

# The Top Five 2009

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



## ***R. v. Grant*, 2009 SCC 32**

<http://scc.lexum.org/en/2009/2009scc32/2009scc32.html>

*In this case, the Supreme Court of Canada (SCC) created a new test for determining whether evidence obtained by a Charter breach should be excluded under s. 24(2) of the Charter, replacing the test from R. v. Collins. The R. v. Grant case was released concurrently with R. v. Harrison, 2009 SCC 34.*

**Date Released: July 17, 2009**

### **The Facts**

Three police officers were on patrol for the purposes of monitoring an area near schools with a history of student assaults, robberies and drug offences. Two of the officers were dressed in plainclothes and driving an unmarked car, while the third was in uniform driving a marked police car. Mr. Grant, a young black man, was walking down the street when he came to the attention of the two plainclothes officers. As they drove past, Mr. Grant stared at them and started to fidget with his coat and pants, prompting the officers to request that the uniformed officer stop and speak with Mr. Grant to determine if there was any cause for concern. The uniformed officer approached Mr. Grant on the sidewalk and requested that he provide identification. Mr. Grant was behaving nervously and was about to adjust his jacket when the officer asked Mr. Grant to keep his hands in front of him. After observing the exchange from their car, the two plainclothes police officers approached the pair on the sidewalk and identified themselves as police officers. The three police officers blocked Mr. Grant's path on the sidewalk and asked him if he was in possession of anything that he shouldn't be. Mr. Grant told the police that he was in possession of "a small bag of weed" and a firearm. At this point the officers arrested and searched Mr. Grant, seizing a bag of marijuana and a loaded gun. They advised him of his right to counsel and took him to the police station.

At trial, Mr. Grant alleged that his rights under ss. 8, 9 and 10(b) of the *Canadian Charter of Rights and Freedoms* had been violated.

#### ***Canadian Charter of Rights and Freedoms***

8. Everyone has the right to be secure against unreasonable search and seizure.
9. Everyone has the right not to be arbitrarily detained or imprisoned.
10. Everyone has the right on arrest or detention
  - (b) To retain and instruct counsel without delay and to be informed of that right

The trial judge found that Mr. Grant was not detained before his arrest and that ss. 9 and 10(b) of the *Charter* were not infringed. The gun was admitted into evidence and Mr. Grant was convicted of firearm offences. The conviction was appealed.

The Court of Appeal for Ontario held that s. 9 of the *Charter* was infringed because the officers had no reasonable grounds to detain Mr. Grant. However, the court held that the firearm should be admitted under s. 24(2) and Mr Grant's conviction was upheld. Mr. Grant appealed the decision to the SCC.

### ***Canadian Charter of Rights and Freedoms***

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(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 Decision**

### **Whether Mr. Grant was Detained**

The Majority of the SCC defined "detention" as the suspension of an individual's liberty by a significant physical or psychological restraint. A psychological detention occurs where an individual has a legal obligation to comply, or where a reasonable person would conclude that, based on the police conduct, he had no choice but to comply. The court identified several factors to consider when determining whether there was a psychological detention. Such factors include:

- (1) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.
- (2) The nature of police conduct, including the language used, the use of physical contact, the place where the interaction occurred, the presence of others and the duration of the encounter.
- (3) The particular characteristics or circumstances of the individual where relevant, including age, physical stature, minority status and level of sophistication.

The Court held that Mr. Grant was psychologically detained when he was told to keep his hands in front of him and when the police officers stopped him from walking away. As a result, Mr. Grant was arbitrarily detained in violation of s. 9 of the *Charter*. The right to counsel arises immediately upon detention and the police failed to notify Mr. Grant of his right to speak to a lawyer before they

began the questioning that led to discovery of the firearm. Therefore, the majority of the SCC concluded that Mr. Grant was also denied his right to counsel in violation of s. 10(b) of the *Charter*.

### **Whether Evidence Should be Excluded under s. 24(2)**

After determining that Mr. Grant's *Charter* rights were violated, the court addressed the application of s. 24(2) of the *Charter*. Section 24(2) deals with the exclusion of evidence in a trial. When evidence is obtained through the violation of a *Charter* right, claimants may apply under s. 24(2) of the *Charter* to have the evidence excluded from the trial.

The majority of the SCC replaced the *Collins* test (the previous test for determining the exclusion of evidence) and created a new three-part test to determine whether admitting evidence obtained by a *Charter* breach would damage the reputation of the justice system. The Court outlined the following factors for deciding whether or not to exclude evidence in the event of a *Charter* breach:

- (1) Seriousness of the *Charter*-infringing state conduct
  - This inquiry focuses on the severity of the state conduct leading to the *Charter* breach, and includes an analysis of whether the breach was deliberate, and whether the officers were acting in good faith.
- (2) Impact on the *Charter*-protected interests of the accused
  - This inquiry focuses on how the accused person was affected by the state conduct. Depending on the *Charter* right engaged, this could include an analysis of the intrusiveness into the person's privacy, the direct impact on the right not to be forced to incriminate oneself, and the effect on the person's human dignity.
- (3) Society's interest in an adjudication on the merits
  - This inquiry focuses on how reliable the evidence is in light of the nature of the *Charter* breach, importance of the evidence to the Crown's case, and seriousness of the offence.

The SCC held that despite the *Charter* breaches, the gun should not be excluded as evidence against Mr. Grant and, consequently, the conviction was upheld.

### **The Dissent**

Justice Deschamps, in a concurring decision, agreed with the majority's conclusion that the gun should not be excluded, but disagreed with the majority's proposed test. She proposed a simpler two-part test for s. 24(2) of the *Charter* that balances two aspects:

- (1) The public interest in protecting *Charter* rights.
  - Considerations include police conduct, nature of the evidence, nature of the violated right, urgency of the situation, and clarity of the law. The judge should consider the long-term impact of admission on every individual whose rights might be violated in a similar way, rather than only focusing on the rights of the accused being tried.
- (2) The public interest in an adjudication on the merits.

- With respect to the benefits of getting to the truth of what happened, the judge should consider reliability of the evidence, how important it is to the prosecution's case, and the seriousness of the offence being tried.

In Justice Deschamps' opinion, the court should be focused not on the individual accused, nor on the conduct of the police in the case, but on the public interest.

### Discussion Issues

1. It is a balancing process to determine whether or not to exclude evidence that was obtained in breach of an individual's *Charter* rights. The court must assess the effect of admitting evidence on society's confidence in the justice system. Review the wording of s. 24(2) of the *Charter*. What does it mean to bring the administration of justice into disrepute? Discuss how the admission or exclusion of the gun as evidence could bring the administration of justice into disrepute?
2. Try applying the *Grant* test to the facts of the case. What type of analysis would you give for each step and why? Do you agree or disagree with the result reached by the SCC?
3. In applying step two of the three-part *Grant* test, the SCC ruled that "the impact of the *Charter* breach on the accused's protected interests was significant, although not at the most serious end of the scale." Discuss this statement. Why was the police conduct not considered to be at the most serious end of the scale? In your opinion, what would constitute conduct at the most serious end of the scale? Do you think the SCC has adequately balanced the rights of accused with the power of police?
4. What do you think will be the implications of this case in the future? Do you think this will result in police conducting their investigations differently? Why or why not?