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Editorial

The Future of Section 24(2) of the Charter

The Supreme Court's pending decision from the appeal of the Ontario Court of Appeal's decision to admit conscriptive real evidence in *R. v. Grant* (2006), 209 C.C.C. (3d) 250 will be eagerly awaited by all our readers. The court's decision may well signal a new approach or even a new test for excluding unconstitutionally obtained evidence under s. 24(2).

The tests articulated by the Supreme Court in *R. v. Collins*, [1987] 1 S.C.R. 265 and *R. v. Stillman*, [1997] 1 S.C.R. 607 have many critics. The main concern has been that the court has gone beyond the spirit of s. 24(2) and created an automatic exclusionary rule with respect to conscriptive evidence. The rationale for the general rule of excluding conscriptive evidence is that its admission will adversely affect the fairness of the subsequent trial by requiring accused unconstitutionally to participate in their conviction and violating their right against self-incrimination.

The critics of the fair trial test outnumber its defenders, but there are some distinct virtues to the existing test. After having been applied for over 20 years, the test is well understood and quite predictable. Lawyers can predict that conscriptive evidence, often unconstitutionally obtained statements or bodily substances, will almost always be excluded. Before 1987, the s. 24(2) jurisprudence was an inconsistent mess. It seemed like each judge had his or her own views about what was required to bring the administration of justice into disrepute.

One unanticipated effect of either a relaxation or the abolition of the fair trial test would be to make s. 24(2) unpredictable. This would increase the need for and the length of *voir dires*. The accused would have to explore the reasons behind the police conduct in a search to establish bad faith and the seriousness of the violation in every case. The Crown will frequently attempt to justify the admission of conscriptive evidence on the basis of the good

faith of the police, the seriousness of the offence and the importance of the evidence.

Even if the appellate courts took an increasingly deferential approach to how the trial judge balances the competing factors, there will be more *voir dires* to determine where the balance of interests lies in the particular case. Taken by themselves, these concerns about predictability and efficiency are not decisive. Nevertheless, they should not be ignored in an age when many are concerned about the growing length of trials.

Another virtue of the existing fair trial test is that it captures situations such as that in *Grant* where a co-operative accused reveals the existence of evidence that could otherwise only be discovered by the police through an intrusive search that would constitute a serious violation of the Charter. Mr. Grant was a 18-year-old first-time offender who was detained for seven minutes and was eventually surrounded by three larger police officers. He was asked a number of questions including his name, address and whether he had been arrested. In response to such questions, he revealed that he was carrying drugs and a loaded revolver.

Going back to the widespread criticism of the pre-Charter cases of *R. v. Brownridge*, [1972] S.C.R. 926 and *R. v. Hogan*, [1975] 2 S.C.R. 574, there seems to be something unfair about giving unco-operative suspects the benefit of due process rights while denying such benefits to co-operative suspects who, perhaps out of fear or inexperience, help the police when they do not have to. Mr. Grant would have been better off if he had simply exercised his right to silence. If the police had searched him for drugs and the gun, this would likely have been held to be a serious Charter violation given the lack of grounds for a search or an arrest. Mr. Grant effectively convicted himself by truthfully answering the questions he was asked by the police.

The Chief Justice in her dissent in *R. v. Stillman* argued that it is a mistake to extend the right against self-incrimination beyond testimonial compulsion. There is certainly support for this proposition in pre-Charter law and the 5th Amendment jurisprudence. Nevertheless, the Charter, with its particular emphasis on rights that apply to detentions, interrogations and searches, is united by a basic principle that the state should not be allowed unconstitutionally to take advantage of suspects.

The fact that there are constitutional means to force suspects to incriminate themselves does not justify the use of unconstitutional forms of self-incrimination. Most constitutional forms of self-incrimination such as fingerprinting, DNA samples and testimony are regulated by legislation and/or the judiciary. Unconstitutional forms of self-incrimination most often result from the exercise of police discretion. Courts should be aware of the power imbalance between detainees such as Mr. Grant and the police.

Another argument of the Chief Justice that was adopted by the Ontario Court of Appeal is that one should take a qualitative approach to how much

the fairness of the trial is affected by the admission of unconstitutionally obtained evidence. Laskin J.A. concluded that the impact of admitting the gun in *Grant* was "at the less serious end of the scale" (at para. 59) because the gun was reliable real evidence and because the police misconduct was not serious.

The idea that the admission of unconstitutionally obtained conscriptive evidence renders the trial unfair is something of a misleading rhetorical flourish. Although the label is trial fairness, the real issue is the right against self-incrimination. Here a more absolutist approach makes sense. It is undeniable that the admission of the gun will allow the state to benefit from Mr. Grant's participation in helping the state to build the case against him. If Mr. Grant had remained silent, the police would likely not have found the gun. If they had found the gun, they would have violated the Charter in a most serious manner given their lack of grounds to search Mr. Grant.

The Ontario Court of Appeal in *Grant* placed considerable emphasis on the reliability of the evidence. Courts should, of course, be concerned with the reliability of evidence, but that is a factor that applies to all the rules of evidence. The courts should not wait for a Charter violation before excluding evidence that is unreliable.

Section 24(2) is built on the premise that reliable evidence will sometimes be excluded. The framers of the Charter rejected the pre-Charter law that allowed improperly evidence to be admitted if it was reliable.

Reliability in *Grant* is really a surrogate for the state and social interests that would be harmed by the exclusion of the gun. These interests are a valid factor under the third part of *Stillman*. It is difficult to overestimate the danger of guns. That said, s. 24(2) is concerned with the long term reputation of the administration of justice. For every case where unconstitutional conduct results in the discovery of important evidence, there will be an unknown number of cases where the unconstitutional conduct results in the discovery of no evidence. In most of these latter cases, there will be no effective remedy for the individual and no effective rebuke of the police conduct.

What will or what should the court do in Mr. Grant's case? The most radical step would be to jettison the fair trial test on the basis that the right against self-incrimination is limited to testimonial compulsion. This would be a rejection of 20 years of s. 24(2) jurisprudence, as well as considerable s. 7 jurisprudence.

The fair trial test would then only apply to unconstitutionally obtained statements and not all such statements would have the same effect on the fairness of the trial. In practice, most cases would depend on the balancing of the seriousness of the violation against the adverse effects of the evidence. Different judges will resolve this balance in different ways and appellate courts will likely defer to reasonable exercises of the trial judge's discretion.

Of course, the idea that exclusion of evidence is a discretionary remedy sits uneasily with the mandate that courts shall exclude unconstitutionally obtained evidence if its admission would bring the administration of justice into disrepute.

A less radical approach would be for the court to affirm *Stillman* but in a flexible form. There is some support for this approach both in the references to conscriptive evidence generally affecting the fairness of the trial and in the few cases where the court has admitted conscriptive evidence.

A more flexible test, however, may still have a destabilizing effect on the law. The court will need to craft some guidelines about when the lack of seriousness of the violation or the adverse effects of excluding evidence justifies the admission of unconstitutionally obtained conscriptive evidence.

One factor may be the good faith of the police, but this should not be decisive in every case. Consideration should be given to requiring the state to establish good faith as it will be in the best position to know what efforts were taken to ensure respect for the Charter.

The seriousness of the violation should not be assumed away in cases such as *Grant*. The fact that a suspect co-operates does not mean that the police have acted properly. All of the circumstances have to be considered in determining the seriousness of the violation. There may be a space between bad faith and good faith that still results in a violation that is unacceptable.

The adverse effects of excluding evidence cannot be simply measured by the seriousness of the offence charged without creating considerable tension with the presumption of innocence. The importance of the evidence combined with the seriousness of the offence will hold greater weight especially with respect to weapons and drug offences. At the same time, however, it would be an unprincipled "ends justify the means" approach to sanction a gun exception to s. 24(2).

Criticizing *Stillman* is easy. Devising workable and principled alternatives to it will be difficult. Indeed such an exercise may lead to a conclusion that *Stillman* is not so bad after all.

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