

SECTION 24(2) OF THE *CHARTER* – EXCLUSION OF EVIDENCE

CASE STUDY - *R v AM, 2008 SCC 19*

St. Patrick's High School in Sarnia had a zero tolerance policy for possession and consumption of drugs and alcohol. The principal of the school advised the Youth Bureau of Sarnia Police Services that if the police ever had sniffer dogs available to bring into the school to search for drugs, they were welcome to do so. On November 7, 2002, three police officers accepted his invitation and took their police dog, Chief, to the school. Chief was trained to detect drugs. Neither the principal nor the police had any suspicion that any particular student had drugs, though the principal said that it was pretty safe to assume that drugs were in the school. The principal used the school's public address system to tell students that the police were on the premises and that they had to stay in their classes until the search had been conducted. The police then walked Chief around the school.

Chief reacted to one of several backpacks that had been left unattended in the gymnasium by biting at it. Without obtaining a warrant, the police opened the backpack. Inside they found 10 bags of marijuana, a bag containing approximately ten magic mushrooms (psilocybin), a bag containing a pipe, a lighter, rolling papers and a roach clip. The back pack also had the student's wallet that enabled the police to identify A.M. as the owner. He was charged with possession of narcotics for the purposed of trafficking.

At trial, A.M. brought an application for exclusion of the evidence, arguing that his rights under s. 8 of the Charter had been violated. The trial judge allowed the application, finding two unreasonable searches: the search conducted with the sniffer dog and the search of the backpack. He excluded the evidence and acquitted the accused. The Court of Appeal and the Supreme Court of Canada upheld the acquittal.

DISCUSSION QUESTIONS

1. Do you think the evidence should have been excluded? Why or why not?

2. What factors did you base your decision on?

EXCLUSION OF EVIDENCE

When the police have breached someone's rights, the *Canadian Charter of Rights and Freedoms* allows a judge to exclude evidence that was gathered as a result of the *Charter* violation.

Exclusion of evidence means that the judge or jury in a trial cannot consider that piece of evidence while making their decision. Where the trial is by jury, the jury will usually not even hear or see the evidence. The judge will decide – often before the trial starts – that it cannot be brought forward by the prosecutor either through a witness' testimony (for instance, by a police officer talking about what was found during a search) or as an exhibit (in the case of an item that was found during a search).

The authority for excluding evidence is found in s. 24(2) of the *Charter*. The section reads:

Where ... 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 Supreme Court of Canada (SCC) has established a legal test to determine whether the admission of evidence obtained through a *Charter* breach would bring the administration

of justice into disrepute (i.e. harm the reputation of the justice system). The SCC first set out a test for determining whether evidence obtained by a *Charter* breach should be excluded under s. 24(2) in the case of *R v Collins* (1987). In 2009, the SCC established a new test for determining the exclusion of evidence in the case of *R v Grant*.

THE CASE OF *R v GRANT*

In *R v Grant*, 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.

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

The SCC 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*.

THE GRANT TEST – 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*. 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 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. The seriousness of the *Charter*-infringing state conduct

This inquiry focuses on the severity of the state conduct leading to the *Charter* breach. It includes an analysis of whether the breach was deliberate and whether the officers were acting in good faith. The more severe or deliberate the police conduct that led to the *Charter* violation, the more likely the evidence will be excluded.

In *Grant*, the SCC ruled that the police did not deliberately intend to illegally detain the accused. Furthermore, the court found no evidence that the accused was a target of racial profiling or any other discriminatory police practices.

2. The impact of the breach 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. The more serious the infringement on the accused rights, the greater the likelihood the admission of the evidence would undermine the justice system.

In *Grant*, the court concluded that the impact of the *Charter* breach on Mr. Grant's protected interests was significant; however, the breach was not at the most serious end of the scale to warrant excluding the evidence of the marijuana and the gun.

3. Society's interest in the adjudication of the case on its merits

This inquiry focuses on how reliable the evidence is in light of the nature of the *Charter* breach, the importance of the evidence to the Crown's case and the seriousness of the offence.

In *Grant*, the SCC held that the firearm was highly reliable evidence and essential to uncovering the truth in the case.

CONCLUSION

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. Following this case, this analysis became the new legal test for determining whether or not evidence obtained through a *Charter* breach should be excluded.

SUMMARY OF THE *GRANT* TEST

Evidence is obtained in breach of a *Charter* right

Section 24(2) deals with the exclusion of evidence

KEY QUESTION: Would a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter*, conclude that the admission of the evidence would bring the administration of justice into disrepute?

Three Lines Of Inquiry:

1. The seriousness of the *Charter*-infringing state conduct

This inquiry focuses on the severity of the state conduct leading to the *Charter* breach. It includes an analysis of whether the breach was deliberate and whether the officers were acting in good faith, uncovering the truth in the case.

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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 the adjudication of the case on its merits

This inquiry focuses on how reliable the evidence is in light of the nature of the *Charter* breach, the importance of the evidence to the Crown's case, and the seriousness of the offence.

After making an assessment under each of the three lines of inquiry, would the admission of evidence obtained by *Charter* breach bring the admin of justice into disrepute?

Yes

No

Evidence excluded pursuant to s. 24(2)

The evidence is admitted

DISCUSSION QUESTIONS

1. 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. 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?
3. 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?

APPLYING THE GRANT TEST

R v Harrison, 2009 SCC 34

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

In a decision rendered concurrently with *R v Grant*, 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.

Review the facts of the case and apply the steps of the *Grant* test. Compare your answers with the decision given by the SCC to see if you gave the same ruling.

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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 signaling 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.

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.

Use the chart below to apply the *Grant* test to this case. When you are finished, compare your analysis to the one given by the SCC.

APPLYING THE *GRANT* TEST

Was the evidence obtained in breach of a *Charter* right?

Section 24(2) deals with the exclusion of evidence

KEY QUESTION: Would a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter*, conclude that the admission of the evidence would bring the administration of justice into disrepute?

Three Lines Of Inquiry:

1. The seriousness of the *Charter*-infringing state conduct

2. The impact of the breach on the *Charter*-protected interests of the accused

3. Society's interest in the adjudication of the case on its merits

After making an assessment under each of the three lines of inquiry, would the admission of evidence obtained by *Charter* breach bring the admin of justice into disrepute?

Yes

(circle)

No

Evidence excluded pursuant to s. 24(2)

The evidence is admitted

Reasons:

LOWER COURT DECISIONS

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*.

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 35kg 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.

SUPREME COURT OF CANADA DECISION

Writing for the majority, Chief Justice McLachlin held that the *Charter* breaches in this case were clear, and that the sole issue was whether the cocaine was properly admitted into evidence. The Court 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.

Was the evidence obtained in breach of a *Charter* right?

The SCC held that it was clear the appellant's rights under ss. 8 and 9 of the *Charter* were violated by the detention and search, as found by the trial judge. Given that the officer recognized prior to the detention that the appellant's SUV did not require a front licence plate, he should not have made the initial stop. The subsequent search of the SUV was not incidental to the appellant's arrest for driving under a suspension and was likewise in breach of the *Charter*.

Section 24(2) deals with the exclusion of evidence

KEY QUESTION: Would a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter*, conclude that the admission of the evidence would bring the administration of justice into disrepute?

Three Lines Of Inquiry:

1. The seriousness of the *Charter*-infringing state conduct

The majority found that the officer acted recklessly and displayed a blatant disregard for *Charter* rights. This conduct was on the serious end of the scale.

2. The impact of the breach on 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 SCC ruled that the impact was "significant".

3. Society's interest in the adjudication of the case on its merits

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

After making an assessment under each of the three lines of inquiry, would the admission of evidence obtained by *Charter* breach bring the admin of justice into disrepute?

Yes (circle) No

Evidence excluded pursuant to s. 24(2)

The evidence is admitted

Reasons: After balancing the three lines of inquiry, the majority held that the seriousness of the breach outweighed the reliability of the evidence. The SCC 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.

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 QUESTIONS

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. 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?
4. 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?