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Editorial

Section 24(2) of the Charter

This issue examines the evolving test for excluding unconstitutionally obtained evidence under s. 24(2) of the Charter in the wake of the Supreme Court's landmark decision in *R. v. Grant*, [2009] 2 S.C.R. 353.

The Supreme Court's recent decision in *R. v. Morelli*, [2010] 1 S.C.R. 253, underlines how the seriousness of the violation has now replaced the classification of the evidence as the most important factor in deciding whether evidence should be excluded. In *Morelli*, the Court held that child pornography obtained under a warrant should be excluded because of several misleading statements made by the police in obtaining the warrant. The Court reached this decision even though the trial judge did not characterize the Charter violation as deliberate and even though in *R. v. Beaulieu*, [2010] 1 S.C.R. 248, it stressed the need to defer to the trial judge's decisions under s. 24(2) including decisions made without the benefit of the decision in *Grant*.

Justice Fish for a 4:3 majority in *Morelli* stressed that the s. 8 violation was careless and unacceptable even if it was not wilful or even negligent. He concluded that:

[T]he repute of the administration of justice is jeopardized by judicial indifference to unacceptable police conduct. Police officers seeking search warrants are bound to act with diligence and integrity, taking care to discharge the special duties of candour and full disclosure that attach in *ex parte* proceedings. In discharging those duties responsibly, they must guard against making statements that are likely to mislead the justice of the peace. They must refrain from concealing or omitting relevant facts. And they must take care not to otherwise exaggerate the information upon which they rely to establish reasonable and probable grounds for issuance of a search warrant. *R. v. Morelli* 2010 SCC 8 at para 102.

The Court took a broad and systemic approach to determining the effect of misleading warrant practices on the administration of justice. It may be time

now for the Court candidly to recognize, as it recently did in the context of damages under s. 24(1) of the Charter in *Vancouver v. Ward*, 2010 SCC 27 at para. 29, that deterrence of Charter violations is a legitimate purpose of constitutional remedies.

Morelli, coupled with *R. v. Harrison*, [2009] 2 S.C.R. 494, suggests that courts will engage in a searching review of police and administration of justice conduct in determining the seriousness of the Charter violation. In *Morelli*, the Court held that misleading statements made in the warrant to obtain could bring the administration of justice into disrepute, while in *Harrison*, the Court considered misleading statements made by the police at trial a factor that favoured exclusion. It is noteworthy that important evidence of a serious crime was excluded in both cases.

The first article in this issue by Jonathan Dawe and Heather McArthur provides a comprehensive examination of the effects of *Grant* and its companion case on the exclusion of evidence under s. 24(2). It examines the effects of the decisions on the exclusion of evidence that was previously classified as conscriptive or non-conscriptive. It suggests that evidence like body and breath samples that used to be classified as conscriptive are now much more likely to be admitted, especially in cases where the judge is not persuaded that the violation is serious and even though such decisions will often leave the accused without a remedy for the Charter violation. The authors also argue that it will be more difficult to predict s. 24(2) decision-making under *Grant* than under the previous tests and the result may be more *voir dire*s.

Michael A. Johnston critically examines the changes from the Court's previous precedents of *R. v. Collins*, [1987] 1 S.C.R. 265 and *R. v. Stillman*, [1997] 1 S.C.R. 607 to the present regime under *Grant*. He suggests that the seeds of the approach taken in *Grant* can be found in Chief Justice McLachlin's dissent in *Stillman*. At the same time, he argues that the abandonment of the concept of conscriptive evidence may lead to an impoverished understanding of self-incrimination and justice, especially with respect to the admission of unconstitutionally obtained bodily substances. He relates the increased unwillingness to exclude bodily substances as opposed to statements to the truth-seeking functions of the criminal trial; he also suggests that they should not be placed above its justice-seeking functions. Johnston recognizes, however, that the Court's exclusion of evidence in *Harrison* and *Morelli* underlines its willingness to exclude evidence of serious crimes in cases where it finds a serious and unacceptable violation of the Charter.

The final article in the issue by Jordan Hauschildt provides a valuable and critical examination of the Supreme Court's treatment of the seriousness of the violation part of the test as it was administered before the Court's decision in *Grant*. He argues that the Court operated under a *de facto*

assumption of police good faith that is at odds with available sociological knowledge about how police frequently depart from rules including Charter rulings and their use of racial profiling. Hauschildt argues that exclusion in *Harrison* was an exceptional response to flagrant police misconduct.

The *Grant* decision did not make any formal legal changes to the seriousness of the violation test as it was previously applied by the Court. Nevertheless, recent decisions such as *Harrison* and *Morelli* in my view signal that the courts may take a more critical and searching approach to police conduct when determining whether evidence should be excluded under s. 24(2). In addition, the Court in the Charter damage context at least seems more comfortable with the idea that its remedial decisions may deter future Charter violations. The result is that the police may be put on trial in an increasing number of s. 24(2) *voir dire*s.

The ultimate decision whether to exclude evidence or not may frequently depend on the skill of counsel in attacking and defending police conduct and the attitudes of judges in assessing police conduct. The split decision in *Morelli* underlines the range of judicial judgment when assessing police conduct.

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