New Zealand's Evidence Exclusionary Rule: Assessment of *R v Shaheed* in 2003

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I: Exclusion of Evidence: The *Shaheed* Test

1. Introduction

On 28 March 2002, New Zealand criminal procedure was significantly altered in *R v Shaheed*[1] with regard to the exclusion of evidence obtained by police in violation of the New Zealand Bill of Rights Act 1990 ("NZBORA").[2] The majority in *Shaheed* revoked the prima facie rule of exclusion and in its place introduced the "*proportionality-balancing*" approach.[3] Naturally, because the *Shaheed* test had such a dramatic impact, academics, practitioners and judges have had much to say.[4] This article will endeavour to step back from that debate and analyze it in light of the case law that has emerged since *Shaheed* was first decided.

The first part of this article considers the *Shaheed* test, which is applied to the exclude 'tainted' evidence.[5] In part II, the predicted reasons for why the *Shaheed* test would or would not be supportable are outlined. This section sets the foundations for part III, where the post-*Shaheed* case law is analyzed and critiqued

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* BProp/LLB(Hons). I am grateful to my supervisor and lecturer, Scott Optican. He has been very generous with his time and helped me greatly in writing this paper. He has also recently written an article, "The New Exclusionary Rule: Interpretation and Application of R v Shaheed" [2004] NZ Law Rev (Part III, forthcoming) and presents cogent and contrasting views to selected points made in this paper. Thank you Scott. It should also be noted that this paper has been extensively edited from the author's Honours dissertation (an unedited copy of which is held by the Davis Law Library, University of Auckland).

1 [2002] 2 NZLR 377 (CA) ["*Shaheed*"].

2 While the NZBORA applies to actions of any state agent (s 3), the majority of cases considered in this article involve actions of the police. Hence, the term "police" is used. Nevertheless, the discussion applies equally to any state agent.

3 The phrase "*Shaheed* test" will be used throughout this article when referring to this approach.

4 See Optican and Sankoff, "The New Exclusionary Rule: A Preliminary Assessment of *R v Shaheed*" [2003] NZ L Rev 1; Mount, "*R v Shaheed*: The Prima Facie Exclusionary Rule Re-examined" [2003] NZ L Rev 45 ["The Rule Re-examined"]; Rishworth et al, "Part 28" in *The New Zealand Bill of Rights* (2003); Lithgow, "When Ignorance is Bliss..." [2002] NZLJ 149, 151; Optican, "*R v Shaheed*: The Demise of the Prima Facie Exclusion Rule" [2003] NZLJ 103 ["The Demise"]. See also the comments of Elias CJ in *Shaheed*, supra note 1, [1]-[25].

5 Evidence obtained in breach of the NZBORA is often referred to as 'tainted evidence'. Throughout this paper, the term 'tainted evidence' will be used interchangeably with the phrase 'evidence obtained in breach of the NZBORA'. For a comprehensive overview of the past prima facie rule of exclusion and the fairness discretion (a test that still survives after *Shaheed*) see Optican and Sankoff, supra note 4.

with reference to these predictions. This analysis enables informed conclusions to be made regarding the accuracy of these predictions, and hence whether arguments for and against the *Shaheed* test are well-founded. The analysis also enables the identification of principles underlying the application of the *Shaheed* test. The article concludes with some comments regarding the application of the *Shaheed* test, along with recommendations on beneficial directions for future research, so as to assess the true effects of the test.

2. Exclusion of Tainted Evidence – The New Test

(a) The Facts[6]

In October 1998 an unknown assailant abducted and raped a teenage girl who was walking to school. The police obtained a male DNA profile ("sample 1") from swabs of semen taken from the victim's underwear and vagina. This profile matched no known offender at the time but was placed on the police database for future use.

In October 1999, the police arrested a man named Abdul Shaheed for accosting a teenage girl who was walking to the same school as the 1998 rape victim. Shaheed subsequently pleaded guilty to an offensive behaviour charge. While in police custody, a police constable requested that Shaheed provide a voluntary blood sample from which a DNA profile could be extracted and retained in a databank ("sample 2").[7] In obtaining that sample, various breaches of the procedural protections afforded to individuals under the Criminal Investigations (Blood Samples) Act 1995 ("Blood Samples Act") resulted.[8] It is important to note that the Crown conceded that sample 2 was not taken voluntarily and was taken in breach of the Blood Samples Act. In addition, it was also conceded that sample 2 had been secured in breach of s 21 of the NZBORA.[9]

Police subsequently discovered that sample 2 matched sample 1. As a result of that DNA match, police showed a photomontage to the 1998 rape victim, in which the 1998 rape victim positively identified Abdul Shaheed as the man responsible for her rape.

Sample 2 could not, however, be used at trial for the 1998 rape,[10] so police sought a compulsion order to obtain a new sample for comparison.[11] Chambers J

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6 A more detailed summary of the facts of *Shaheed* can be found in Optican and Sankoff, supra note 4, 6. See also, Rishworth et al, supra note 4, 772-773; Ip, "The End of the Prima Facie Exclusionary Rule" (2002) 9(3) Auckland U L Rev 1016, 1017-18.

7 This was done pursuant to the Criminal Investigations (Blood Samples) Act 1995.

8 However, as noted by Richardson P, Blanchard and Tipping JJ in *Shaheed*, supra note 1, [46], these breaches of procedure were made unwittingly and without any attempt to deceive.

9 Section 21 of the NZBORA provides: "Unreasonable search and seizure – Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise."

10 Section 71(1) of the Criminal Investigations (Blood Samples) Act 1995 prohibited this.

11 This was required by s 13 of the Criminal Investigations (Blood Samples) Act 1995.

granted that order, and as a result, an evidential blood sample was taken ("sample 3") from Shaheed. The police then matched sample 1 to sample 3 and Shaheed was arrested and charged for the 1998 rape.

Counsel for Shaheed challenged the admissibility of both sample 3 (the court-ordered evidential blood sample), and also the victim's identification evidence. The basis of the challenge was that sample 2 was obtained in breach of s 21 of the NZBORA and therefore the subsequent evidence (sample 3 and the identification evidence) was tainted derivative evidence, bearing a 'real and substantial connection' to the original breach. Thus, it was submitted that the evidence should have been excluded by operation of the prima face exclusionary rule.[12]

(b) The Judgment and the Resulting Shaheed Test

A full seven-member bench decided the case. The result (although with reasons differing considerably between the members)[13] was that sample 3 was inadmissible while the photomontage identification evidence was admissible.[14] In determining the admissibility of the evidence in question, the prima facie rule of exclusion was abolished by a 6-1 majority and a new test for the exclusion of tainted evidence was set in place – the *Shaheed proportionality-balancing test.*

In applying the *Shaheed* test, the first inquiry is to determine whether the police have breached a right affirmed in the NZBORA, and whether that breach caused the evidence to be obtained. Having decided there was such a causative breach, the court must then undertake a balancing exercise to determine "whether exclusion is a proportional remedial response to the violation of the Bill of Rights at issue in the particular criminal case".[15] The Court of Appeal in *Shaheed* enumerated a number of *non-exhaustive* factors that *may* weigh in the balancing exercise. These are as follows:[16]

(i) Nature of the Right Breached and the Seriousness of the Breach[17]

The starting point is always the nature of the right and the seriousness of the breach. The more fundamental the value which the right protects and the more serious the intrusion upon it, the more that weighs in favour of exclusion.

12 Such an argument had been well supported in previous case law. See *R v Bainbridge* (1999) 5 HRNZ 317; *R v Ratima* (1999) 17 CRNZ 227.

13 For a comprehensive summary of these differing views, see Rishworth et al, supra note 4, 772-774.

14 Elias CJ held all evidence should be admissible. Richardson P, Tipping and Blanchard JJ excluded all evidence. Gault and Anderson JJ admitted all evidence. McGrath J excluded sample 3 but admitted the photomontage identification evidence.

15 Optican and Sankoff, supra note 4, 5. See also *Shaheed*, supra note 1, [156].

16 The best summary of these factors can be found in *Shaheed*, supra note 1, [145]-[156].

17 See *Shaheed*, ibid [146]-[147].

(ii) Police Conduct[18]

The more deliberate the breach or the more the police are reckless or careless towards the accused's rights, the more likely it is that the evidence will be excluded. However, breaching rights in good faith, for example, not knowing that a right was being breached, or breaching rights in a situation of urgency or danger, will often be merely a neutral factor in the balancing process.

(iii) Other Investigatory Techniques[19]

If another method of obtaining the evidence in question (which would not have involved breaching the defendant's rights) was available, but police chose not to utilise that technique, this will weigh in favour of excluding the evidence.

(iv) Nature and Quality of the Evidence[20]

The reliability, probative nature, and type of evidence may be relevant factors for the judge to take into consideration. Thus, the more unreliable and the less probative the evidence, the more likely it is that the evidence will be excluded. Therefore, real evidence, for example drugs or weapons, will have a considerably higher chance of being admitted as opposed to confessional evidence.

(v) Centrality of the Evidence to the Prosecution's Case[21]

The more probative and crucial the evidence is to the prosecution's case, the more likely it is that the evidence will be admissible. The rationale for this is that exclusion of the evidence, leading to a failure of the Crown's case, may be a remedy out of proportion to the circumstances of the breach.

(vi) Seriousness of the Offence[22]

Finally, the seriousness of the crime involved may also be an important factor. Thus, the more serious the crime, the more likely it is that the evidence will be held admissible.[23] Richardson P, Blanchard and Tipping JJ commented that "[w]eight is given to the seriousness of the crime not because the infringed right is less valuable to an accused murderer than it would be to, say, an accused burglar,

18 Ibid [148]-[149].
19 Ibid [150].
20 Ibid [151].
21 Ibid [152]. Note this factor did not appear to operate significantly in *Shaheed* itself, as the majority was prepared to exclude the crucially important and clearly reliable DNA evidence (see Rishworth et al, supra note 4, 774). However, it was not entirely crucial, given the fact that the Crown also had the witness identification evidence which proved to be sufficient to convict Shaheed.
22 Ibid [152].
23 However, see the interesting comments in Rishworth et al, supra note 4, 780.

but in recognition of the enhanced public interest in convicting and confining the murderer".[24]

Despite the fact that the Court of Appeal listed these factors, there is no requirement for a judge to consider all or any of them when undertaking the balancing exercise. However, in summing up the mechanics of the test, Blanchard J made it clear what the judge is required to do:[25]

> [W]here there has been a breach of a right guaranteed to a suspect by the Bill of Rights, a Judge who is asked to exclude resulting evidence must determine whether that is a response which is proportionate to the character of such a breach of the right in question. The Judge must make that determination by means of a balancing process in which the starting point is to give appropriate and significant weight to the existence of that breach but which also takes proper account of the need for an effective and credible system of justice.

3. Summary

The new *Shaheed* test leaves the court with a wide discretion to consider any number of factors when determining the admissibility of evidence. In the following part, the focus will turn to the reasons that are given by commentators for why the *Shaheed* test should or should not be supported.

II: Predicted Strengths and Weaknesses of the *Shaheed* Test

1. Introduction

The *Shaheed* proportionality-balancing test, from the moment of its conception, came under close scrutiny from a variety of different groups, including judges, academics, and practitioners.[26] Some showed their support for the Court of Appeal's new test while others openly expressed their distaste for it.

From within this debate, it is possible to extract several reasons why the *Shaheed* test is or is not supportable. Analyzing each of these reasons is a useful process because the reasons given by suppoters and dissenters were made before any post-*Shaheed* case law emerged. Hence, opinions of the Shaheed test are based largely upon its predicted effects rather than the actual effects discernable from the post-*Shaheed* case law itself.

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24 *Shaheed*, supra note 1, [152].
25 Ibid [156].
26 See text accompanying note 4 above.

2. Predicted Reasons for and against support of the *Shaheed* Test

The predictions which either provide support or challenge the *Shaheed* test can be placed into five categories:

1. The uncertainty with which the *Shaheed* test may be applied to a fact situation.
2. The reasoning behind the application of the *Shaheed* test.
3. The encouragement for police to violate rights.
4. Uncertain rationale for excluding evidence.
5. Encouraging and rewarding the ignorance and good faith of police.

(a) The Uncertainty with which the Shaheed Test May Be Applied to a Fact Situation

This uncertainty prediction regarding the application of the *Shaheed* test was first recognized in *R v Shaheed* itself, in the dissenting judgment of Elias CJ.[27] The predicted uncertainty identified by Elias CJ (and other critics) can be divided into two distinct types:[28] (i) uncertainty in the factors to be considered when applying the *Shaheed* test; and (ii) uncertainty within the factors themselves.

(i) The Predicted Uncertainty in the Factors to be Considered

The factors relevant in applying the *Shaheed* test are not exhaustive.[29] Therefore, it was predicted that because the court could consider additional factors relevant, almost any result would be possible, and there would be uncertainty in applying the *Shaheed* test. However, it was also predicted, in response to that, that it would be unlikely that many cases would arise in which additional factors were considered.[30]

Further uncertainty in application was predicted because there was no firm statement from the Court of Appeal as to whether all or only some of the factors listed in *Shaheed* would have to be considered. This raised concerns over uncertainty regarding which factors, as listed in *Shaheed*, would be applied in future cases.[31]

Critics predicted that by having a list of non-exhaustive factors, of which some, all, or more factors may be taken into account, the end result would be

27 Supra note 1, [19]. See also Rishworth et al, supra note 4, 773.

28 See Optican, The Demise, supra note 4, 104. See generally, Optican and Sankoff, supra note 4.

29 See, *Shaheed*, supra note 1, [145] per Blanchard J: "There may of course be other factors relevant to particular cases."

30 Mount, "*R v Shaheed*: The First Eleven Months" [2003] Criminal Law Pot Pourri 1, n 1 ["The First Eleven Months"].

31 See *R v Shaheed*, supra note 1, [145] per Blanchard J.

uncertainty in the application of the test. One case may be decided based on a consideration of all the factors, while another case may be decided primarily on one factor and yet another case based upon entirely new factors not listed in *Shaheed.*

(ii) Uncertainty within the Factors

This predicted uncertainty can be divided into a further two types. First, it was predicted that the factors would be uncertain in how they were to be "weighted or applied in any particular case".[32] For example, how much weight would be given to a breach of rights; how much weight would be given to the seriousness of the offence; and how much weight would be given to police misconduct? Secondly, some predicted that the factors would be uncertain in respect of the interpretation given to the various terms within them. For example, how would one define what a "serious offence" was; what a "serious breach" was; what "urgency" meant; or when police conduct would be considered "grossly careless" or merely a "reasonable mistake"?[33]

Supporters of the overall uncertainty prediction argue that, at least with the strict prima facie rule of exclusion, there was simplicity and certainty in its application.[34] Essentially, if there was a breach of the NZBORA the evidence would be excluded unless there was good reason to admit that evidence (that discretion being exercised rarely). It has been suggested that, "since all cases will be decided on their facts, every decision applying *Shaheed* will be idiosyncratic and no judgment will have much precedential value for the ones that come next".[35]

However, those who supported the new *Shaheed* test, in an attempt to deal with the overall uncertainty prediction, suggested that, just as with other new tests and principles that emerge in the law, so too, as post-*Shaheed* case law developed, the application of the *Shaheed* test would become certain as principles and precedent were set in place.[36]

(b) The Reasoning behind the Application of the Shaheed *Test*

Elias CJ made another prediction against the new *Shaheed* test, stating that it had the potential to lead judges to participate in results-orientated reasoning.[37] If that prediction does prove to be true (something which will be considered in part III) then Elias CJ has identified a strong reason for why the test should not be

32 Optican, The Demise, supra note 4, 104.
33 See, Optican and Sankoff, supra note 4, 23. See also Rishworth et al, supra note 4, 784.
34 See Lithgow, supra note 4, 151. See generally Optican and Sankoff, supra note 4.
35 Optican, The Demise, supra note 4, 105. See also Rishworth et al, supra note 4, 774; and Optican and Sankoff, supra note 4, 23, where the *Shaheed* test has been referred to as nothing more than a "judicial 'gut check'".
36 Mount, The Rule Re-examined, supra note 4, 68.
37 *Shaheed*, supra note 1, [19].

supported.[38] This is particularly true in New Zealand where the Court of Appeal has adopted and reinforced a rights-centred approach.[39] A rights-centred approach is not concerned with whether real or confessional evidence was found by police or whether the evidence found was significant or minor. To treat the centrality of the evidence to the prosecution's case and the seriousness of the offence as relevant factors in the balancing exercise (something which the *Shaheed* test does) "reverses the usual jurisprudence of a Bill of Rights, which is to elevate procedural protections over any particular result".[40]

Results-orientated reasoning was mostly avoided under the prima facie rule because once it was found that a right had been breached, the evidence would most often be excluded.[41] And although the rule was not absolute, the discretion to admit the evidence never really developed into any form of ad hoc, results-orientated reasoning.

In addition to the prediction of results-orientated reasoning, non-supporters of the test have predicted that the actual reasoning process itself (be that a principled reasoning process or an ad hoc results-orientated reasoning process) would lack any significant discussion or analysis. This is to say that, because the *Shaheed* test leaves the individual judge with such a wide discretion as to how to apply it to any given set of facts, "if so inclined by temperament or workload, a judge would simply be able to declare evidence admissible or inadmissible under *Shaheed* without much elaboration or discussion of the judgment itself".[42] This is problematic because, without detailed, principled reasons for why the evidence is admissible or inadmissible, it becomes very difficult to predict how future cases will be determined, which in turn supports the prediction discussed above, namely that the *Shaheed* test would be uncertain in its application.

Critics of the *Shaheed* test argue that under the prima facie rule, the reason for excluding the evidence was clear – to vindicate the particular provision of the Bill of Rights that had been breached.[43] This meant that the reasons given in judgements for excluding the evidence were clear and consistent, which provided certainty and strong precedent for future cases.[44] Supporters of the *Shaheed* test have predicted the opposite:[45]

> One of the advantages of the balancing test is that it encourages courts to focus on the *reasons* for excluding evidence because questions of weight can only be addressed with reference to the purposes and objectives of a particular factor.

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38 Other critics of the *Shaheed* test have also identified this as a reason for rejecting the new *Shaheed* test. See, Optican and Sankoff, supra note 4, 28.

39 See *R v Goodwin* [1993] 2 NZLR 153, 192-193; *Shaheed*, supra note 1, [144].

40 Optican, "Rolling Back s 21 of the Bill of Rights" [1997] NZLJ 42, 44 ["Rolling Back s 21"].

41 Optican and Sankoff, supra note 4, 3.

42 Ibid 42. See also Mount, The Rule Re-examined, supra note 4, 69.

43 See *R v Goodwin*, supra note 40, 193-194. See also Optican and Sankoff, supra note 4, 3; Mahoney, "Vindicating Rights: Excluding Evidence Obtained in Violation of the Bill of Rights", in Huscroft and Rishworth (eds), *Rights and Freedoms* (1995) 447.

44 See Optican and Sankoff, supra note 4, 2-4.

45 Mount, The First Eleven Months, supra note 30, 26. See also Mount, The Rule Re-examined, supra note 4, 69.

If this reason for supporting the *Shaheed* test is well-founded (something which will be considered in part III), then this may provide some comfort to critics of the test. However, it would provide no comfort with respect to the concerns about results-orientated reasoning.

(c) The Encouragement for Police to Violate Rights

Those against the *Shaheed* test argue that, because the test opens up the possibility for results-orientated reasoning, the police will be encouraged to "gamble on violations of the Bill of Rights",[46] particularly in cases involving serious offences.[47] In other words, if the police believe that they can obtain critical evidence in relation to a serious offence, then they may 'gamble' on the fact that, even though they may obtain that evidence in breach of rights, the evidence may nonetheless be admitted under the *Shaheed* balancing test. Critics of the test would argue that it is precisely in these types of cases (cases where the offence involved is serious) that rights should be upheld most vigorously by the courts because it is in these types of cases that the temptation for police to breach rights and get results is at its greatest.[48] The prima facie rule of exclusion avoided this problem because, as already noted, once the court found that the police had breached the defendants' rights, the evidence was almost always excluded. Hence, police would be discouraged from breaching rights due to the fact that, if they did, they would almost certainly lose the evidence.

(d) Uncertain Rationale for Excluding Evidence

Despite Blanchard J in *Shaheed* stating that the exclusion of evidence under the *Shaheed* test is still a remedy linked to the vindication of rights,[49] the consequence of the new *Shaheed* test is that not every right that is breached will be vindicated by the exclusion of evidence or in fact, vindicated at all.[50] This creates a major contradiction. It is difficult to understand how the majority in *Shaheed* can insist that the exclusion of evidence is a remedy linked with the vindication of rights, when under the *Shaheed* test not every right breached will be vindicated by the exclusion of evidence. This in turn means that the very jurisprudential basis upon which evidence is excluded under the *Shaheed* test is rendered uncertain. It has been predicted that in some instances, evidence will be excluded for the purpose of condemning and deterring police misconduct.[51] Such a prediction seems well-

46 See Optican, The Demise, supra note 4, 105.

47 See generally, Optican, Rolling Back s 21, supra note 40; Mullins, "The Legacy of *R v Grayson* – Do the Ends Justify the Means?" (1997) 8(2) AULR 602.

48 See generally Optican, Rolling Back s 21, supra note 40; Mullins, "The Legacy of *R v Grayson* – Do the Ends Justify the Means?", supra note 47.

49 *Shaheed*, supra note 1, [153]-[155].

50 Optican and Sankoff, supra note 4, 22.

51 Ibid 22.

founded, given that the state of mind of the police officer when breaching the right may be a relevant factor to consider in applying the *Shaheed* test.

In contrast, the prima facie rule of exclusion treated the right as the predominant factor to consider rather than a factor among many. Once a right had been breached, the evidence was almost always excluded – that could not usually be avoided. And, although the Court of Appeal suggested that deterrence of police misconduct could provide the rationale for excluding evidence in certain cases,[52] the vindication of rights was the main rationale upon which exclusion operated. Thus, the prima facie rule was based upon a firm jurisprudential basis and hence certain in its application in this respect.

Such uncertainty in the jurisprudential basis upon which evidence is to be excluded makes the *Shaheed* test even more uncertain in its application. This provides the critics of the *Shaheed* test with yet another reason why the test should not be supported.

(e) Encouraging and Rewarding the Ignorance and Good Faith of Police

It was predicted that the more ignorant the police officer of the right being breached or the more the police officer acted in good faith in obtaining the evidence, despite the breach, the more likely it was that the evidence would be admitted.[53] Thus, it would be beneficial for an officer to be ignorant or act in good faith when breaching rights.[54]

Providing the case law shows this to be true, this is another compelling reason for not supporting the *Shaheed* test. There seems to be very little difference between breaching a right knowingly or ignorantly or in good faith – the right nonetheless remains breached.[55]

The majority in *Shaheed* however, disagreed that this would play out. Blanchard J held that, although bad faith on the part of the police would be a factor weighing in favour of excluding the evidence, "good faith [would] in itself often be merely a neutral factor".[56]

3. Summary

As can be seen, the *Shaheed* test has been greatly scrutinized and it is clear that there is very little support for it. Critics of the *Shaheed* test have a substantial

52 *R v Pointon* (1995) 5 HRNZ 242, 249.

53 See Lithgow, supra note 4, 151. See also Rishworth et al, supra note 4, 781, 786.

54 In cases prior to *Shaheed*, good faith was rejected as a factor weighing against exclusion. See eg *R v Goodwin*, supra note 39, 202 per Hardie Boys J. See also Jull, "Exclusion of Evidence and the Beast of Burden" (1988) 30(2) Criminal Law Quarterly 178, 185: "An offender who, for a sympathetic motive, violates the Criminal Code in good faith ignorance of its provisions will not be accorded a defence; why should an officer who violates Charter rights in good faith ignorance of the law be treated any differently?".

55 Rishworth et al, supra note 4, 781.

56 *Shaheed*, supra note 1, [149].

number of reasons for why the test should not be supported. However, these reasons are mostly based on predictions rather than any solid case law analysis. Therefore, the following part will turn to analyze the post-*Shaheed* case law in an attempt to determine which of these reasons (if any) are well-founded and which are not.

III. Analysis and Critique of the *Shaheed* Test

1. Introduction

This part of the article will focus on post-*Shaheed* case law. This case law will be used to undertake two important tasks. First, it will be used to analyze and critique the application of the *Shaheed* test. This analysis will help determine which reasons discussed in part II are proving correct and which are not. This will clarify what the true reasons are for supporting or not supporting the new *Shaheed* test. Secondly, the case law will be useful in determining and identifying the key principles guiding the application of the *Shaheed* test. It is important to tease out these principles from the case law because they form the foundation upon which the test is applied and hence give some degree of certainty as to its future application.

2. Accuracy of Predicitons Relating to the *Shaheed* Test

(a) Uncertainty of Application

Critics of the *Shaheed* test predicted there would be uncertainty regarding application of the test to future fact situations. In particular, they foresaw uncertainty as to which factors would go into the balancing test. These included the weight the factors would bear in relation to one another; and the interpretation that would be given to the terms within each factor. It is submitted that these predictions, while not entirely unfounded, have not, to the extent predicted, proven correct. Each predicted area of uncertainty is dealt with below.

(i) The Consideration of Additional Factors in the Balancing Exercise

There is a small amount of case law to date that has shown that judges are considering additional factors (factors outside those listed in *Shaheed*) in the balancing exercise. However, this should not be overstated. While in the majority of cases thus far, the judges have limited themselves to the factors listed in *Shaheed* (as was predicted by the supporters of the *Shaheed* test), there are still some cases where additional factors have been considered.

In *R v Rollinson*,[57] a search was held to be unreasonable and thus in breach of s 21 NZBORA. In applying the *Shaheed* test, O'Regan J concluded that the evidence was "clearly" required to be excluded.[58] The factors listed supporting this conclusion were additional factors not listed by the majority in *Shaheed*. These included:

1. The defendant did not object to the evidence obtained, as a result of the search, being used in pending proceedings for the revocation of his firearms licence – moreover, he did not seek the return to him of items of property which were removed by the police in order to check ownership, where the check revealed that the property did not belong to him;[59]
2. The search was both unlawful and unreasonable;[60]
3. The affidavit produced in support of the application for the search warrant did not support the issuing of a warrant to search for cannabis;[61]
4. The information contained in the affidavit was presented in an inappropriate way;[62]
5. the representation of the significance of intercepted conversations was inaccurate;[63]
6. The police sought a warrant covering stolen items when there was nothing in the affidavit even referring to the involvement on the part of the defendant in a burglary and the receiving of those items;[64] and
7. The defendant was influenced in his decision to invite the police into his property and take them to the cannabis growing operation by the fact he was presented with a warrant which, on its face, authorized a search for cannabis.[65]

Additional factors were also considered in *R v Allison*.[66] In that case, while the defendants were driving home, police stopped their vehicle for an apparently routine check. The men were stopped for a period of fifteen minutes while the officer questioned the driver, Mr Taito, as to his name, identity and other similar matters. However, as later discovered, the routine stop was anything but routine. The vehicle had been stopped for the purposes of delaying Mr Taito's arrival at his home so as to give undercover police officers (who were at Mr Taito's

57 (25 March 2003) unreported, Court of Appeal, CA434/02.
58 Ibid [37].
59 Ibid [36]. This particular factor seems to suggest that the attitude of the defendant will be a relevant factor to consider when determining the admissibility of evidence. However, it is difficult to understand why the defendant's attitude should be relevant when assessing whether a right is to be vindicated or not. There is not one set of Bill of Rights for 'non-criminals' and one set for 'criminals'– all persons have equal rights.
60 Ibid [37].
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid.
66 (9 April 2003) unreported, High Court, Auckland, T002481.

residence) additional time to carry out an interception warrant for the purposes of installing a listening device. The Court held that sections 22 and 18(1) of the NZBORA had been violated by police in stopping the vehicle.[67] In determining the issue of admissibility of the evidence,[68] many of the factors listed in *Shaheed* were discussed by the court. However, additional factors were also considered. In particular, Williams J stated that the "principal factor"[69] requiring the evidence to be admissible was that:[70]

> The stopping and obtaining of the detail was carried out in a way which, absent the ulterior motive on the part of the Police, appeared to Mr Taito, Mr Saifiti [the passenger in the vehicle] and would have appeared to any disinterested observer as being conducted wholly within the powers and time in the Land Transport Act 1998 ss 113, 114.

An additional factor Williams J considered relevant was the fact that ruling the evidence inadmissible would be artificial – the jury had already heard the evidence.[71]

The above cases do illustrate the use of additional factors in the balancing test mandated by *Shaheed*. However, as noted above, the concern this raises regarding the uncertainty of the test and its application should not be overstated. There does not appear to be, thus far, a regular use of additional factors.[72] Nonetheless, the very fact that some cases do show the use of these additional factors begs the question of why the courts do this.

One possible answer to this question, provided by the *Allison*[73] case, is that it enables a court to achieve the result it wants.[74] That is to say, it is possible that if the court were to limit itself to the factors listed in *Shaheed*,[75] the balancing process would generate an unfavourable result and hence, the judge uses additional factors to achieve a result that is more favourable. In *Allison*,[76] if one looks only at the factors Williams J considered that were taken from *Shaheed*, it is at least arguable that, taken on their own, they would have led to the evidence

67 NZBORA, s 22: "Everyone has the right not to be arbitrarily arrested or detained"; s 18(1): "(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand."

68 The evidence being the intercepted and recorded conversations at Mr Taito's residence regarding illegal substances. By speaking with Mr Taito during the routine check, the officer was able to identify Mr Taito's voice in these reordered conversations.

69 *R v Allison*, supra note 66, [32].

70 Ibid.

71 Ibid para [31].

72 In most cases, the courts restrict themselves to the factors listed in *Shaheed*. See *R v Maihi* (22 August 2002) unreported, Court of Appeal, CA181/02, [33]-[38]; *R v Haapu* (2002) 19 CRNZ 616, [26]-[31]; *R v Chapman* (4 November 2002) unreported, Court of Appeal, CA241/02, [30]; *R v McManamy* (5 December 2002) unreported, Court of Appeal, CA303/02, [30]-[32].

73 *R v Allison*, supra note 66.

74 This explanation is only hypothetical and it is not intended to be seen as a firm conclusion.

75 This is not, however, something that the *Shaheed* test requires – see [145] per Richardson P, Blanchard and Tipping JJ.

76 *R v Allison*, supra note 66.

being inadmissible. The rights affirmed in sections 22 and 18 of the NZBORA were classified as important rights[77] and the breach was described as deliberate,[78] both of which would support inadmissibility. However, the offence involved was classified as "very serious criminal offending";[79] the safety of the police officers was at issue;[80] and the evidence was potentially crucial,[81] all of which would support admissibility. Although it is impossible to suggest that if one were to only consider these factors the evidence would have been inadmissible, it is still nonetheless a moot point. This is particularly so, given that the factors supporting admissibility in this case were a little dubious. In particular, the safety of the officers would be unlikely to carry a lot of weight in this fact scenario – one would imagine it a simple matter to remove the officers from the house by, for example, radio communication. Moreover, in light of other cases, it is questionable whether the offence in this case was "very serious". It is therefore arguable that, had Williams J relied solely on the factors he listed from *Shaheed* to determine the admissibility of this evidence, the balance would have favoured inadmissibility. It is submitted that there is a possibility that Williams J therefore introduced the additional factors listed above for the purposes of swinging that balance back in favour of admissibility in order to achieve the desired result.

The above is merely a hypothetical possibility and by no means a firm conclusion. Further case law will be required to determine the extent to which additional factors are being considered by the courts and the extent to which those additional factors are being used to generate a desired result.[82] At present, the concern that the Shaheed test would generate uncertainty because the judge can consider additional factors in the balancing process is only partially true. In most cases, the courts have restricted themselves to the factors listed by the majority in Shaheed and therefore any uncertainty additional factors may bring does not seem to be of any real concern.

(ii) Selective Consideration of Factors

The prediction that the *Shaheed* test would generate uncertainty because the judge is not required to consider all the factors listed in *Shaheed*, or in fact any of them, is also not entirely true in practice. However, there have been some cases where it is self evident that the judge has selected only particular factors. This raises some concern regarding the certainty of the application of the *Shaheed* test, because if the court can emphasize any factors it chooses, and then not discuss others, any result seems possible. Thus, if the court lists factors favouring

77 Ibid [24].
78 Ibid [24].
79 Ibid [25].
80 Ibid [26].
81 Ibid [30].
82 However, if this reason is correct, it would lend support to a major reason for why the *Shaheed* test should not be supported; namely, because it leads to results-orientated reasoning.

exclusion only and ignores the relevant factors favouring admissibility, the result can only be exclusion and vice versa.

A good example of where this has occurred is the case of *R v Kokiri*.[83] Mr Kokiri had been charged with manslaughter after his vehicle collided head-on with another vehicle at approximately 180 kilometres per hour. When back at the police station, the police then commenced an interview with him (once his lawyer had left) from which they obtained incriminating statements.

The Court of Appeal held that these statements had been obtained in breach of s 23(4) of the NZBORA.[84] In applying the *Shaheed* test, McGrath J listed all the factors from *Shaheed* except one – the seriousness of the offence. In this particular case, the offence was manslaughter which, on this set of facts, was a serious offence. The failure to consider this factor in the judgment meant that all the factors listed by his Honour supported the evidence being inadmissible. Although this factor may have been insufficient by itself to swing the balance back in favour of admitting the evidence, it does illustrate the important point that there is the potential for judges to select only certain factors in their application of the *Shaheed* test.[85]

Nevertheless, this predicted uncertainty is not supported by the bulk of the post-*Shaheed* case law. The case law has shown that courts have been fairly consistent in considering all of the factors listed in *Shaheed*.[86] This is particularly true in cases involving breaches of s 21 of the NZBORA.[87] For example, in *R v McManamy*;[88] *R v Hjelmstrom*;[89] *R v Maihi*;[90] *R v Moran*;[91] and *R v Pou*,[92] the courts were consistent in considering most of the factors listed in *Shaheed*. A possible reason for this is because *Shaheed*, as a test for exclusion, is still a relatively new test. Hence the courts are careful to apply it in a similar way to that of the Court of Appeal in *Shaheed*. What will be of interest is whether this diligent process of listing all the factors in *Shaheed* continues once the *Shaheed* test becomes just another legal test. However, until that time, the conclusion that the post-*Shaheed* case law leads to is that, there is very little uncertainty, if any,

83 (1 October 2003) unreported, Court of Appeal, CA190/03.

84 NZBORA, s 23(4): "Everyone who is arrested or detained under any enactment for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right."

85 See also *R v Pou* (9 September 2002) unreported, Court of Appeal, CA200/02 for another example where the seriousness of the offence is not mentioned and given the facts, it would have undoubtedly supported admitting the evidence.

86 However, one factor that is commonly being left out when judges apply the test is "other investigatory techniques" (see text accompanying note 54 above). See *R v Maihi*, supra note 72; *R v Vercoe* (6 September 2002) unreported, High Court, Rotorua, T01/3866; *R v M* (4 October 2002) unreported, High Court, Hamilton, T022528; *R v McManamy*, supra note 72. However, not all cases fit this pattern: see *R v Kokiri*, supra note 83.

87 See, *R v McManamy*, supra note 36; *R v Hjelmstrom* [24 July 2003] CA85/03; *R v M*, supra note 86; *R v Moran* [25 March 2003] CA412/02. However, not all cases seem to follow this pattern, see eg *R v Rollinson*, supra note 57.

88 *R v McManamy*, supra note 72, [31]-[32].

89 *R v Hjelmstrom*, supra note 87, [19]-[20].

90 *R v Maihi*, supra note 72, [33]-[37].

91 *R v Moran*, supra note 87, [19].

92 *R v Pou*, supra note 85.

being generated from the courts' ability to select only certain factors listed in *Shaheed* when conducting the balancing exercise.

(ii) The Weight of the Factors

Further uncertainty in application of the *Shaheed* test relates to the relative weight of the various factors. Critics predicted that it would be unclear how the judge would weight the factors in reaching a conclusion on the admissibility of the evidence. It was suggested that if no indication was given as to how the factors were weighed against each other, it would be somewhat difficult to predict how future cases would be decided, and that this would depend on how much weight the individual judge gave to the particular factors.

An analysis of the case law does not, however, fully support this prediction. It is clear from the case law that where there has been a breach of a right and that breach is serious,[93] the courts have consistently held the evidence, obtained as a result of that breach, to be inadmissible. For example, in *R v Pou*,[94] Randerson J, in declaring the evidence inadmissible, held:[95]

> When carrying out the balancing exercise contemplated by this Court in *Shaheed* ... the starting point is to give appropriate and significant weight to the existence of the breach. This was a *serious breach* of an important value secured by the [NZBORA] and it was carried out deliberately by the police .... It is accepted that the evidence found is real and is central to the joint burglary counts ... but in our judgment, this does not outweigh other factors. In the circumstances of this case, *the only proper response necessary to vindicate the breach of the rights in question is to exclude the evidence so obtained.*

In *R v Kokiri*,[96] McGrath J stated:[97]

> Weighing these factors we took the view that the *seriousness of the breach weighed particularly heavily in favour of exclusion* and that its weight, along with that of other factors mentioned, was not displaced by the probative value of the confessional statement, in the particular circumstances, as evidence of guilt.

These case examples illustrate the fact that where a right is breached and that breach is serious, that factor will carry considerable weight, and in fact, possibly the most weight in the balancing process. Such a conclusion is well-supported in the post-*Shaheed* case law where the police have breached the defendant's section 21 rights in undertaking an unreasonable search and seizure. In all cases where the court has found a breach of section 21, and where the court has described that

93 As to how one defines a serious breach, the case law provides little answer.
94 *R v Pou*, supra note 85.
95 Ibid [45]. Emphasis added.
96 *R v Kokiri*, supra note 83.
97 Ibid [24]. Emphasis added.

breach as being something more than a trivial breach, the evidence has been held inadmissible. In *R v Chapman*,[98] the breach of Mr Chapman's section 21 right was described as a "substantial invasion" and his rights "could not be adequately vindicated other than by the exclusion of the evidence".[99] Randerson J, in *R v Pou*,[100] described the breach of section 21 as "serious" and held that "the only proper response ... to vindicate the breach of the rights in question [was] to exclude the evidence so obtained".[101] After describing the breach in *R v Maihi*[102] as not involving a major invasion of privacy (although, "by no means a trivial invasion"),[103] Tipping J concluded that, although the case could be seen as coming quite close to the borderline, there was "not enough weight in the public interest side of the scales to outweigh the starting point, which [was] to give *appropriate and significant weight* to the fact that Mr Maihi's s 21 rights were breached".[104] A final example is *R v McManamy*.[105] There, the breach of section 21 was described as "a major invasion of privacy" and the evidence was declared inadmissible as the need to vindicate the breached right was outweighed by the public interest in securing a conviction.[106]

In contrast, it seems that where the court has described the breach as being somewhat trivial,[107] the evidence is usually declared admissible. This is well demonstrated in the cases involving a breach of section 22 of the NZBORA ("Liberty of the person"). For example, in *R v Vercoe*,[108] the arbitrary detention was described as "not a particularly severe violation of s22",[109] and the evidence was admissible. Although the comments regarding the application of the *Shaheed* test were obiter in *Manuel v Police*,[110] Heath J in describing the breach as "technical" would have held the evidence admissible.[111] However, it should be noted that not all cases seem to fit this pattern. In *R v Allison*,[112] even though the breach was described as deliberate and serious, the evidence was nonetheless held admissible.[113]

The examples above reinforce the point that where a right has been breached and where that breach is serious, the evidence will usually be declared inadmissible

98 *R v Chapman*, supra note 72.
99 Ibid [30].
100 *R v Pou*, supra note 85.
101 Ibid [45].
102 *R v Maihi*, supra note 72.
103 Ibid [34].
104 Ibid [38]. Emphasis added.
105 *R v McManamy*, supra note 72.
106 Ibid [32].
107 As to how this is defined, the courts provide little guidance.
108 *R v Vercoe*, supra note 86.
109 Ibid [36].
110 *Manuel v Police* (31 May 2002) unreported, High Court, Auckland, A29/02.
111 Ibid [37]-[39].
112 *R v Allison*, supra note 66.
113 Ibid [24]-[25].

and vice versa. This in turn suggests that the seriousness of the breach will be a factor which the courts consider weighs heavily in determining the admissibility of tainted evidence. However, any certainty that this may indicate can not be taken too far. In the cases mentioned above, there is very little (if any) indication given as to just how much weight other factors, such as the centrality of the evidence to the prosecution's case, seriousness of the offence, and the availability of other investigatory techniques have in relation to one another.[114] That tends to suggest uncertainty in respect of the weight that these other factors may have.

It is therefore submitted that there is some certainty surrounding the weight that the courts will give to the seriousness of the breach. However, there is little indication given thus far as to the weight to be given to other factors within the test. Thus, it is submitted that a greater body of case law is required before any firm conclusion can be reached on the predicted uncertainty surrounding the weight to be given to the factors within the *Shaheed* test.

(iv) The Interpretation of Terms within the Factors

The final prediction regarding the application of the new *Shaheed* test suggested that, because the terms describing the factors (such as 'serious offence', 'police bad faith' or 'serious breach'), had potentially infinite interpretations, the test would be uncertain.

It is submitted that the case law does not support this prediction in respect of all the terms within the *Shaheed* factors. Given that section 21 cases make up so much of the post-*Shaheed* case law, they can be used to show how the courts are consistently interpreting some terms, so adding to the certainty with which the *Shaheed* test may be applied.

The first, most obvious consistency, is in relation to search and seizure cases involving the discovery of drugs; in particular, the discovery of cannabis. The courts have consistently interpreted offences involving cannabis, (such as possession), as being not particularly serious. The courts have used phrases such as, "not ... of the most serious kind";[115] "not offending at the most serious level";[116] "not particularly serious";[117] "not of special seriousness";[118] and "not of such seriousness as to be given particular weight",[119] to describe such offences.[120]

114 However, see the obiter dictum in *R v Richardson* [12 June 2002] HC, Christchurch, T10/02, [61]-[64] where the centrality of the evidence was the weightiest factor.

115 *R v Chapman*, supra note 72, [30].

116 *R v Rollinson*, supra note 57, [38].

117 *R v Maihi*, supra note 72, [37].

118 *R v Moran*, supra note 87, [19].

119 *R v Hjelmstrom*, supra note 87, [20].

120 See also *R v McManamy*, supra note 72, [32]. The offence involved a very small number of ecstacy tablets and was described by the Court of Appeal as being "low down in the scale of culpability of offending".

However, not all cases fit this pattern.[121] Further consistency in the interpretation of offences is shown in the court's interpretation of what amounts to a "serious offence". In cases involving some form of sexual offending or where a victim has died, the court has consistently interpreted such offences as being serious. Some phrases used to describe such offending have been, "the most serious crime";[122] "most serious category of offence";[123] and "very serious".[124]

The second most notable consistency in interpretation relates to cases where the police have searched a *residence* in breach of section 21. The courts have been consistent in interpreting that section 21 right as being fundamental and important and any breach as being serious. In *R v Pou*,[125] Randerson J described the breach of section 21 as a "serious breach of an important value".[126] In *R v Chapman*,[127] Blanchard J stated that "a search of a residence on a farm involves a substantial invasion of a place where reasonable expectations of privacy are greater than for the rest of the property".[128] In *R v McManamy*,[129] Salmon J described the breach as a "major invasion of privacy".[130] Finally, in *R v Moran*,[131] Blanchard J stated that "A citizen's right not to be subjected to an unreasonable search is an important guaranteed right. The breach of that right in this case involved an unlawful and significant invasion of privacy."[132]

One factor, however, that does indicate some degree of uncertainty is the description that police conduct receives from the court when police breach a right. Although a greater body of case law would be helpful in terms of making a firm conclusion on this matter, some cases which have partially similar facts do provide evidence of this uncertainty. Consider the facts of *R v Maihi*[133] and *R v M*.[134] Both cases involved searches of a defendant's vehicle in breach of section 21 of the NZBORA. In *Maihi*,[135] police stopped the defendant's vehicle which they had just seen leave the Black Power headquarters and which was heading

121 See *R v Allison*, supra note 66. This case involved police obtaining evidence of drug offences – the offence in this case was described as "very serious criminal offending involving sophisticated methamphetamine manufacture from more than one location, large numbers of persons involved, substantial quantities of drugs, mainly Class B but also Class A and C and substantial sums of money". Note however, given that the drug operation in this case was considerably larger and more sophisticated than the ones listed above, it is somewhat distinguishable from the above examples and hence, does not seem to disturb the pattern discussed in a substantial way.

122 *R v Kai Ji* (15 August 2003) unreported, High Court, Christchurch, CRI2002-009-844715, [106] (murder).

123 *R v Hoko* (2 October 2002) unreported, High Court, Auckland, T015205, [35] (murder). This phrase was used by counsel; however, the Court accepts it at [36].

124 *R v Vercoe*, supra note 86, [38] (sexual offending).

125 *R v Pou*, supra note 85.

126 Ibid [45].

127 *R v Chapman*, supra note 72.

128 Ibid [30].

129 *R v McManamy*, supra note 72.

130 Ibid [32].

131 *R v Moran*, supra note 87.

132 Ibid [19].

133 *R v Maihi*, supra note 72.

134 *R v M*, supra note 86.

135 *R v Maihi*, supra note 72.

towards a motorcycle convention in which the police had been informed other gangs would be present. The police were informed that Black Power members would be carrying weapons for protection, in case of attack by other gangs. Having this background knowledge, the police stopped Maihi's vehicle and searched it under sections 202B(1) and 202A(4)(a) of the Crimes Act 1961,[136] after they saw the driver lean down, first to his left and then to his right, while driving. The basis for invoking these sections was that they believed that he was attempting to hide something, namely an offensive weapon. The search of the vehicle (which was conducted without the consent of Maihi) revealed a knife and an assortment of different drugs. The Court of Appeal rightly held the search to be unlawful and in violation of section 21 of the NZBORA and that under the *Shaheed* test the evidence should be inadmissible. In making that finding of inadmissibility, Tipping J described the police conduct in this way:[137]

> We note next the fact that the breach in the present case cannot be characterised as having been committed deliberately, or in reckless disregard of the accused's rights, or in circumstances amounting to gross carelessness: see *Shaheed* at para 148. That tells not so much in favour of admissibility, rather it is the absence of a feature which would have pointed strongly in favour of exclusion. And, as *Shaheed* suggests, the undoubted good faith on the part of the police should in this case be regarded as a neutral feature.

Now compare the facts of that case to *R v M*,[138] and the description given there to police conduct. Officer 'A' stopped the defendant's vehicle after he noticed it was moving within its lane. The driver happened to have a number of outstanding warrants for his arrest. However, at the time of stopping the vehicle and questioning him, officer A did not know this.[139] After an initial conversation with the defendant, officer A called for assistance from another police unit, as he suspected the defendant had been drinking but did not have a breath screening kit with him. Upon his arrival, officer 'B' took the defendant to the rear of the vehicle to conduct the breath screening test. During the test, officer A opened the passenger door of the defendant's car to inspect the Warrant of Fitness. Officer A's evidence (which the Court did not accept) was that the defendant had said to him that his mobile phone was in the car somewhere and that, if officer A could find it, the defendant would be able to give him a phone number which officer A had previously requested from him. Upon locating the telephone, officer A stated that he saw a spotting knife and subsequently invoked the warrantless search powers under section 18(2) of the Misuse of Drugs Act 1975 and searched the defendant's vehicle.

136 These provisions relate to the possession of offensive weapons in a public place.

137 *R v Maihi*, supra note 72, [35].

138 *R v M*, supra note 86.

139 In fact, it was not until later that morning when the defendant was arrested that they realized who he was.

The search of the vehicle, to which the defendant did not consent, revealed plastic bags containing a crystal substance drug. Heath J declared the search to be unlawful and also unreasonable. In holding the evidence inadmissible under the *Shaheed* test, the police conduct in this case was described as "in reckless disregard of the accused's right or in circumstances where the conduct of the Police, in relation to the breach, [had] been grossly careless".[140]

The facts of these two cases, although in detail different, are essentially identical scenarios whereby the police have stopped a vehicle and searched it in a situation which is both unlawful and unreasonable under section 21. It would therefore seem that the police conduct in both cases should have been described in the same way. Instead, the Court of Appeal in *Maihi*[141] almost suggests that the police acted in good faith, while in *R v M*,[142] the High Court suggests that the police almost acted in bad faith. This raises a concern about the consistency with which the conduct of the police is interpreted. This is problematic because how police conduct is defined will impact directly on the admissibility of the evidence, which in turn seems to indicate uncertainty in the application of the *Shaheed* test. However, there cannot be a firm conclusion on this matter yet. The potential reason for why the conduct in the two cases was described differently is most likely due to the fact that, in *R v M*, the Court held that the evidence given by the officer had been "embellished ... in an unsatisfactory way".[143] This most likely resulted in Heath J suggesting that police had almost acted in bad faith in breaching the rights of the defendant.[144] Until more case law develops and similar fact patterns emerge, no firm conclusions as to the uncertainty evolving around the interpretation being given to police conduct can be drawn.

It is submitted that, although there is some inconsistency in interpretation regarding the terms of the factors, the case law is demonstrating some certainty. Thus, the prediction discussed in part II about increased uncertainty in application due to uncertainty in interpretation is not necessarily correct.

(v) Summary: Uncertainty of Application?

As has been discussed above, the case law so far demonstrates that some aspects of the test's application are relatively certain and predictable. The courts do not regularly consider factors over and above those listed in *Shaheed* when applying the test. Moreover, the courts are giving some indication as to the weight of at least one of the major factors in the test (the seriousness of the breach) and further, some terms within those factors are being fairly consistently interpreted. However, as also noted, that certainty should not be overstated. This is not only

140 *R v M*, supra note 86, [79](c).
141 *R v Maihi*, supra note 72.
142 *R v M*, supra note 86.
143 Ibid [73].
144 However, it is difficult to see how the manner in which a police officer gives his/her evidence in court impacts on how one defines the manner in which police breached the defendant's rights.

because the case law shows some areas of uncertainty, such as the consideration of additional factors and the interpretation of police conduct, but also, because the amount of post-*Shaheed* case law is still small. For definite conclusions to be reached regarding just how certain the test is in application, a greater number of cases is required so that similar fact patterns can be identified. That will enable a clearer view to be taken as to just how certain the application of the *Shaheed* test is.

(b) Application of the Shaheed Test: Principled or Results-Oriented?

One of the predicted concerns regarding the reasoning behind the application of the *Shaheed* test was that it had the potential to lead judges to participate in results-orientated reasoning. As discussed in part II of this article, such reasoning is problematic in New Zealand where the Court of Appeal has adopted and reinforced a rights-centred approach.

Given that certain factors are relevant in the *Shaheed* test, such as seriousness of the offence and centrality of the evidence to the prosecution's case, the *Shaheed* test does seem to suggest that results-orientated reasoning is inevitable. However, making such a conclusion from the case law is not an easy task and in fact, it is difficult to really say with any conviction that this is what the judges are doing when applying the test. Nonetheless, some tentative comments on the issue can be made.

The first relates to the case of *Police v Wallis*.[145] In that case, the defendant was driving a vehicle which collided with a pedestrian who died instantly. The defendant had been driving with excess blood alcohol, and failed both a breath test and blood test. It was, however, held that that evidence had been obtained in breach of the defendant's rights.[146] In applying the *Shaheed* test, even though the court described the offence in this case as "serious"[147] and the evidence was obviously accurate and crucial to a successful prosecution, the evidence was nonetheless held to be inadmissible.[148]

It should be noted that the charge in this case was only related to driving with excess blood alcohol, and not the more serious charge of manslaughter.[149] Nonetheless, given that the injuries suffered by the victim in this case resulted in death, and that the evidence was real and crucial, the fact that the evidence was nonetheless inadmissible does suggest that even though the court may not like

145 *Police v Wallis* (22 May 2002) unreported, High Court, Dunedin, AP30/01.

146 Note, however, at ibid [34], the Court questioned whether this was really a case where the police had breached the defendant's rights or whether it was a simple case where the police had breached a statute. The Court nonetheless proceeded on the basis that it was a breach of rights.

147 Ibid [42].

148 Note, however, at ibid [43], it is clear that the finding of inadmissibility was a reluctant conclusion.

149 See ibid [42].

the end result,[150] they will uphold that result in favour of ensuring that procedure is followed properly by the police when obtaining evidence. This in turn lends support to the proposition that courts are not participating in results-orientated reasoning. However, one cannot make any firm conclusion on this matter. *Police v Wallis*[151] is the only case to date where the evidence has been real and crucial to a successful prosecution and where the offence involved has been classified as serious. Until more cases develop with these factors, it would be difficult to conclude that the courts are not participating in results-orientated reasoning.

The second comment to make in this area is that, some post-*Shaheed* case law does indicate that courts may be manipulating the factors in the *Shaheed* test to reach a desired end (be that intentionally or innocently). The first area which may indicate such manipulation is in relation to the seriousness of the offence and the seriousness of the breach factors. There have been some cases where, in discussing the seriousness of the offence, the judge compares the offence in question to an even more serious offence. For example, in *R v Haapu*,[152] Chambers J, in considering the seriousness of the burglary offence with which the defendant had been charged, commented that, "[w]hile burglary is a serious offence, it is not in the same league as, say, murder".[153] This comparison to a more serious offence has the effect of downgrading the particular offence in question, which in turn supports the inadmissibility of the evidence. Alternatively, there have been examples where, in considering the seriousness of the breach of rights in question, the court compares the breach to an even more serious breach. For example, in *R v Vercoe*,[154] Baragwanath J, in discussing how serious the breach of section 22 was, said:[155]

> I further accept that there was no flagrant or particularly grave breach of the right in this case. The accused drove to the police station voluntarily. The arbitrary detention occurred on his arrival at the police station. *This is a less grave breach of s22 than the paradigm case in which the police arrive on a man's doorstep, take him into custody and interrogate him at the police station.*

This subtle comparison has the effect of making the breach in question look less serious, which in turn would help to support the admissibility of the evidence.

Although additional case law will be helpful in this area to see if there is a regular pattern emerging, it is worthwhile to note that in *Haapu*,[156] the evidence was held to be inadmissible, while in *Vercoe*[157] the evidence was held to be admissible. Those determinations as to the admissibility of the evidence would

150 As emphasized by the fact that the court was reluctant in this case to hold the evidence inadmissible.
151 *Police v Wallis*, supra note 146.
152 *R v Haapu*, supra note 72.
153 Ibid [30].
154 *R v Vercoe*, supra note 86.
155 Ibid [36]. Emphasis added.
156 R v Haapu, supra note 72.
157 *R v Vercoe*, supra note 86.

lend support to the conclusion that judges are manipulating the factors in the test in the said way so as to achieve a desired end.

A second area which may indicate some manipulation is the factors that the court lists as supporting or not supporting the admissibility of the evidence. There is some evidence to suggest that the court may list the same factor more than once but in slightly different ways. The problem with this, and the reason why it may indicate manipulation of the test, is that stating the same factor in different ways will make it appear that there is an overwhelming number of factors supporting the conclusion reached regarding the admissibility of the evidence. *R v Rollinson*[158] provides a good example. The Court, in listing the factors that supported excluding the evidence, lists the same factor (namely that the police acted improperly) in slightly different ways. His Honour stated that, in relation to the search warrant:[159]

(i) The information contained in the affidavit supporting the search warrant was presented in an inappropriate way.
(ii) The representation of the significance of the intercepted conversations (which formed the basis of the police obtaining a search warrant) referring to Mr Rollinson or involving his participation was inaccurate.
(iii) The police sought a warrant covering the Appendix B stolen items when there was nothing in the affidavit even referring to involvement on Mr Rollinson's part in the burglary and receiving of these items. Although the Registrar who signed the warrant deleted the reference to Appendix B, the officers executing the warrant had a copy of that appendix with them and used it to check items found in Mr Rollinson's house.

These three factors are really just the same factor phrased in slightly different language – they essentially boil down to the fact that the police acted inappropriately in both obtaining the search warrant and executing it.[160] Therefore, it would seem logical to treat them as one factor. However, by listing them separately as different factors, there appears to be overwhelming support for why the evidence should be inadmissible. Thus, it is possible that *Rollinson*[161] provides a good example of another way in which courts can manipulate the factors in the *Shaheed* test to achieve a desired end. However, this is the only case where this has occurred – further case law will be required to determine whether or not such manipulation is present. To date, given that the bulk of the case law does not disclose this pattern, it is unlikely that this adds much support to the prediction that the *Shaheed* test would generate results-orientated reasoning.

158 *R v Rollinson*, supra note 57.
159 Ibid [37].
160 Note, it was submitted above that these factors (amongst others) represented additional factors over and above those listed in *Shaheed*. That is still a submission that is maintained. However, if that is incorrect, this second submission is an alternative suggestion as to what those factors are.
161 *R v Rollinson*, supra note 57.

In general, it is difficult to say whether the *Shaheed* test is generating results-orientated reasoning. Once again, although comments such as these can be made on this issue, it will be useful to wait and see whether a greater selection of case law generates some firmer conclusions.

In addition to the prediction of results-orientated reasoning, it was also suggested that the actual reasoning process itself (be that a principled reasoning process or an ad hoc results-orientated reasoning process) would lack any significant discussion or analysis. Without detailed, principled reasons for why the evidence is admissible or inadmissible, it was suggested that it would become very difficult to predict how future cases would be determined, which in turn would generate uncertainty. However, supporters of the *Shaheed* test predicted the opposite, saying that the test would encourage courts to focus on the *reasons* for excluding evidence.

It would appear that the case law supports the later prediction. As already identified in this article, the courts, in applying the *Shaheed* test, have been quite consistent in stating the reasons why the evidence should be admissible or inadmissible. Given that the reasons are being diligently listed by the courts, there seems to be adequate reasoning underlying the judgments.[162]

However, one particularly concerning case is that of *R v Lapham*.[163] Lapham and Bowman were jointly charged with six counts of cultivating cannabis, each count relating to an area defined as a particular plot, numbered from one to six. For present purposes, the relevant charge was related to plot three. In 2002, a Constable and an informant went to plot three where they saw two men, one possessing a firearm, fleeing. They were apprehended and various incriminating statements were made by the men, who were then charged with cultivating cannabis. The key issue was the challenge to the admissibility of the statements made by the two men while being arbitrarily detained in breach of section 22 of the NZBORA. In applying the *Shaheed* test to the statements made by the second defendant (Mr Bowman) Doogue J said:[164]

> There is no doubt the appellants were by then detained. *Shaheed* applies. However, we are satisfied beyond question that given the unusual circumstances in a remote location the Constable's question, where he had not resolved what kind of situation he was actually dealing with, was entirely reasonable and proper. He could not have anticipated Mr Bowman's answer. He immediately refrained from asking any further questions. We are satisfied that on any analysis in terms of *Shaheed* the evidence is admissible.

Essentially, the application of the *Shaheed* test in this case boils down to whether the police acted reasonably and properly in the circumstances. In terms

162 See especially, R v Haapu, supra note 72, [26]-[31]; R v Maihi, supra note 72, [33]-[38].
163 R v Lapham (12 June 2003) unreported, Court of Appeal, CA29/03, 30/03.
164 Ibid [22].

of the actual factors considered by Doogue J in applying the *Shaheed* test, they are almost non-existent. At best, it could be said that Doogue J is considering the fact that this situation was potentially dangerous,[165] which outweighed other factors. Alternatively, Doogue J could also be referring to the fact that, because the constable's behaviour was reasonable and proper, there was good faith on his part.[166] However, even accepting this, there is no mention of the other factors. For example, there is no mention of how serious the breach was;[167] there is no mention of how serious the offence was; and there is no mention of alternative investigatory techniques. The reasons for why the evidence is admissible are almost non-existent.

Fortunately, *Lapham* is only a rare example where the court offers little in the way of reasoning behind the application of the test. The case law to date has not demonstrated a regular pattern of such blasé reasoning. The courts seem to be quite consistent in providing the reasons for why the evidence should or should not be admissible.

(c) Encouraging Police Violation of Rights

Critics of the *Shaheed* test predicted that because the test would open up the possibility for results-orientated reasoning, police would be encouraged to gamble on violations of the Bill of Rights, particularly in cases involving serious offences. As discussed above, it is still unclear whether such reasoning is well-founded. However, even if a firm conclusion could be reached on that matter, there is not enough post-*Shaheed* case law to conclude whether the test is encouraging police to violate rights. The issue will not be resolved in this article, but will be a fruitful area of research in years to come.[168]

(d) Uncertain Rationale for Excluding Evidence

Because, under the new test, not every right that is breached will be vindicated by the exclusion of evidence, it was predicted that the very jurisprudential basis upon which evidence is to be excluded would be rendered uncertain. It was suggested that in some instances, evidence would be excluded for the purpose of condemning and deterring police misconduct. This, it was said, would bring greater uncertainty to the application of the *Shaheed* test.

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165 A relevant factor in *Shaheed*.

166 A factor considered in *Shaheed* as relevant. However, even if that is accepted as being the factor Doogue J is referring to, the presence of good faith is usually a neutral factor.

167 Surely, one would expect at least a mention of how serious the breach of right in this case was, given that the majority in *Shaheed* makes it very clear that the right breached is the starting point.

168 As *Shaheed* case law develops however, this will be an interesting issue to research. Consider also, the following comment by White, "The Exclusion of Evidence Pursuant to s24(2) of the Charter: A view from the Moat" (1986) 52(4) Criminal Reports 388, 390: "In practice, police officers do not generally and deliberately break the law in order to further an investigation, but do so out of carelessness or lack of knowledge concerning the legal requirements that must be satisfied in order to obtain legally admissible evidence in court."

This prediction is partially coming true, but the case law indicates inconsistency in this area. In *R v Vercoe*,[169] Baragwanath J makes it quite clear that the basis upon which evidence is to be excluded in New Zealand under the *Shaheed* test is not to deter police misconduct:[170]

> There are powerful arguments of principle in favour of exclusion as a disincentive against the police engaging in unlawful detention. Exclusion may be necessary to give force to the longstanding judicial condemnation of unlawful detention for the purpose of questioning and to the fundamental right in s 22 to be free from arbitrary state interference with liberty. *However, in determining whether to admit or exclude the evidence, I must turn my mind to the relevant criteria identified in R v Shaheed.*

However, in *R v M*,[171] the basis for excluding the evidence was quite clearly to deter police misconduct in that case to discourage police officers from embellishing their evidence when before the court.[172]

To a lesser degree, Anderson J adds to this jurisprudential uncertainty in *R v I*,[173] by stating:[174]

> The case demonstrates, irrespective of the question of admissibility, that Corrections Officers have the same powers and authority of members of the Police to conduct warrantless searches in accordance with s18(3) and (4) of the Misuse of Drugs Act. Corrections Officers will no doubt feel confident of exercising such powers in an appropriate way, particularly if they are properly trained in this respect. *Therefore considerations of deterrence do not carry as much weight in this case as they otherwise might.*

Although these examples tend to suggest uncertainty as to the jurisprudential basis upon which evidence is to be excluded, that uncertainty should not be exaggerated. As already discussed,[175] the courts have consistently stated that where there has been a serious breach of a right affirmed in NZBORA, that will be a very weighty factor in the balancing exercise. This supports the proposition that the basis for excluding evidence under the *Shaheed* test is to vindicate the right that has been breached.

The post-*Shaheed* case law therefore appears to be in an uncertain state. In some instances, the underlying rationale for excluding the evidence is to vindicate the right breached. However, the case law also indicates that in some instances the rationale is to deter police misconduct. The result of this confusion is that it

169 *R v Vercoe*, supra note 86.
170 Ibid [31]. Emphasis added.
171 *R v M*, supra note 86.
172 Ibid [84]. Emphasis added.
173 *R v I* [17 June 2002] CA71/02.
174 Ibid [6](5). Emphasis added.
175 See especially *R v Maihi*, supra note 72, [38]; *R v Chapman*, supra note 72, [30]; *R v McManamy*, supra note 72, [32].

generates uncertainty in terms of how the *Shaheed* test is applied to future cases. In some instances, the court will be focused on the police misconduct and exclude the evidence to deter it, while in other cases, the court may choose to admit the evidence, even though police may have acted inappropriately. It would seem, at least from a logical point of view, the courts cannot continue to use the *Shaheed* test and still maintain that the evidence is excluded on the rationale that there is a need to vindicate the right. Under the *Shaheed* test, not every right will be vindicated. If the courts continue to use the *Shaheed* test, it would seem more sensible to adopt a deterrence model rather than a rights-centred model because in that way, this obvious contradiction is avoided.[176]

(e) Encouraging and Rewarding the Ignorance and Good Faith of Police

It was predicted that the more ignorant the police officer was as to the rights being breached and the more that the police officer acted in good faith, the more likely it was that the evidence would be admitted. The problem resulting from this was that it makes no difference how police breach a right – a right is still breached whether it is done in good faith or in bad faith. The majority in *Shaheed* said the opposite, stating that good faith would often be merely a neutral factor.

In the majority of cases thus far, the court has tended to treat good faith on the part of the police as a neutral factor, neither adding to nor subtracting from the end result. For example, in *R v Maihi*,[177] the Court of Appeal acknowledged that the police had not breached the accused's rights deliberately, or in reckless disregard or in circumstances amounting to gross carelessness.[178] However, in concluding that the police had acted in good faith, Tipping J stated:[179]

> [The lack of bad faith] tells not so much in favour of admissibility, rather it is the absence of a feature which would have pointed strongly in favour of exclusion. *And, as Shaheed suggests, the undoubted good faith on the part of the police should in this case be regarded as a neutral feature.*

In *R v McManamy*,[180] Salmon J was clear that good faith was merely a neutral factor: "We accept that [the search] was not committed deliberately or in reckless disregard of the accused's rights *but that is a neutral factor only*." [181]

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176 This is merely a suggestion. A deterrence model may generate more difficulties. To conclude that that would be the best approach to adopt would involve considering jurisdictions in which such a model operates and looking to see what the pros and cons are of it. This is something outside the scope of this article but certainty something which would be useful to research.

177 *R v Maihi*, supra note 72.

178 Ibid [35].

179 Ibid. Emphasis added.

180 *R v McManamy*, supra note 72.

181 Ibid [32]. Emphasis added.

In *R v Moran*,[182] Blanchard J was also clear in concluding that the absence of bad faith was merely a neutral factor in declaring the evidence inadmissible:[183]

> The police officers appear to have acted without really thinking about whether they might be trespassing. Mr Corby did not seek to depict their actions as being in any way sinister. But they were certainly careless about the occupier's rights of property and privacy. *The absence of bad faith is merely a neutral feature.*

Finally, in *R v Hjelmstrom*,[184] Blanchard J again makes the same point: "Although the officers may not have acted in bad faith, *that is only a neutral factor* and the appellant was, at best, incorrectly informed about their search powers."[185]

These examples show that any prediction suggesting that good faith would work actively in favour of admitting the evidence is wrong and that, as the majority commented in *Shaheed*, good faith (or the absence of bad faith) would often be a neutral factor. However, there have been three post-*Shaheed* cases which, although the comments regarding the application of the *Shaheed* test were obiter (because the court found that there had in fact been no breach of the defendant's rights), nonetheless indicate the willingness of the court to consider good faith as an active factor in the balancing process. In *Manuel v Police*[186] Heath J commented that, had it come to the balancing exercise, one of the factors which he would have given weight was the fact that, "there was no element of deliberate detention with a view to disadvantaging [the defendant] or deliberately infringing his rights".[187] In *Tawhai v Police*,[188] Hansen J stated (obiter) that, one of the factors weighing in favour of admitting the evidence was the fact that, any breach was "an oversight arising out of a conscientious attempt by the police constable to ensure that [the defendant] had a full opportunity to consult a lawyer".[189] His Honour said that there could have been no question of recklessness or bad faith.[190] Although Hansen J does not clearly state that good faith would have been an active factor weighing in favour of admitting the evidence, that obiter comment tends to suggest that it would have been. Finally, in *R v Natua*,[191] Randerson J had no hesitation in concluding that good faith on the part of the Crown would have been a factor weighing in favour of admitting the evidence.[192]

It is submitted that the prediction suggesting good faith would be helpful to the police when breaching rights (in that it would help to get tainted evidence

182 *R v Moran*, supra note 87.
183 Ibid [19]. Emphasis added.
184 *R v Hjelmstrom*, supra note 87.
185 Ibid, [19]. Emphasis added.
186 *Manuel v Police*, supra note 110.
187 Ibid [38].
188 *Tawhai v Police* (26 August 2002) unreported, High Court, Auckland, 109/02.
189 Ibid [24].
190 Ibid.
191 *R v Natua* (26 July 2002) unreported, High Court, Auckland, T013481.
192 Ibid [26].

admitted) is wrong. It seems that good faith is treated by the courts as a merely neutral factor in the balancing exercise. Nonetheless, the obiter comments mentioned above do give cause for concern. Careful attention will need to be given in this area as further case law emerges to see whether good faith does start to feature actively in cases, where the courts actually find that the police breached the defendant's rights. However, until such time, it seems safe to conclude that good faith is, as the majority in *Shaheed* stated, treated as merely a neutral factor.

3. Predictions for and against the *Shaheed* Test: Some Concluding Comments

This section has tested the predicted reasons for and against the *Shaheed* test against the post-*Shaheed* case law. The purpose of this is to see whether those reasons are well-founded, and so form some conclusion as to whether the *Shaheed* test should or should not be supported. The results of this analysis are, however, not clear enough to be able to form such a definitive conclusion as that. As has been commented throughout this article, with many of the issues discussed there is simply not enough case law to make firm conclusions. However, despite this, some preliminary conclusions and comments are possible.

First, the uncertainty with which the *Shaheed* test may be applied to future fact situations is really not that considerable. In fact, the case law is starting to show that there is some certainty in its application. There is good evidence to suggest that the courts do not frequently consider additional factors outside of those listed by the majority in *Shaheed.* In fact, the courts have been quite consistent in limiting themselves to considering only those factors listed in *Shaheed.* That indicates certainty in the application of the test because it is clear which factors will be considered in making a determination on the admissibility of the evidence. Further certainty is added by the fact that the courts do not commonly select only certain factors from the *Shaheed* test when carrying out the balancing exercise. Instead, they usually consider all of the factors in conducting the balancing exercise. Another area which adds certainty to application is that the courts have been consistent in giving considerable weight (if not the most weight) to the seriousness of the breach. Finally, there is certainty in application being demonstrated by the fact that there is some consistency in the interpretation of terms within the factors, particularly in relation to what a serious offence is; how serious a breach of section 21 of the NZBORA is; and how important the section 21 right is.

However, this certainty should not be overstated. There are still examples where the courts have (a) considered additional factors; (b) selected only some factors; (c) given little indication as to the weight they have placed on the other factors within the *Shaheed* test; and (d) been inconsistent in their interpretation they give to police conduct. Thus, there is some uncertainty being demonstrated in the application of the *Shaheed* test.

Secondly, no conclusion can be reached as to whether the courts actively participate in results-orientated reasoning. There is some indication in *Police v Wallis*[193] that the courts do not concern themselves with what the results of the *Shaheed* test are; they are more concerned with ensuring that police follow proper procedure. However, there are cases that seem to indicate that courts are actively manipulating the *Shaheed* test to reach desired ends in two different ways. First, by manipulating the seriousness of the offence and the seriousness of the breach involved, and secondly, by listing the same factor in different ways. The post-*Shaheed* case law leads to no firm conclusion on this issue. However, if the prediction of results-orientated reasoning proves to be correct, there will be cause for concern. As discussed, such reasoning is contradictory to the rights-centred approach adopted in New Zealand.

Thirdly, the case law so far shows that, regardless of whether courts are using results-orientated reasoning or not, they are nonetheless providing reasons for reaching a conclusion as to why the evidence should or should not be admissible. As noted above, the courts consistently list the factors which weighed in the balancing exercise when determining the issue of admissibility and hence, reasons are being given by the courts for their decisions. However, as further case law develops, careful attention needs to be given to whether the courts begin slipping into the pattern of merely stating a conclusion as to whether the evidence is admissible or not, as Doogue J did in *R v Lapman*.[194]

Fourthly, there is uncertainty surrounding the jurisprudential basis upon which evidence is excluded. Some case law indicates that it is to vindicate the defendant's rights which have been breached, while other case law indicates that the reason for excluding evidence is to deter police misconduct. This uncertainty is problematic in that, without knowing the rationale for evidence being excluded, the uncertainty as to how future cases will be decided under the *Shaheed* test increases.

Finally, good faith is not treated by the courts as being a factor that actively weighs in the balancing process; rather it is a neutral factor. Nonetheless, some obiter comments from the High Court suggest otherwise, and careful attention will need to be given to whether the courts begin to treat good faith as an active factor in the balancing test.

Overall, it is clear that there can be no correct answer as to whether the *Shaheed* test should or should not be supported. However, this analysis is still helpful for several reasons. First, the analysis is based on the case law. This means that the reasons to support or not support the *Shaheed* test are no longer mere predictions based on intelligent guess-work. Secondly, the analysis has indicated that there may not be as many reasons for rejecting the *Shaheed* test as once predicted. The case law (in some instances) has strongly indicated that some of the arguments

193 *Police v Wallis*, supra note 146.
194 *Lapham*, supra note 164.

against the test have little merit in practice. Thus, the reasons for and against the test seem somewhat more evenly matched in light of this analysis.

Thirdly, this analysis has clearly identified issues which will guide further research once more cases applying the *Shaheed* test are decided.[195] Finally, in determining the truth of the predicted reasons for why the test should or should not be supported, the case law has enabled two consistently applied principles underlying the application of the *Shaheed* test to be identified. Being able to identify these principles generates greater certainty in the application of the test because the principles help to predict how the court will go about determining the admissibility of evidence. It is these principles that will now be discussed.

IV: Principles Underlying the Application of the *Shaheed* Test

Like any legal test, the ultimate challenge is to identify the principles which guide the courts in applying it. Unfortunately, the selection of case law since the decision in *Shaheed* is still small and it is therefore difficult to identify a great number of definite principles. Nonetheless, two consistently applied principles are outlined below.

1. Protection of NZBORA Section 21 Rights

Section 21 of the NZBORA will be interpreted by the courts as an important right and a searching of a *residence* in breach of section 21 will usually be considered a "serious breach" which will weigh heavily against admissibility.[196]

2. Conduct of the Police will Impact Upon Classification of a Breach

Bad faith or a deliberate breach on the part of the police is more likely to result in the court classifying the breach as being serious. However, if the police demonstrate good faith, or the less deliberate the breach, the more likely it is the court will classify the breach as being trivial. For example, again consider *R v Maihi*[197] and *R v M*[198] – two cases with very similar fact patterns.[199] In *R v Maihi*,[200] the police conduct was described as being essentially in good faith. Tipping J, in describing the breach in this case, said that "the breach did not involve a major

195 These will be fully outlined in part IV.
196 See the discussion at below.
197 *R v Maihi*, supra note 72.
198 *R v M*, supra note 86.
199 The facts of these cases were discussed in detail earlier in this part.
200 *R v Maihi*, supra note 72.

invasion of privacy ... but it was by no means a trivial invasion".[201] In *R v M*[202] however, the police conduct was described as almost being in bad faith and the breach in that case was described as "serious".[203] Thus, despite the fact that both cases had similar facts, the breach in *R v M* is classified as being more serious than that in *R v Maihi*. Given that the only real distinction between the cases was the police conduct, this would suggest that the classification of the breach is influenced by the seriousness of the police misconduct.

This principle seems to operate fairly consistently throughout the post-*Shaheed* case law. The following examples will further serve to demonstrate this consistency. In *Police v Wallis*,[204] police conduct was described as deliberately breaching the defendant's rights while the breach was described as being a "serious breach".[205] In *R v Pou*,[206] police conduct was again described as a deliberate breach and the breach was described as being serious.[207] In *R v Schutte*,[208] police conduct was described as being "blatant and intentional" and the breach was again described as "serious".[209] In contrast to these cases consider the following. In the obiter comments of Heath J in *Manuel v Police*,[210] the police conduct was described as not deliberate and the breach involved was classified as technical.[211] In *R v Hjelmstrom*,[212] police were described as not acting in bad faith and the breach was described as a "not insignificant invasion of privacy".[213] Finally, in *R v I*,[214] the court said that the Corrections Officer had misled the defendant and described the breach as "not of a fleeting nature".[215] These examples seem to indicate the same principle being applied, namely that the classification of the breach will be determined by the seriousness of the police misconduct. However, it must be noted that this principle is not absolute and that there are cases which do not fit this pattern. For example, in *R v McManamy*,[216] even though police conduct was described as being essentially in good faith, the breach was classified as being a "major invasion of privacy".[217] Then, in *R v Vercoe*,[218] the mistake that police made was described as being an unreasonable mistake yet the breach was described as being not a "flagrant or particularly grave

201 Ibid [34].
202 *R v M*, supra note 86.
203 Ibid [79](b) and (c).
204 *Police v Wallis*, supra note 146.
205 Ibid [41].
206 *R v Pou*, supra note 85.
207 Ibid [45].
208 *R v Schutte* (22 September 2003) unreported, Court of Appeal, CA178/03.
209 Ibid [12].
210 *Manuel v Police*, supra note 110.
211 Ibid [37]-[38].
212 *R v Hjelmstrom*, supra note 87.
213 Ibid [19].
214 *R v I*, supra note 174.
215 Ibid [6](2).
216 *R v McManamy*, supra note 72.
217 Ibid [32].
218 *R v Vercoe*, supra note 86.

breach".[219] Therefore, although there seems to be a principle that police conduct will colour the classification of the breach, it is not a conclusive principle.

It is submitted that further post-*Shaheed* cases are required before further principles can be identified with any certainty. However, as to the principles outlined above, a word of caution seems appropriate. While it is true that these principles do help to bring greater certainty to the application of the *Shaheed* test, that certainty is limited. These principles are entirely dependent upon being able to give conclusive definitions to certain terms. For example, the first principle will only give greater certainty to the *Shaheed* test if one can define what an "important right" is and what a "serious breach" is. Likewise, the second principle will only give certainty if it is possible to define exactly what "bad faith" means and what a "serious breach" is. Until the courts themselves begin to interpret these terms when applying the *Shaheed* test, their definitions will remain uncertain, and if they remain uncertain, so too will the principles.

V: Conclusion

In part I, the new *Shaheed* proportionality-balancing test was introduced. It was submitted that this new test for the exclusion of tainted evidence leaves the court with considerable flexibility but is based upon reasonably certain factors.

In part II, the predicted reasons for why this new balancing test either is or is not supportable were considered. It was seen that critics of the *Shaheed* test provided a substantial number of reasons for why the test should not be supported. Although supporters of the *Shaheed* test did not produce arguments to rebut each and every one of the above reasons, they nonetheless gave some reasons of their own for why the test should be supported.

In part III, the case law was analyzed with specific reference to these predicted reasons so as to be able to determine which arguments discussed in part two were supported by the case law and which were simply incorrect. The conclusions reached in this respect were not as profound as first anticipated. Primarily, this is because there is simply insufficient case law applying the *Shaheed* test at present to reach broad conclusions. However, having said that, some conclusions were possible.

In light of the conclusions and observations made in part III, the obvious question is: to what use can they be put with respect to the future of the *Shaheed* test? It is submitted that the analysis presented in this article should not be used to recommend that the *Shaheed* test be changed or that the status quo be maintained. There is insufficient case law to date to be able to make such a suggestion and it would seem more prudent to wait until firmer conclusions can be reached regarding the reasons for why the test should or should not be supported. Once conclusions can be reached with precision, it will then be possible to make an

219 Ibid [35].

informed decision as to whether it should be so altered or whether it should continue to operate in its current state. However, this is not to say that the analysis in this article is of little value. It is submitted that this analysis is and will be very useful for several reasons.

1. Points of Conclusion

The analysis does provide some reasonably firm (although not absolute) conclusions:

(a) The courts are limiting themselves to considering only those factors that were listed by the majority in *Shaheed.* They rarely consider additional factors in the balancing process.
(b) The courts are consistent in considering most of the factors listed by the majority in *Shaheed.* Although there are examples where the court has selected only some of those factors in conducting the balancing exercise, that is not frequently done.
(c) It is apparent that the seriousness of a breach weighs heavily in the balancing exercise, and in fact, may be the weightiest factor.
(d) The courts have been consistent in interpreting drug offences, particularly those involving the discovery of cannabis in breach of section 21 of the NZBORA, as not being particularly serious. They have also been consistent in interpreting offences resulting in the death of the victim or cases involving sexual violation of the victim as being the most serious. Moreover, they have been consistent in interpreting the section 21 right as being fundamental and important and any breach as being serious.
(e) The courts are clear in giving reasons as to why evidence is or is not admissible.
(f) Police conduct amounting to good faith will not be a factor which actively weighs on the side of admitting the evidence.

These conclusions are useful because they show which predicted reasons are correct and which are not. In addition, these conclusions provide a basic framework from which further research into the *Shaheed* test can be carried out. As further case law develops, it will be possible to test each of the above conclusions against the case law, in a similar way to which the predicted reasons outlined in part II were tested against the case law. Such research will either confirm the above conclusions or disprove them, in which case they may need to be refined. However, regardless of what that outcome may be, that future research will help generate firm conclusions from which recommendations for the *Shaheed* test can then be made.

2. Points Highlighted as Requiring Further Research

The second reason why the analysis is useful is because it highlights specific issues that need to be researched. First, the case law (although it enabled some comments to be made) never allowed any firm conclusion to be reached as to whether the *Shaheed* test was generating results-orientated reasoning. It will need to be assessed whether the courts are following the example of *Police v Wallis*[220] (which would suggest courts are not interested in what the end result may be) or whether they are manipulating the test in the ways discussed in part III to reach desired results.

Answering that question should shed light on a second unresolved issue in this article, namely, whether the test encourages police to gamble on violations of the NZBORA in the hope of obtaining sufficiently probative and crucial evidence of a serious offence. If the courts are willing to admit evidence based on the fact that the offence was serious or that the evidence obtained was probative and central to the prosecution's case, police will begin to understand that they will not necessarily lose evidence from a trial if they breach rights, providing they can get sufficiently good evidence of a serious offence.

A third issue that needs to be researched (once a sufficient amount of post-*Shaheed* case law develops) relates to determining how much weight the court will give to factors, other than the seriousness of the breach, when conducting the balancing exercise. As concluded in part III, it is uncertain how much weight these other factors are currently given by the court.

The final issue that this analysis left unresolved is determining what the rationale is under the *Shaheed* test for excluding tainted evidence. This article concludes that it seems to be a contest between the vindication of rights and the need to deter police misconduct. Although it was suggested that it would be logical to adopt a police deterrence model, research is required to determine what the rationale actually is under the *Shaheed* test. Until that is clear, the test will always remain uncertain in its application.

3. The Direction of Law Reform

The analysis in this paper is useful for making a prediction regarding the role that legislation may have with regards to the *Shaheed* test. Section 29 of the Evidence Code currently provides a different test for the exclusion of tainted evidence than that of the *Shaheed* test. Section 29(3) provides:

> Improperly obtained evidence offered by the prosecution in a criminal proceeding is inadmissible unless the judge considers that the exclusion of the evidence would be contrary to the interests of justice.

220 *Police v Wallis* supra note 146.

In exercising this discretion, section 29(5) provides that the judge *must* consider, among other relevant matters:

(a) the significance of the New Zealand Bill of Rights Act 1990 as an Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
(b) the nature and gravity of any impropriety; and
(c) whether any impropriety was the result of bad faith; and
(d) the likelihood that the evidence would have been discovered or otherwise obtained regardless of any impropriety.

Section 29 was written after the fairness discretion and the prima facie rule were developed, but before the *Shaheed* test was created. While it has aspects similar to that of the *Shaheed* test, there are some obvious differences. First, section 29(3) maintains a presumption of inadmissibility, while under the *Shaheed* test there is no presumption either way. Secondly, the factors that the court is required to consider under section 29(5) are mandatory, in contrast to the *Shaheed* test. Thirdly, section 29 (5)(d) makes causation a factor to consider in the balancing exercise. Under the *Shaheed* test, causation is (according to the majority in *Shaheed*) a factor that does not feature in the balancing exercise, but rather is simply a prior hurdle to cross in order to consider the test. The final difference is that, under section 29(5) the seriousness of the offence, the centrality of the evidence, and the availability of other investigatory techniques are not factors that feature in the assessment like they do in the *Shaheed* test. However, it is clear that they may be considered under section 29(5) given that the factors listed are not exhaustive and that the court is able to consider "other relevant matters".

In light of these substantial differences between section 29 of the Evidence Code and the current *Shaheed* test, it is predicted that section 29 will be rewritten in line with the more modern *Shaheed* test. This is a likely outcome given that the analysis of the post-*Shaheed* case law has given no indication of the Court of Appeal abandoning the test. Thus, if the Evidence Code is enacted, it is likely that the *Shaheed* test will no longer be a common law test, but rather a statutory test. What the exact content of this statutory test will be is difficult to predict. It will depend heavily upon the development of the case law.

4. Conclusion

By way of a final comment, it needs to be emphasized that the *Shaheed* test is still only a recent addition to criminal procedure in New Zealand and it is only now that the actual effects of the test are being felt. Until a greater volume of case law is produced, firm conclusions on the reasons why the test should or should not be supported can not be fully assessed. However, once these reasons are clearly identified, what seems certain is that there will not be unanimous support for, or

rejection of, the test. There will always be those who think that the test for the exclusion of tainted evidence should be something other than the *Shaheed* test. However, it is hoped that as the post-*Shaheed* case law develops and research into the test continues, the *Shaheed* test will be refined to the point where, although not everyone will like it, at least everyone can agree that the test is applied consistently, in a principled manner, and with judicial honesty and integrity.