analysis that involves determining whether the search for truth would be better served by admitting the evidence or by excluding it, I must point out that the evidence in question was reliable physical evidence. It was found shortly after the injured person was taken away by ambulance, and it was gathered near the alleged scene of the crime. Although my colleague acknowledges that the trial judge did not speak to the reliability of the physical evidence, he assumes that the judge attached the necessary weight to this factor (para. 55). With respect, I have difficulty seeing how such a conclusion can be drawn.
13. It is possible that the trial judge’s failure to discuss the reliability of the evidence is due to the fact that he was applying the law as it stood before *Grant*. According to the test from *Collins* and *Stillman*, the discoverability of physical evidence was linked to the protection against self‑incrimination and the assessment of trial fairness (*Grant*, at para. 121). Exclusion was almost automatic (*Grant*, at para. 64). In that context, the reliability of the evidence was of little consequence. However, one of the changes effected in *Grant* was in fact to move away from automatic exclusion toward an analysis in which all the circumstances would be considered. On this point, I agree with my colleague Cromwell J. that the discoverability of physical evidence may be relevant to the decision whether to exclude evidence (para. 74). The relevance of discoverability is no longer limited to the protection against self‑incrimination, and it is essential to consider the reliability of the evidence.
14. Because the trial judge did not discuss the reliability of the physical evidence, I cannot find that he considered all the relevant factors in determining whether physical evidence should be excluded. In my view, this was a serious flaw.
15. As regards the importance of the physical evidence to the conduct of the trial, it is sufficient to note that this evidence was circumstantial. Because the statements made to the police by Ms. Côté had been excluded, it was the only remaining evidence. Its admission was therefore likely to be of crucial importance to the truth‑seeking function and to the conduct of the trial.
16. At the stage of assessing society’s interest in the conduct of the trial, having regard to all the relevant facts, I see nothing that would weigh in favour of excluding the physical evidence. Although the evidence as a whole was limited by the exclusion of the statements made to the police by Ms. Côté, some reliable evidence remained that the prosecution could still have considered sufficient to conduct the trial.
17. After completing all three stages of the analysis, the court must balance the factors that weigh in favour of and against excluding the evidence. This is a qualitative exercise and not a quantitative one (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 36).
18. In the instant case, the police misconduct, considered as a whole, is serious and the courts must dissociate themselves from it. However, it is possible to do so in respect of the constitutional violations in this case without excluding *all* the evidence. There are cases of impacts on expectations of privacy that are much more serious. Moreover, where reliable and important evidence exists, society’s interest in the search for truth stands out. On the whole, I can only conclude that, in this case, it is the exclusion of the physical evidence that would bring the administration of justice into disrepute.
19. For these reasons, I would dismiss the appeal.

Appeal *allowed,* Deschamps J. *dissenting.*

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