



# Criminal Law News

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## *Harrison and Grant – The Supreme Court Giveth, The Supreme Court Taketh Away*

Every so often, the Supreme Court comes out with a case or two that fundamentally alters the criminal law landscape. These two cases, released together by the Supreme Court on July 17, 2009, just may be two such cases. Or, they may not be. Time will tell. Obviously, how they're interpreted and applied by trial judges over the next little while will determine the issue. What can be said is that these cases have the potential to alter the landscape. If they do alter the landscape, whether it is altered for the better, or worse, remains to be seen. I guess that will depend on your perspective.

These cases, particularly *R. v. Grant*, rewrote the analytical framework for when evidence ought to be excluded pursuant to s. 24(2) of the Charter after the court has determined a breach of an accused's rights has occurred.

Prior to these decisions the rules for excluding evidence were set down primarily in the cases of *Collins* and *Stillman*. *Collins* required the court to look at basically three factors. First, whether the evidence obtained as a result of the breach would undermine the fairness of the trial. Second, the seriousness of the breach, and third, the effect of excluding the evidence

on the long-term repute of the administration of justice. In 1997, ten years after *Collins* came *Stillman*. In this case the court embarked on an analysis of whether the evidence was "conscriptive" or "non-conscriptive." Evidence was classified as conscriptive if an accused, in violation of his Charter rights, was compelled by the state to incriminate himself. Under this analysis, conscriptive evidence was almost always viewed as evidence that undermined trial fairness, and for a time almost universally resulted in its exclusion.

Recently however, it seemed that courts had been feeling constrained by this analysis and began chafing at the almost automatic exclusion of conscriptive evidence. An example of this was breath test results in over .08 cases. Immediately following *Stillman*, if there had been, say, a breach of the accused's rights to counsel prior to the breath test being taken, the test results would just about automatically be excluded because the breath test results were classified as conscriptive evidence. However, recently courts were beginning to reject this result since it was often found that the Charter violation was relatively minor and the breath tests were viewed as very reliable evidence.

What the Supreme Court found in *Grant* was that although *Collins* and *Stillman* brought a measure of cer-

tainty to the s. 24(2) analysis, the results it sometimes produced were inconsistent to the language and objectives of s. 24(2). As a result, the court thought it time to rethink and rework the rules. So it did.

In this case the court went back to first principles and took a fresh look at what 24(2) actually said. For those of you who don't have it memorized it says the following:

24(2). Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The court then focussed on what the purpose of the phrase "bring the administration of justice into disrepute" was meant to capture. In this regard it said the following in par. 68:

The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the

evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

After reviewing 24(2), *Collins*, *Stillman* and other jurisprudence since, the court went on to formulate a new analytical framework for these types of applications and set it out in par. 71:

When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2)

determination as enunciated in *Collins* and subsequent jurisprudence.

So what the heck does this mean? The court is saying it's up to the trial judge to "assess and balance" the effect of admitting the evidence on society's confidence in the justice system, having regard to three things, which it then sets out. It seems to me it's pretty broad and could mean just about whatever the trial judge hearing the application wants it to mean.

The court then goes on to try to explain a bit the three enumerated factors. Under the first factor, the seriousness of the state conduct, the court states what is pretty obvious, there's a range of conduct from minor, inadvertent *Charter* violations on the one end up to wilful and reckless disregard for *Charter*-protected rights on the other end. Not surprisingly, the court stated the former are not likely, by themselves to bring the administration of justice into disrepute, while the latter may.

The second factor seeks to look at (par. 76) "the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused." Huh? This seems to be saying that some *Charter* violations, from the perspective of the accused, are more serious than others. For instance, a warrantless search of a home, or an unlawful body cavity search are obviously more serious than the search of a backpack while entering a concert venue that turns up a joint or two. Once again the court says, the more serious, the more likely the administration of justice would be brought into disrepute while the less serious, the less likely so.

The third factor is explained in par. 79 by asking whether "the truth-seeking function of the criminal trial process

would be better served by admission of the evidence, or by its exclusion." This compels the trial judge to review the reliability of the evidence. The more reliable it is, the more likely it ought to be admitted, the corollary of course is that the less reliable the evidence, the less likely it is to be admitted. However, that being said, the court did issue the following warning at par. 84:

The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

All that sounds great, so why don't we see how the court applied it in these first two cases? First *Grant*. Mr. Grant was observed walking on Greenwood Avenue in Toronto at midday on November 17, 2003. Two plainclothes officers in an unmarked car were patrolling the area because there are apparently four schools in the area that had been the subject of assaults, robberies and drug dealing at that time. According to the officers, Mr. Grant came to their attention because as they drove past him, he apparently stared at them in an intense manner and fidgeted with his coat and pants. This was enough for the officers to decide Mr. Grant needed checking out. A uniformed officer in a cruiser was in the area so the plainclothes officers suggested to this officer to go and have a "chat" with Mr. Grant. So he did.

The uniformed officer pulled up his cruiser, exited it and took up a position directly in front of Mr. Grant on the sidewalk in his intended path. Not long after, the two plainclothes officers pulled up, exited their vehicle, identified themselves as police officers, and took up positions behind the uniformed officer. The uniformed officer then engaged Mr. Grant in conversation and at one point when Mr. Grant apparently adjusted his jacket the officer told him to keep his hands in front of him. Mr. Grant was asked to identify himself, asked what he was doing and the questioning eventually got around to whether “he had anything on him he shouldn’t have.” According to the officers, at that point he admitted to having some marijuana and when asked if that was it, he was alleged to have put his head down and admitted to having a firearm on him.

The Supreme Court found that in these circumstances given the position of the officers and the direction to keep his hands in front of him that at that point Mr. Grant had been unlawfully detained by the officers, which also triggered other rights he had, like being advised of his rights to counsel pursuant to s. 10, all of which were violated.

In applying their new 24(2) test to decide if the gun should be admitted at trial, the court ultimately found that it should be. First, they held that the police conduct was not abusive, deliberate or egregious. They said the point when a police encounter becomes a detention is not always clear and the police were not acting in bad faith.

On the second stage the court found that the impact on the infringement of Mr. Grant’s rights was significant. A casual conversation quickly turned

into a coercive situation and he was denied legal advice in a situation where it was sorely needed.

The final stage the court found was kind of a wash. The gun was highly reliable evidence and the offence extremely serious, but Mr. Grant countered this by arguing that the seriousness of the offence made it all the more important his rights be respected.

In the end, the court stated that this was a close case. The court found that there were significant serious breaches of Mr. Grant’s rights but the gun was reliable evidence and there was high level of public interest in determining the matter on its merits. The court found that since the officers were operating in an area of considerable legal uncertainty, this tipped the balance in favour of admissibility.

*Harrison* is a case you may remember, especially if you have the unfortunate habit of reading my articles. I wrote an article about this case shortly after the Court of Appeal released its decision last year. You may also remember the facts. Mr. Harrison and a friend were driving a rented SUV in northern Ontario. They were obeying all the traffic rules but a keen eyed O.P.P. officer noticed they didn’t have a front licence plate. He activated his roof lights but when he got behind the vehicle he noticed that the vehicle was bearing Alberta plates, which, since Alberta doesn’t require front plates, meant no offence was being committed.

Notwithstanding the officer knew at that point he did not have grounds to make a stop, he continued to pull the vehicle over in order to maintain the “integrity of the police.” I’m not kidding, that was his actual evidence at trial. Apparently, he was worried that

if others noticed him turning off his roof lights and letting the non-offending vehicle continue on its way, they would assume the rule of law had been repealed and chaos would ensue.

In any event, he pulled over the vehicle and started to question Mr. Harrison. He later determined Mr. Harrison was a suspended driver and arrested him for that. He then searched the vehicle. His explanation for doing so at trial was either as an incident to arrest, or to search for the licence. What he thought the chances of finding a licence were given that Mr. Harrison was suspended is unclear, but even if he did find a licence its evidentiary value would have been negligible given it wouldn’t affect Mr. Harrison’s driving status.

What the trial judge found was that the officer’s explanations for stopping and searching the vehicle were “contrived and defy credibility” which is a nice way of saying he was lying.

Unfortunately for Mr. Harrison, the search of the vehicle turned up 77 pounds of cocaine. For those of you not in the criminal law field, we who do practise in this area would describe this as “Holy crap, that’s a lot of coke.” Although most of us would use more colourful language, not fit to print in a family magazine such as this.

Both the trial judge and the Court of Appeal held that the cocaine was admissible notwithstanding the serious and flagrant Charter breaches because, as the trial judge stated, the breaches “paled in comparison to the criminality involved.” Fortunately for Mr. Harrison Madam Justice Cronk dissented at the Court of Appeal and punched him a ticket to the Supreme Court. In her opinion the trial judge

and the majority of the Court of Appeal let the seriousness of the offence overwhelm the 24(2) analysis.

The Supreme Court, in applying their new framework, again first assessed the seriousness of the Charter-infringing state conduct. In this part the court found that the police conduct represented a blatant disregard for Charter rights which was aggravated by the officer's misleading testimony at trial. This last part is something I find both interesting and heartening. The officer's testimony at trial was distinct from the Charter breaches that occurred at the side of the road many months before, but it was still held to be a significant aggravating factor in the 24(2) analysis. Specifically, the court stated the following at par. 26:

I note that the trial judge found the officer's in-court testimony to be misleading. While not part of the Charter breach itself, this is properly a factor to consider as part of the first inquiry under the s. 24(2) analysis given the need for a court to dissociate itself from such behaviour. As Cronk J.A. observed, "the integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s. 24(2) of the Charter. Few actions more directly undermine both of these goals than misleading testimony in court from persons in authority" (para. 160).

In determining the impact on the Charter-protected interests of the accused the court found that although the encounter was not demeaning to

the integrity of the accused, it was much more than trivial. In the end they held that although not egregious, it was a significant intrusion to Mr. Harrison's Charter-protected rights.

On the final branch of the analysis the court found the cocaine to be highly reliable, critical evidence virtually conclusive of guilt. This branch favoured its admission.

However, the court found when all these considerations were balanced, the admission of the cocaine would bring the administration of justice into disrepute and it should have been excluded, even though that would mean a person would be acquitted of a serious offence that the public expects to be determined on its merits. This is how the court described it in par. 39:

This case is very different. The police misconduct was serious; indeed, the trial judge found that it represented a "brazen and flagrant" disregard of the Charter. To appear to condone wilful and flagrant Charter breaches that constituted a significant incursion on the appellant's rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it. In this case, the seriousness of the offence and the reliability of the evidence, while important, do not outweigh the factors pointing to exclusion.

And then again in par 41:

Additionally, the trial judge's observation that the Charter breaches "pale in comparison to the criminality involved"

in drug trafficking risked the appearance of turning the s. 24(2) inquiry into a contest between the misdeeds of the police and those of the accused. The fact that a Charter breach is less heinous than the offence charged does not advance the inquiry mandated by s. 24(2). We expect police to adhere to higher standards than alleged criminals.

In the end, Mr. Harrison was acquitted by the Supreme Court.

So there you have it. A new world order when it comes to s. 24(2). I often read cases like these and get excited (yes, my life is that pathetic) and think, "this is gold for the defence, we'll never lose another one of these." Then of course we do and my feet quickly get planted firmly on the ground again.

I hope though that these cases do force courts to cast a more critical eye when assessing an application to exclude evidence. Remember if they're at the 24(2) stage then a determination has already been made that Charter breaches have occurred. Like the court said, we expect the police to adhere to higher standards.

There are a few nuggets of gold scattered throughout these cases that defence counsel should continue to highlight. I especially like the notion that this isn't a contest between police misconduct and the accused's misconduct. I like the notion that even though the police misconduct may not be as serious as the criminality involved, the evidence can still be excluded. In paragraph 133 of *Grant*, the Supreme Court also indicated that although they are not expected to "engage in judicial reflection," the police are presumed to know what the

law is. Being ignorant of or failing to keep abreast of judicial pronouncements cannot be used as a crutch in attempting to establish their acts as being done in good faith. In particular, the court explicitly emphasized that going forward, it would now be more difficult for police to allege they were uncertain as to where the line between innocent encounter and an unlawful detention was, given the decision in *Grant*. By further example, another gold nugget can be found in paragraph 75 of *Grant* where the Supreme Court recognizes that for every breach that comes before the courts, many others go unrecognized and unredressed because they did not turn up any relevant evidence. This is a point sometimes made by defence counsel but which has up until now been given little weight as courts are reluctant to give any weight to a notion such as this without any evidence to back it up. Where and how the defence was to get such evidence I could never figure out, so I'm glad the Supreme Court has now recognized what seemed to me to be a common sense notion.

The new framework is pretty broadly worded. As such there is always room for courts to fit the facts of their case in the analysis however they desire the result to be. Hopefully, maintaining the proper balance will ensure that the courts continue to apply these principles in a manner that ensures a long term respect for the sanctity of Charter protected rights and the administration of justice. ■

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