Good Faith, Bad Faith and the Gulf between: A Proposal for Consistent Terminology

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Since the earliest days of section 24(2) jurisprudence, the phrase “good faith” has been used. For nearly as long, it has been used inconsistently. The same is true, to a lesser extent, of the phrase “bad faith.” This article traces the confusion which arises in understanding and in reasoning from the failure to restrict these phrases to single meanings. The article then proposes particular meanings for each, which would limit their applicability to extreme situations at either end of the spectrum. It is proposed that the term “good faith” should only be used in circumstances where it settles that the “seriousness of the state-infringing conduct” factor favours admission of the evidence. Conversely, “bad faith” should only be used when it settles that that factor favours exclusion. The terms should not be used if the behaviour in question does not fall so clearly to one or the other end of the spectrum.

1. INTRODUCTION

Since the earliest days of section 24(2) jurisprudence, the Supreme Court of Canada has incorporated the question of whether the police acted in “good faith” into the analysis. In Collins, the case first setting out a framework for analysing whether evidence should be excluded in a particular case, the Court held that a

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relevant question to ask of the breach was: “. . . was it deliberate, wilful or flagrant, or was it inadvertent or committed in good faith”?1

This same question was incorporated into the Stillman analysis. The latest version of the section 24(2) analysis, framed in Grant, puts a similar consideration in this way:

“Good faith” on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith . . . Wilful or flagrant disregard of the Charter by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct.2

Although good faith has therefore been a part of the exclusion analysis from the beginning, its exact meaning has been ambiguous for just as long. Exactly what is needed to constitute good faith has never been entirely settled: put another way, it has never been clear what the phrase “good faith” actually means.3 Similarly, many cases have spoken of the companion concept of “bad faith.”4 This seems to include at least the “deliberate, wilful and flagrant” Charter breaches referred to in Collins, Stillman and Grant, but is possibly not limited to those characteristics.

Further, the significance to the analysis of a finding of good faith or bad faith, or the failure to find one or the other, has not been treated consistently. Finally, and perhaps most

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3 In “Good Faith and Exclusion of Evidence under the Charter” (1992) 11 C.R. (4th) 304, I argued that Supreme Court Charter cases in the first five years after Collins used the phrase “good faith” in two quite distinct ways, without recognizing the important difference between them. The “technical” sense of good faith involved the police acting on a power that was only declared to be unconstitutional in the very case being decided: since the police could not have known they did not have the power in question, they behaved in good faith in relying on it. The other meaning of “good faith” was simply “the absence of any malice or improper motive.” I argued that the former situation created a basis for concluding that evidence should not be excluded while the latter did not, and therefore that it was important to distinguish between the two uses.

fundamentally, it has never been authoritatively determined whether “good faith” and “bad faith” between them fill the field: does deciding that conduct does not fall into one category necessarily entail that it falls into the other?

In this article, I will propose terminology that I suggest would bring clarity and consistency to this aspect of any section 24(2) analysis. The good faith analysis under Grant is part of the “seriousness of the state-infringing conduct” analysis. In assessing seriousness, I suggest courts ought to distinguish between three situations, and to be careful in their use of language accordingly. The three situations reflect an ascending degree of seriousness:

1) Good faith
2) Absence of good faith/Absence of bad faith
3) Bad faith.

My argument is very simple. A finding of good faith should strongly favour non-exclusion. Indeed, we should only categorise behaviour as “good faith” if the explanation for the police behaviour is so exculpatory of their motives as to override any other considerations about seriousness: to use the term “this was good faith” should amount, in virtually all cases, to saying that the seriousness portion of the analysis has been settled in favour of non-exclusion. Equally, a finding of bad faith should strongly favour exclusion. The phrase “bad faith” should be reserved for situations where attaching that label outweighs any counter-vailing considerations, and settles that the seriousness portion of the analysis must favour exclusion.

Put in the negative, this means that if the motive behind the behaviour (which is typically what determines whether we should call something good or bad faith) is not itself so overpowering as to determine the issue, we should not use those labels. In fact, if the approach outlined here were used consistently, it is likely that the terms “good faith” and “bad faith” would be relevant much less frequently.

A finding that the police behaviour falls into the middle category is more neutral, in that it does not by itself clearly indicate whether the facts favour exclusion or non-exclusion. That is, finding no bad faith means that a particular reason that might have led to exclusion of the evidence is not present: that is not an argument for inclusion, it is merely the absence of an argument against it. Similarly, a finding that there was no good faith means that a particular good reason not to exclude is not present: that alone is not a reason to exclude. Finding “this is X faith” will settle the seriousness issue: finding “this is not X faith” leaves the issue still to be settled. In any given case falling into this category, the facts might tend

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5 I say “virtually all” to allow for the possibility of egregious behaviour entirely unrelated to the good faith question. It would be good faith for the police to rely on a statutory search power which they had no way of predicting would be struck down. If in the course of such a search the police assaulted someone, however, that should override the good faith. This would have been the case in R. v. McCrimmon, 2010 SCC 36, 2010 CarswellBC 2665, 2010 CarswellBC 2666, according to the dissenting judgment of Justice Fish: although the officer was acting in good faith in denying the accused access to counsel after his initial consultation because his understanding of the law was reasonable, other aspects of the behaviour of the officer made the infringement serious.

6 I should stress that I am not arguing for a Stillman-like rigidity in reasoning: the whole point of the Grant decision was to get away from that type of inflexibility. I do not propose either that good faith necessarily leads to non-exclusion nor that bad faith necessarily leads to exclusion. My suggestion is limited to how the seriousness factor in the Grant approach should be weighed in the overall balance. The Court in Grant said that “We also take comfort in the fact that patterns emerge with respect to particular types of evidence” (para. 86). My hope is to germinate one such useful pattern.
either to show that the infringement of rights is or is not serious.

I shall first discuss the current usage of "good faith" and "bad faith," looking at the ambiguity in which courts or lawyers arguing before them use those terms. In doing so I shall review current case law, primarily provincial Court of Appeal cases on exclusion decided since Grant. Following that I will move beyond the topic of terminology to offer some suggestions as to the most appropriate content of those categories. In doing so I will argue that the approach to terminology I have outlined matches what the Supreme Court of Canada is actually doing, even if they have not articulated it this precisely.

2. THE CURRENT CASE LAW

The use of terminology is at present quite inconsistent between courts and even, it must be said, within the same court. Judges do not always make the same assumptions about how the terms should be used. I shall discuss this by looking at whether good faith and bad faith are taken to be binary options or to mark opposite ends of a scale; what kind of behaviour tends to be seen as qualifying (or not qualifying) as "good faith, and; what behaviour is classified as "bad faith." To a large extent, the first two topics overlap with one another, but it is helpful to think of the questions differently. Discussing what kind of behaviour has been taken to justify use of a particular label will lead to the next section, which looks more specifically at what content each category should be given.

(a) Is Everything Either Good or Bad Faith?

One point about which there has been ambiguity virtually from the beginning is whether, between them, good faith and bad faith "fill the field." Does a finding that there was no bad faith lead to the conclusion that there was good faith, and vice versa? This is a point that has been surprisingly elusive, and about which courts have disagreed since long before Grant: or at least, about which they have not always been clear. Some judges have quite explicitly asserted that things do not necessarily fall into one or the other. The British Columbia Court of Appeal, for example, has said:

In considering whether the police and the Crown Agent acted in "good faith," the judge applied this Court’s decision in R. v. Smith, 2005 BCCA 334, 199 C.C.C. (3d) 404, 213 B.C.A.C. 286. He relied on Smith in support of the proposition that the absence of good faith does not equate to the existence of bad faith and that the absence of bad faith does not equate to the presence of good faith. In short, the judge held, correctly in my view, that there can be a middle ground where neither mitigating good faith nor aggravating bad faith is found.7

On the other hand, some Supreme Court of Canada cases decided before Grant appear to treat the absence of bad faith as good faith.8 Post-Grant, some

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provincial Court of Appeal cases, while not necessarily using the language of bad faith, have drawn conclusions which seem based on the assumption that only two categories exist. In a different decision the British Columbia Court of Appeal has also said:

... The judge found the officer acted deliberately in the sense that he intended to arrest and search the applicant, but he lacked bad faith in acting as he did, because he had “a subjective, genuine belief in the lawfulness of what he was doing”. This renders the infringement less serious and weighs towards admitting the evidence. (Emphasis added.)

This approach only makes sense if one concludes that the absence of bad faith is a positive factor, not just the absence of a negative one. Similarly, in Hines the Ontario Court of Appeal held that: “The police were clearly acting in good faith and as indicated, if the information to obtain the warrant missed the mark, it did so by very little.”

“Good faith” on this approach is apparently satisfied by something like “doing your best” or “having no ill motive.” This reasoning seems (although the point is not beyond dispute) premised on the assumption that all behaviour is either good faith or bad faith.

Similarly in Wong the British Columbia Court of Appeal upheld the reasoning
cused’s door to see whether they could smell marijuana. There were not relying on any authority saying they could so act, but there was until that time no decision explicitly saying they could not. The fact that the police did not think they were violating Charter rights was taken to be sufficient to constitute good faith.

9 R. v. Ward, 2010 BCCA 1, 2010 CarswellBC 1 ([In Chambers]), para. 14. Similar reasoning appears to be used in R. v. Volk, 2010 SKCA 3, 2009 CarswellSask 860, where the Saskatchewan Court of Appeal seems to find a breach not serious on the basis that:

[t]he eliciting by the police officers of information from the accused after he had indicated he wished to speak to a lawyer was a serious infringement of the accused’s s. 10(b) right. However, the evidence indicates that neither officer was abusive or acting in bad faith and the questioning was limited.

It is hard to see how the failure to make a serious breach worse by being abusive is a basis for finding that things have been made better, unless one assumes that the absence of bad faith amounts to good faith.

10 See also the dissenting judgment in R. v. Gomboc, 2009 ABCA 276, 2009 Carswell-Alta 1250, 70 C.R. (6th) 81, 247 C.C.C. (3d) 119 which labels the behaviour of the police as “good faith” seemingly on the ground that they had not set out to violate the accused’s Charter rights. Similarly, see R. v. Payette, 2010 BCCA 392, 2010 CarswellBC 2323, where the Crown argued that behaviour which was not a wilful or flagrant violation, but rather an honest mistake, could be classified as good faith: the court properly rejected that label, categorising the error as being in the mid range of seriousness.


12 See also R. v. McInnes, 2010 BCSC 1270, 2010 CarswellBC 2386 where it was found that “the officer acted in good faith in the sense that he held an honest belief” (para 39).
of a trial judge who concluded that a breach was not serious:

37 The judge concluded there was no bad faith on the part of the investigat-

ing officers or the affiant of the ITO. He held they acted in good faith and

that the “nature of the breach could best be described as arising from inad-

vertence or carelessness”. . . .

38 It was the judge’s opinion that “[t]he investigators in this case did not

operate under any improper motive or with malice or bad faith . . . the

search was not random or based merely on a good guess”.13

On that approach, carelessness about rights is not merely being found to be

“not bad faith”: the carelessness is actually being classified as “good faith.” That

can only result if “not bad faith” and “good faith” mean the same thing.

Sometimes, of course, things are simply ambiguous. The Supreme Court in

Grant, as it had in previous decisions, has said things that can be taken two ways. A
typical statement is:

. . . Were the police deliberately and systematically flouting the accused’s

Charter rights? Or were the officers acting in good faith, pursuant to what

they thought were legitimate policing policies?14

It is not obvious that the Court here intends to say that “deliberately flouting”

and “good faith” create an “either/or” situation, (as opposed to being opposite ends

of a scale) but one could certainly be forgiven for reading this, and similar

passages, in that way.15

Adding to the ambiguity is the fact that courts are inconsistent, or at least not
careful enough, in the way they use the term “good faith.” For example, the Su-

preme Court in Grant gave some clear guidance on the meaning of good faith: “. . .
negligence or wilful blindness cannot be equated with good faith . . . .”16

In this passage the Court states quite clearly that the broad category “good

faith” does not include actions motivated by ignorance and negligence. This pas-

gage has, however, been understood as saying “[g]ood faith that is not a result of

ignorance of or wilful blindness of Charter standards is a factor that weighs to-

wards admission” (emphasis added).17 That way of stating the point presumes that

there could be good faith actions which were the result of ignorance or negligence,

which is the opposite of the Court’s point in Grant.

(b) What is “Good Faith”?

There is also inconsistency over what is needed to constitute “good faith.” As

noted above, in Wong the British Columbia Court of Appeal held that a breach

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14 Grant, supra note 2, para. 124.
15 See for example Greffe, supra note 4, “The absence of this inquiry is extremely impor-
tant since it goes to the assessment of the seriousness of the Charter violations, and
more specifically the element of good or bad faith on the part of the police in con-
ducting the search.”
16 Grant, supra note 2, para. 75.
17 Ward, supra note 9, para. 9.
caused by inadvertence or carelessness could be classified as “good faith.” This is by no means a universal view, of course: in *Dhillon* the Ontario Court of Appeal held that significant carelessness, even in the absence of an intent to mislead, tended to make a breach serious. \(^{18}\)

Further, some cases treat a mere honest belief on the part of a police officer that he was complying with the law as sufficient to mean there was good faith. For example in *Harding* the Alberta Court of Appeal found: “In this case, the trial judge found that Sgt. Topham at all times acted in good faith. Sgt. Topham honestly believed he had grounds for arrest based on the smell of raw marijuana.” \(^{19}\)

The Court of Appeal found the violation not to be serious. To similar effect, the British Columbia Court of Appeal upheld a finding of good faith based on an accused’s mistaken but honest belief in *McInnes*. \(^{20}\)

In contrast, other courts hold to a stricter standard than simply an honest belief. Some decisions have held that officers cannot be acting in good faith if they *ought* to have realised that they were not meeting *Charter* standards. See for example the British Columbia Court of Appeal in *Siniscalchi*:

114 In this case, the conduct of the state in obtaining the recordings was not a deliberate disregard of Mr. Siniscalchi’s *Charter* rights. Prison officials refused to hand over the recordings without a judicial authorization in the form of a production order, and the police obtained such an order.

115 Nonetheless, this was not a mere inadvertent or minor violation of the *Charter*. *It ought to have been clear to state authorities that the affidavit used to obtain the production order was deficient.* The requirements discussed in *Garofoli* in respect of information obtained from confidential informants are well-established, and *ought to have been in the forefront of the police officers’ minds* when they sought the production order. As the Supreme Court observed at paragraph 75 of *Grant*, “ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith”. (Emphasis added.) \(^{21}\)

(c) What is “Bad Faith”

It is immediately observable that there is really no inconsistency in the case law over the question of what “bad faith” means. The Supreme Court noted years ago, in *Wise*, that: “Bad faith has been found in situations where there has been a blatant disregard for the *Charter* rights of an accused or where more than one *Charter* right has been violated.” \(^{22}\) Courts reserve the label of bad faith for the most egregious conduct on the part of state officials. Decisions tend to couple the issue of bad faith with an “improper motive or with malice,” or with behaviour that


\(^{19}\) *R. v. Harding*, 2010 ABCA 180, 2010 CarswellAlta 1050, 256 C.C.C. (3d) 284 at para. 41. Many pre-*Grant* cases adopted essentially the same approach to good faith.

\(^{20}\) *McInnes*, supra note 12, para. 39: “the officer acted in good faith in the sense that he held an honest belief that waiting for 10 minutes was necessary.”


\(^{22}\) *Wise*, supra note 8.
As noted above, there is disagreement over whether an honest mistake constitutes good faith. There seems to be no dispute over the claim, however, that if a mistake is an honest one then it is at least not bad faith. That label is reserved for behaviour that is (as the Supreme Court described it in Collins) “deliberate, wilful or flagrant.” In Grant itself, for example, the Court specifically finds the police did not act in bad faith when their understanding of the law was “erroneous but understandable.”

3. WHAT TYPES OF BEHAVIOUR SHOULD FALL IN EACH CATEGORY?

I have suggested above that my major goal is to create consistent use of terminology: to limit the use of the terms “good faith” and “bad faith” to situations where that label settles the seriousness aspect of the analysis. Strictly speaking, that point is independent of how to actually fill the categories. That is, one could agree that attaching the label of bad faith ought to settle things, but disagree over whether a negligent failure to respect rights should or should not fall into the “bad faith” category. Nonetheless, it is difficult to argue for the use of labels which will settle the debate without giving persuasive substantive content to those labels. Accordingly, that is the issue I shall now discuss.

In assessing this point, it must be acknowledged that obviously there was something wrong with the way the police behaved: if there were not, no section 24(2) analysis would be underway. Accordingly, one cannot insist on good faith being so high a standard that it amounts to “there was no breach.”

Questions of seriousness related to good or bad faith will primarily be decided by what is going on — or ought to be going on but isn’t — in the minds of the peace officers causing the Charter breach. Police behaviour would be most justified when, with good reason, they thought they were complying with the law. A step down would be when they reasonably could not know they were not complying with the law. Less justifiable would be cases where the police honestly thought they were complying with the law, though there is nothing to which one can point that would clearly make that belief a reasonable one. Next would be the case where police were unreasonable or negligent in not knowing they were complying with

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23 See Wong, supra note 13 and Volk, supra note 9, respectively.
25 Collins, supra note 1, para. 35.
26 Grant, supra note 2, para. 33.
27 This is as good a point as any to make an observation about onus of proof. The person seeking the remedy has the onus of establishing that the evidence should be excluded. However, as a practical matter, if there is a claim of good faith, then the onus of establishing that particular point effectively falls upon the Crown. The onus of proving bad faith would fall on the accused, but really is subsumed into the more general onus under s. 24(2) as a whole.
the law.\footnote{Perhaps it is a fine distinction, but it seems worth trying to distinguish between “not demonstrably reasonable” and “unreasonable.” See for example the finding in \textit{Stanton}:} Finally there would be cases where police deliberately did not comply with the law, consciously ignored \textit{Charter} standards, and so on.

No doubt other types of behaviour could be described, but this seems a reasonable enough approximation. And, in fact, whether more intermediate situations can be found is relatively unimportant to my claim. My suggestion is that the terms “good faith” and “bad faith” should be reserved for the two ends of the scale. Anything in between might be relevant to seriousness, but will not on its own settle the issue.


we recognize that Sgt. Skrine was acting in good faith, in accordance with the law as he (and other courts, for that matter) understood it. (para. 221).

The other situations do not settle the issue on their own, but of course might be relevant. Legal uncertainty will often help show that a violation was not serious: negligence will help show that it was. They will do so, without any need to worry about whether on the particular facts it is appropriate to attach a label to the kind of faith involved.\footnote{This approach is illustrated on the facts of \textit{Grant} and \textit{R. v. Buhay}, 2003 SCC 30, 2003 CarswellMan 230, 2003 CarswellMan 231, [2003] 1 S.C.R. 631, 10 C.R. (6th) 205, 174 C.C.C. (3d) 97. In \textit{Grant} the Court found that the legal uncertainty in which the police were operating made the infringement less serious, but did not call it “good faith.”}

There is, of course, nothing novel about reasoning on the assumption that the
presence of something is important, but that its absence is not equally important. The Supreme Court noted in *Harrison*, in a similar context, that “while evidence of a systemic problem can properly aggravate the seriousness of the breach and weigh in favour of exclusion, the absence of such a problem is hardly a mitigating factor.”

It is important to recognise this aspect of the reasoning. On the approach outlined here, the bare conclusion that “the police did not act in bad faith” tells us very little. In particular, one ought not to reason “there was no bad faith, and so that makes the breach less serious.” Just as the Court said in *Harrison*, the absence of an aggravating factor is not a mitigating factor. Equally, one ought not to read too much into the conclusion “this was not good faith.” It will simply mean that the seriousness issue has not been conclusively determined in favour of admission: it does not follow that this is a reason to exclude.

Indeed, in many cases the proper way to understand “there was not X faith” will amount to “there was nearly but not quite X faith.” The fact that there was a serious issue over whether a particular piece of police behaviour was taken in bad faith is likely to show that it was behaviour that was undesirable and which the judicial system will probably be inclined to discourage. That fact, taken with others, might well lead a court to conclude that, on balance, the “seriousness” portion of the *Grant* test favours exclusion. Similarly, behaviour that might not be soexcusing as to constitute good faith is likely still to tend towards non-exclusion. In either of these instances, however, a court will simply be weighing all the factors entering into the seriousness analysis, this among them, and deciding how they balance in the particular case.

I do not claim that this approach to good and bad faith is entirely novel: quite the contrary. Some courts have stated essentially this view in the past. The British Columbia Court of Appeal in *Smith*, for example, held that:

61 To sum up, good faith connotes an honest and reasonably held belief. If the belief is honest, but not reasonably held, it cannot be said to constitute good faith. But it does not follow that it is therefore bad faith. To constitute

Conversely in *Buhay* the Court found the casual and negligent attitude of the officers to increase the seriousness of the violation, but did not characterize it as “bad faith.”

31 *Harrison, supra* note 4, para. 25.

32 One might draw an analogy here to the way in which the concept of a reasonable expectation of privacy operates with regard to reasonable search and seizure. In a particular case it might be argued that an accused person had no reasonable expectation of privacy. If this argument were to succeed, then there would be no unreasonable search because there was no search at all. On the other hand a court might reject the suggestion that the accused had no reasonable expectation of privacy, but conclude that it was a very diminished expectation. In that event, precisely because of the diminished expectation, a search would require less justification and would need to be ringed with fewer protections to still qualify as a “reasonable” one. The same consideration arises at two stages, potentially settling the issue on its own at one stage, but only being a factor entering into the analysis at a later stage. I suggest the same should be clearly recognised as appropriate in the case of the facts underlying a good or bad faith claim, with of course the caveat that the use of the terms should be restricted to only one stage of the analysis.
bad faith the actions must be knowingly or intentionally wrong.

62 . . . while good faith will mitigate, and bad faith will invariably increase
the seriousness of the breach, the absence of good faith may be a neutral
factor or an enhancing factor depending on the circumstances of the case.\(^{33}\)

The problem is not that no one has said this or acted upon it: the problem is
that not everyone (including the British Columbia Court of Appeal that articulated
it) consistently acts in this way. At present, it is sometimes difficult to know what
conclusion is meant to be drawn by particular observations. When a judge says
“this was not bad faith,” does that judge mean “an aggravating factor is absent” or
“a mitigating factor is present”? As things currently stand, it is not always possible
to know. Adopting this approach, which was articulated pre-Grant but is equally
applicable after it, would bring considerable clarity to this aspect of the analysis.

It is worth considering how this rule would apply in practice, and in particular
in those cases which approach, but do not reach, either end of the scale.

A particular issue with which a number of courts have struggled is the signifi-
cance of uncertainty about the law. I suggest that acting in the face of legal uncer-
tainty should not be described as “good faith.” It is worth distinguishing, though,
between “uncertainty” and certainty which is overturned.

The most well-established justification for saying that police acted in good
faith is when they have proceeded based on what was at the time a correct under-
standing of the law. In Hamill, police conducted a search under a writ of assistance:
such writs were found to violate section 8, but the police could not have been ex-
pected to predict that result in advance.\(^{34}\) Similarly in Simmons a customs officer
was acting good faith when she followed the customs procedures of the time.\(^{35}\) In
Wijesinha the police acted in good faith because they acted “in conformity with
what they very reasonably believed to be the law as it existed at the time.”\(^{36}\) In
those cases, where the state of the law was such that a reasonable officer would
believe she was behaving in accordance with Charter rights, there are positive rea-
sons not to exclude.

That is the opposite of the situation in Harrison or Morelli, where there was
well-settled law with which the police were not complying.\(^{37}\) Legal uncertainty, in
turn, falls into a midpoint between those two. In Grant itself, the Court noted that
the police officers who detained Grant thought they were acting lawfully, and that
on the state of the law as it existed at the time, they could not really have known
one way or the other. Another such example is the use by police of PIPEDA to

C.C.C. (3d) 404. The British Columbia Court of Appeal has quoted itself on ex-
actly this point: see R. v. Le, 2009 BCCA 14, 2009 CarswellBC 39, 2009 Car-
swellBC 129.

\(^{34}\) Hamill, supra note 29. The trial judge had found writs of assistance to violate the
Charter. The Crown did not defend the constitutionality of the writs, and the provisions
authorising them had been repealed by the time the case reached the Supreme Court.

\(^{35}\) Simmons, supra note 29.

42 C.R. (4th) 1, 100 C.C.C. (3d) 410 at para. 56.

\(^{37}\) See the further discussion of this point below, at infra note 43.
obtain personal information about an accused without a warrant. Some lower courts are saying this is acceptable, while others are finding that the practice violates the Charter. In such circumstances, it is difficult to find fault with the police for preferring one line of authority to the other.38

“Not finding fault,” however, is not the same as finding good faith. Some judges have described police as acting in good faith when they have proceeded in these circumstances of legal uncertainty.39 That is not necessary, nor advisable, I argue. Such behaviour can count towards non-exclusion, as one of the factors leading to the conclusion that the violation is less serious, without the need to classify it as good faith. Indeed, that is precisely the way in which the Supreme Court reasoned in Grant: the legal uncertainty reduced the seriousness of the violation, but nowhere is the police behaviour characterised as good faith. It is simply weighed with the other factors in considering seriousness.

Towards the other end of the scale, consider honest mistakes about the law that are not reasonable. As noted above, there is inconsistency over this situation, some courts finding it to be good faith, others finding that it is not.

The latter position, that the mere fact a mistake is an honest one does not make it good faith, is on very solid ground. Indeed, it is reasonable to suggest that one can go further, and conclude that an unreasonable mistake increases the seriousness of the violation. Such behaviour might not be classified as “bad faith,” but it increases the seriousness nonetheless.

In Harrison, for example, the Supreme Court referred to the significance of a conclusion that “the police knew (or should have known) that their conduct was not Charter-compliant.”40 Similarly in Morelli the Court excluded evidence, and found support for doing so, on the basis that the officer drafting the affidavit seeking a search warrant had been “improvidently and carelessly drafted.”41 The trial judge specifically found that there was no deliberate attempt to mislead, but the Court concluded that the affidavit was misleading nonetheless and (in part of that basis) excluded the evidence.

This situation is properly distinguished from that above, of legal uncertainty. As the Court said in Grant: “While police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law

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39 See Gomboc, ibid.

40 Harrison, supra note 4, para 22.

is. In neither of Harrison nor Morelli does the Court speak in terms of whether the officer had met the “good faith” requirement, but the conclusion in each that negligence made the breach a serious one clearly shows that it could not be. Note as well, however, that the Court did not find it necessary to make a finding of “bad faith” in either case.

There is a further advantage to recognising clearly that police behaviour can weigh towards making an infringement more serious even if it does not amount to bad faith. It is worth acknowledging that trial judges are likely to feel a strong disinclination to make a finding of bad faith. To do so is to reach a conclusion about the integrity of the witness which could be seen as going beyond the confines of the particular case. On my argument, of course, it is only in cases where such a finding is appropriate that the label “bad faith” would be used. The further thing to keep clearly in mind is that such a finding is not necessary in order to find that the behaviour is serious. As has been found in many cases, behaviour can be objectionable and weigh heavily towards finding an infringement to be serious without rising to the level of bad faith.

In other words, in some cases asking whether particular behaviour is bad faith or not is simply a red herring. A negligent misunderstanding of the limits of police power might not be bad faith: it is nonetheless negligent and is something from which courts should be quick to disassociate themselves. It is entirely legitimate to find a breach serious because police should have known better without attaching a label. As the Court said in Harrison:

[22] At this stage the court considers the nature of the police conduct that infringed the Charter and led to the discovery of the evidence. Did it involve misconduct from which the court should be concerned to dissociate itself? This will be the case where the departure from Charter standards was major in degree, or where the police knew (or should have known) that their conduct was not Charter-compliant. On the other hand, where the breach was of a merely technical nature or the result of an understandable mistake, dissociation is much less of a concern.

[23] The trial judge found that the police officer’s conduct in this case was “brazen”, “flagrant” and “extremely serious”. The metaphor of a spectrum used in R. v. Kitaitchik (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), per Doherty J.A., may assist in characterizing police conduct for purposes of this s. 24(2)

42 See for example Harrison, supra note 4, Morelli, supra note 41, or Reddy, supra note 42. See also the dissenting judgment of Berger J.A. in R. v. Loewen, 2010 ABCA 255, 2010 CarswellAlta 1721.
Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for Charter rights. . . . What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct. [Citation omitted; para. 41.]

The argument made here is entirely consistent with that finding. As I noted in the beginning, adopting this approach is likely to significantly reduce the occasions in which the terms “good faith” and “bad faith” are used, limiting it to the circumstances in which they are genuinely relevant.

4. CONCLUSION

Much inconsistency is observable in the ways in which the terms “good faith” and “bad faith” are used by courts of appeal. This inconsistency extends to the meaning of each term, the content of each category, the legal significance of each finding, and indeed the legal significance of an absence of each finding. This inconsistency is likely to be even greater at the trial level.

The Supreme Court held in Grant that: “Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.” That approach creates the likelihood that inconsistencies in approach between different trial judges will not be “regularized” by Courts of Appeal. That alone is one reason to strive for more consistent terminology in all courts.

Further, the Court’s dictum is based on the assumption that the trial judge has “considered the proper factors.” That too creates a greater incentive to have an agreed meaning of the terms “good faith” and bad faith,” and of the proper approach to reasoning from them. If judges continue to mean different things by the same terms, neither trial judges nor courts of appeal will be able to say with certainty whether the proper factors were considered.

Further, even if there were a consistent approach, the lack of consistent terminology and current ambiguity would makes it difficult to be certain of that fact. Consider, for example, the dissenting judgment of Justice Fish in Sinclair. On this aspect of section 24(2), he says:

[221] Bearing that in mind, we turn first to the seriousness of the state conduct. We believe that the violation of Mr. Sinclair’s constitutionally guaranteed right to counsel was significant, and not merely a technical breach. However, we recognize that Sgt. Skrine was acting in good faith, in accordance with the law as he (and other courts, for that matter) understood it. At trial, he was candid about his understanding of the law . . .

[222] Sgt. Skrine’s view of the law was not unjustified, given the undeveloped jurisprudence in this area. His denial of Mr. Sinclair’s request for counsel was not malicious or otherwise motivated by bad faith.46

44 Harrison, supra note 4.
45 Grant, supra note 2, para. 86.
46 Sinclair, supra note 29.
If Justice Fish takes “good faith” and “bad faith” to be binary options, filling the field between them, this statement means one thing. If he takes “good faith” and “bad faith” to define opposite ends of a spectrum with a gulf between, then it means something different. The latter seems more likely, but without a reliable consistency, we simply cannot be sure what this passage, and many like it, means. That is obviously an undesirable situation.

Accordingly, section 24(2) jurisprudence would be much improved if one of the by-products of the *Grant* decision were to finally bring clarity to this particular aspect of the analysis.