

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. Harrison, 2009 SCC 34

<http://scc.lexum.org/en/2009/2009scc34/2009scc34.html>

In a decision rendered concurrently with R. v. Grant, 2009 SCC 32, the Supreme Court of Canada (SCC) applied the new analysis for excluding evidence under s. 24(2) of the Charter to determine if evidence of cocaine trafficking should be excluded.

Date Released: July 17, 2009

The Facts

The accused and his friend rented a vehicle and were driving from Vancouver to Toronto when a police officer noticed that the vehicle did not have a front license plate, which constitutes an offence in Ontario. After following and signalling the car to pull over, the officer realized that the car was registered in Alberta and therefore did not require a front license plate. The officer was informed by radio dispatch that the vehicle was rented at the Vancouver airport and, although he no longer had grounds to believe an offence was committed, pulled the vehicle over. The officer testified that he decided to pull over the vehicle anyway to preserve the integrity of the police in the eyes of observers.

The officer was suspicious because the vehicle appeared to be weathered and he was aware that rental cars were often used by drug couriers. He also knew that it was rare for drivers to drive that stretch of the road at exactly the speed limit, and was wary of contradictory stories given by the accused and his friend. The accused did not have his driver's license and the officer discovered that the license was under suspension, at which point he arrested him for driving with a suspended license.

The officer asked the accused and his friend if there were any drugs in the car to which they both answered no. The officer proceeded to search the vehicle anyway and testified that the search was incidental to the arrest in order to find the driver's license. The search uncovered two boxes containing 35 kg of cocaine, estimated to be worth approximately \$4 million.

At trial, the judge held that the initial detention was based on mere suspicion, and that the officer did not have reasonable grounds for detaining the accused. The arrest was therefore contrary to s. 9 of the *Charter*. The trial judge also held that the search of the vehicle was not related to the charge of driving with a suspended license and was therefore a breach of s. 8 of the *Charter*.

Canadian Charter of Rights and Freedoms

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

The issue in this case was whether the cocaine should be excluded from evidence under s. 24(2) of the *Charter*. Section 24(2) provides that once a court concludes that evidence was obtained in violation of an individual's *Charter* rights, the evidence must be excluded if its inclusion would harm the reputation of the administration of justice.

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 trial judge applied the test in *R. v. Collins* for determining whether evidence should be excluded under s. 24(2) of the *Charter*. On the seriousness of the breach, the trial judge was critical of the officer's conduct and concluded that the officer's actions "can only be described as brazen and flagrant." Further, the judge held that the officer was not credible when he testified. However, despite the seriousness of the breach, the trial judge found that the officer's actions were "pale in comparison" to excluding 35 kg of cocaine as evidence in the case. Therefore, the evidence was admitted and the accused was convicted.

The decision was appealed to the Court of the Appeal for Ontario. On appeal, the majority stated that it was a "close call" and upheld the trial judge's decision to admit the evidence. The accused appealed the decision to the SCC.

The Decision

Writing for the majority, Chief Justice McLachlin applied the new test for excluding evidence under s. 24(2), which had been established in *R. v. Grant*, replacing the *R. v. Collins* test. The SCC set out three factors a court must consider when determining if the admission of evidence obtained by a *Charter* breach would bring the administration of justice into disrepute:

- (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.

On the seriousness of the *Charter*-infringing state conduct, the majority found that the officer acted recklessly and displayed a blatant disregard for *Charter* rights.

(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.

On the impact of the *Charter*-protected interests of the accused, the majority found that the detention affected the privacy and liberty rights of the accused, and that individuals driving on the highway have an expectation that they will not be stopped, unless for valid highway traffic infractions. In this case, the Court ruled that the impact was "significant".

(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.

Here, the majority found that the cocaine was reliable evidence of a serious drug trafficking charge, which favoured admission of the evidence.

The majority went on to balance the factors and held that the seriousness of the breach outweighed the reliability of the evidence. The Court held that the conduct of the police that led to the *Charter* breaches represented a blatant disregard for *Charter* rights and was further aggravated by the officer's misleading testimony at trial. Therefore, the cocaine was excluded as evidence and the accused was acquitted.

The Dissent

Justice Deschamps, writing in dissent, stated that the majority attached excessive weight to the officer's conduct, which did not fall in the most severe category. Following her decision in *R. v. Grant*, she proposed a simpler two-part test for s. 24(2) which balances the public interest in protecting constitutional rights and the public interest in getting to the truth of what happened. Applying this test, she concluded that the evidence should have been admitted.

Discussion Issues

1. Both cases, *R. v. Grant* and *R. v. Harrison*, involved the application of s. 24(2) of the *Charter*, which requires courts to exclude evidence obtained in violation of *Charter* rights. Did the justices of the SCC apply the same standard in both cases? Why or why not? What factors led to different outcomes?
2. The majority held that “the price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining *Charter* standards. That being the case, the admission of the cocaine into evidence would bring the administration of justice into disrepute.” Do you agree with the majority? Why should “tainted evidence” sometimes be excluded?
3. In *R. v. Grant*, the Court ruled that evidence that has been modestly tainted by police misconduct can be used to convict the accused, unless the violation of *Charter* rights was blatant and would shake public trust in the justice system. Discuss greater implications of this ruling on trial fairness, *Charter* rights and police investigations.
4. Do you agree with the trial judge’s characterization that the police officer’s conduct was “very serious” considering the accused was stopped for a short period of time, there was no use of force or violence, and the search was not of the person? Why or why not?
5. Chief Justice McLachlin stated: “the public expects police to adhere to higher standards than alleged criminals.” Does this decision put more pressure on police to ensure investigations are carried out appropriately, given the consequences of excluding such a large quantity of drugs as evidence?