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## Editorial

### Determining the Seriousness of the Violation under Section 24(2) of the Charter

The debate about the virtues of rules and standards is an old one. Rules provide certainty but are inevitably over and under inclusive. Standards allow for discretion to be exercised depending on how purposes play out in different circumstances.

Before *R. v. Grant* (2009), 245 C.C.C. (3d) 1, [2009] 2 S.C.R. 353, 66 C.R. (6th) 1 (S.C.C.), the Supreme Court took a rule based approach to the exclusion of evidence under s. 24(2). The ultimate question often was whether evidence could be classified as conscriptive. The Court eventually saw the “fair trial” test as overinclusive in mandating the exclusion of evidence that was not obtained through a serious violation.

The *Grant* test made the seriousness of the violation the most important factor in deciding exclusion. The Court in a number of cases starting with the companion case of *R. v. Harrison* (2009), 245 C.C.C. (3d) 86, [2009] 2 S.C.R. 494, 66 C.R. (6th) 105 (S.C.C.) demonstrated that it was still prepared to exclude crucial evidence in serious cases if the violation was serious. The problem, however, is that the grounds for determining the seriousness of the violation remains something of a moving target.

Although the use of standards can be defended on the basis that s. 24(2) requires judges to consider all the circumstances and there is a spectrum of seriousness, the law needs some degree of certainty so that those who are governed by it from police officers to prosecutors to trial judges can make meaningful and educated predictions. Standards that degenerate into strong forms of discretion are not helpful.

It is possible to make the determination of the seriousness of the violation more rule like. The American courts have created a number of good faith exceptions to their exclusionary rules, but have defined discrete categories and rationales for these doctrines. They have also been clear about the deterrent purpose of the exclusionary rule. Good faith and the purposes of exclusion in Canada, however, are more amorphous.

At various times the Court has accepted not only good faith reliance on warrants and statutes, but also good faith reliance on police practice and judicial decisions. As with standards generally, this approach can be defended on the basis that it is sensitive to the facts of the particular case. At the same time, it makes s. 24(2) less predictable. It fails to send clear signals to all concerned about the indicia of good faith, reasonableness or seriousness of the violation.

Two recent decisions — *R. v. Spencer*, 2014 SCC 43, 2014 CarswellSask 342 (S.C.C.) and *R. v. Vu* (2013), 302 C.C.C. (3d) 427, [2013] 3 S.C.R. 657, 2013 SCC 60 (S.C.C.) — continue a trend seen in *R. v. Cole* (2012), 290 C.C.C. (3d) 247, [2012] 3 S.C.R. 34, 96 C.R. (6th) 88 (S.C.C.) and *R. v. Aucoin* (2012), 290 C.C.C. (3d) 448, [2012] 3 S.C.R. 408, 97 C.R. (6th) 294 (S.C.C.) of the Court seeing uncertainty in the law as a factor that strongly cuts against exclusion. This trend is somewhat ironic given that the courts and Parliament have created much of this uncertainty by leaving so much police conduct to ex post case-by-case regulation.

*Spencer* and *Vu* are both important cases where the Court recognizes strong privacy interests in the computer and in doing so help update s. 8 to match the computer age. The Court's reluctance to exclude evidence in both cases may be related to the onerous new standards that the cases will now place on the police to obtain warrants authorizing searches of both computers and subscriber information. It should now be clear to reasonable police officers that warrants are required.

In *Spencer*, the Court held that subscriber information obtained without a warrant in a child pornography case should not be excluded. The Court stressed that the police officer had not engaged in willful or flagrant disregard of the Charter. The Court noted that the police officer "was aware that there were decisions both ways on the issue of whether this was a legally acceptable practice". The Court stressed that the police officer's belief while erroneous "was clearly reasonable", *ibid.*, at para. 77, as demonstrated by the findings of the trial judge and the Court of Appeal in the state's favour. This combined with the seriousness of the child pornography offences justified the admission of the subscriber information despite its damage to the accused's interest in privacy and anonymity.

The Court clearly holds that the police's subjective belief that what they were doing is lawful is not sufficient, but does very little to flesh out what is required to find that the police acted reasonably and in good faith. Should a police officer who is apparently aware of conflicting lines of judicial authority seek legal advice? Can the Court examine that legal advice? Should the police err on the side of caution with respect to violating the Charter? Does the seriousness of the offence or the seriousness of the intrusion on Charter values affect the standard of reasonableness in determining the seriousness of the violation? Is unreasonable police conduct

per se a serious violation that is not committed in good faith? These are all unanswered questions.

Justice Cromwell states in *Spencer* that he “would not want to be understood to be encouraging the police to act without warrants in “gray areas””, *ibid.*, at para. 77. In the absence of more guidance about why the police conduct was reasonable, however, he has identified but not rectified the incentives that may be given to the police in cases where they have some legal authority on their side.

The idea that the police should be excused just because their conduct was upheld at trial and on appeal is problematic. Most disagreements at the level of the Supreme Court are reasonable ones but judgments must be made. A lack of a remedy should not be a consolation price for the state simply for generating some dissent among the judiciary. Such an approach could promote a casual attitude toward Charter compliance. There is a danger that the state will plow ahead whenever they have an arguable case that their conduct is Charter compliant.

In *R. v. Vu* (2013), 302 C.C.C. (3d) 427, [2013] 3 S.C.R. 657, 2013 SCC 60 (S.C.C.), the Court found that a search warrant did not extend to a search of the computers in the house but held that the evidence obtained through the unconstitutional search should not be excluded. Cromwell J. again stressed that “the state of the law with respect to the search of a computer found inside premises was uncertain when police carried out their investigation. The Langley department had a policy of searching computers found on premises and there was no clear law prohibiting them from doing so”. *Ibid.*, at para. 69.

In *Vu*, the Court relied on the trial judge’s finding that the police subjectively believed that the warrant authorized the computer search without the important gloss that the police belief must be reasonable. The approach in *Spencer* in requiring police beliefs to be reasonable is clearly superior. The police officer’s subjective belief may be a relevant circumstance, but it should not be determinative of the seriousness of the violation.

The reluctance to exclude evidence in the above cases can be contrasted with the Court’s unanimous decision in *R. v. Taylor*, 2014 SCC 50, 2014 CarswellAlta 1155 (S.C.C.) to exclude blood samples taken from an accused who was not provided with an opportunity to consult counsel.

The Court held that even though there was no “willful disregard” of s. 10(b) that there was a “a significant departure from the standard of conduct expected of police officers” and that such conduct “cannot be condoned”, *ibid.*, at para. 39. The issue here seems to be not reasonableness but whether there is a significant departure from reasonableness.

In three cases, we have suggestions of three different standards for determining the seriousness of the violation: the officer’s subjective beliefs in

*Vu*; subjective and reasonable beliefs in *Spencer* and a significant departure from reasonableness — a kind of gross negligence in *Taylor*.

It may be an error to insist on *mens rea* type precision and it may be that all three findings have some relevance under the s. 24(2) test. Nevertheless, when it comes to what is now the critical test of the seriousness of the violation for determining whether evidence will be excluded more clarity from the Court would be helpful.

The *Spencer* standard of both subjective belief and a reasonable basis for that belief seems appropriate to encourage compliance with the Charter. The subjective standard in *Vu* encourages the police to be ignorant of the Charter. The marked or significant departure standard in *Taylor* may, especially when combined with the excusing nature of uncertainty in the law, often result in the state being excused for simply having an some argument that it was complying with the Charter. In any event, greater clarity would assist all of us with an interest in s. 24(2).

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