



Criminal Law News

Robert Gee

Canada v. United States – The Merging of Our Approaches to Unlawfully Obtained Evidence?

I'm a pretty predictable type of guy. These articles generally all follow the same pattern: find a case that catches my eye, which is usually limited to Supreme Court or Ontario cases, set out a bit what it's all about, give it my own personal critique, you know thumbs up, thumbs down, that sort of thing. This time, it's a little different. It's not a case that caught my eye, but a newspaper editorial. And not just any newspaper editorial but an editorial from the *New York Times*. It was an editorial about a legal case not, as you might have gathered, a Canadian case but an American one. It wasn't even really the case itself that I found most intriguing but the reaction to it in the form of the editorial that first caught my eye.

The case is *Herring v. United States*, (2009) No. 07-513, a decision of the United States Supreme Court dated January 14, 2009. In this case Mr. Herring was pulled over somewhere in Coffee County. I have no idea where Coffee County is. This was an appeal from the Eleventh Circuit Court so I imagine that Coffee County is somewhere in the Eleventh Circuit, if that helps. It doesn't help me but it doesn't really matter where Coffee County is other than we can be assured it's somewhere in the U.S. In

any event, when Mr. Herring was pulled over the officer had been informed that there was a warrant for his arrest. On the strength of that information he arrested Mr. Herring, searched him and his vehicle, and found some drugs and a handgun.

However, within minutes of the arrest and search and finding of the drugs and gun, it came to light that the warrant on the system was actually in error. The warrant they were referring to had been rescinded some four or five months before and as such was no longer in existence. It turns out that the person responsible for the record keeping had been negligent and didn't remove the warrant from the system when they should have.

Everyone agreed that Mr. Herring's arrest violated the Fourth Amendment to the *United States Constitution*, which forbids "unreasonable searches and seizures." Our version of this is section 8 of the *Charter*. The fact that we each enshrine these rights for our citizens isn't surprising; where we differ is how we treat violations of these rights by the state. In the U.S. the basic rule is that all evidence obtained due to a violation of the Fourth Amendment is almost automatically excluded from any subsequent trial. Not surprisingly, they call this the "Exclusionary Rule." In Canada, we take a much different view. Here any evidence obtained in violation of a *Charter* right is still

presumptively admissible at trial. It is only excluded at trial if it can be shown on a balance of probabilities that its admission would bring the administration of justice into disrepute.

We don't have a pithy name for our rule. If we did, from a defence perspective anyway, we might call it the "Good Luck Getting That Gun Excluded Rule" or the "That's Way Too Much Drugs To Be Excluded Rule."

The U.S. position is that the Exclusionary Rule is needed to deter police behaviour and foster respect for the *Constitution*. Justice Ginsburg, in her dissent in *Herring* stated the purpose of the Rule thusly (at p. 20-21):

Beyond doubt, a main objective of the rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). But the rule also serves other important purposes: It "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness," and it "assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

In contrast, courts in Canada have consistently held that evidence

obtained in violation of a *Charter* right should not be excluded simply to “punish” the police. Our courts engage in a weighing of various factors to try to strike a balance between the individual rights of the accused and the interest in having cases decided based on all the available evidence, however that evidence may have been obtained.

In recent years, however, after casting a longing eye northward for some time, the more conservative faction of the U.S. judiciary has been chipping away at their Exclusionary Rule. Unfortunately for Mr. Herring, the Supreme Court caught up with him. Chief Justice Roberts wrote the majority decision in a 5-4 split that held that the Exclusionary Rule isn’t automatic but will only apply where its deterrent effect will be real. That meant that in this case, since the negligence in the record keeping wasn’t the fault of the police but of some faceless bureaucrat in the court office and since it was apparent the mistake was uncovered quickly when the matter was looked into (just not quite quick enough if you’re Mr. Herring), that the deterrent capabilities of the Exclusionary Rule wasn’t required here and therefore the evidence of the drugs and gun was admissible.

Justice Ginsburg, who wrote the dissent, held that in this day and age databases such as this are the “spine” of law enforcement, and the Exclusionary Rule and its deterrent effects are exactly what is required to ensure they are kept accurate so people’s rights are not violated.

Now getting back to where I started with all this; when this case came out what I found most intriguing was the reaction to the decision. On February 15, 2009 Adam Cohen wrote an editorial in the *New York Times* in which

he pondered whether this was another, but significant, step in the wholesale overturning of the Exclusionary Rule. If this is what was in fact happening, then the *New York Times* was sounding the alarm bells as they saw the Exclusionary Rule as an important safeguard and check on police powers. They reviewed the history of the Rule from when it was first imposed on the state courts by the Supreme Court in 1961 in a case called *Mapp v. Ohio* to the current day attack on the Rule and stated:

There is no denying that the exclusionary rule allows a small number of criminals to go free because the police have blundered — which is certainly no minor matter. But the more faithfully the rule is applied, the more likely the police are to collect evidence lawfully.

As important as it is to convict criminals, the Supreme Court in *Mapp* rightly insisted that the Constitution must not be trampled in the process. “Nothing can destroy a government more quickly,” the court noted, “than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”

My thinking is that in Canada it’s unlikely we’d ever see an editorial in the *Globe and Mail* or *National Post* or even the *Toronto Star* that openly advocated for a rule that would exclude evidence, especially of a handgun, in order to deter police from trampling the *Charter* rights of accused criminals. My thinking is in Canada we’re still a little afraid of the *Charter*. We like it at certain times. Like when we’re bidding against China for Olympic Games

we point to it to distinguish us from them regarding respecting the rights of our citizens, but when it means “a criminal may go free because the police have blundered” we seem to bend over backward to avoid such a result.

A recent case in our own backyard to highlight this is one I wrote an article about last year, *R. v. Harrison*, where as you may recall our Court of Appeal held that even though the officer had no reason to pull over Mr. Harrison’s car, even though the officer had no reason to search Mr. Harrison’s car and in spite of the fact the officer more or less lied in court about his actions, the seventy-odd pounds of cocaine found in the car would not be excluded from the trial. Given those factors, I don’t think even the most conservative faction of the U.S. Supreme Court would not have excluded the drugs. This case I understand has now been argued at our Supreme Court so it will be a sort of litmus test for our own exclusionary rule, if any.

I’m not saying that we should adopt an exclusionary rule as stark as that in the U.S., but it seems to me given the prominent role deterrence plays in the approach our courts take to the accused, that maybe a little bit more deterrence in the mix imposed on the police would be a healthy thing as well. ■

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