

Editorial

The Future of Exclusion of Evidence after *Grant* and *Bjelland*

The Supreme Court's decision in *R. v. Grant* (2009), 245 C.C.C. (3d) 1 has changed the face of s. 24(2). The court has unanimously rejected the concept that evidence conscripted from the accused should generally be excluded to protect the accused's right to a fair trial and right against self-incrimination.

In all cases now, judges will have to weigh three groups of factors: (1) the seriousness of the violation, (2) its impact on Charter-protected interests and (3) society's interest in adjudicating the case on its merits.

The most immediate difference of the new test will likely be in cases involving bodily samples that have been conscripted from the accused. There will no longer be a general exclusionary rule in such cases. Much will depend on the seriousness of the violation, the impact on bodily integrity and the importance of the evidence.

In particular, the court has indicated that automatic exclusion of unconstitutionally obtained breath tests is over (*Grant*, at paras. 106 and 111). Given the non-intrusive nature of breath tests, such evidence will likely only be excluded where the violation is particularly serious. In contrast, there will still be a general but not automatic rule that unconstitutionally obtained statements will be excluded: *ibid.*, at paras. 92, 96 and 98.

The determination of the seriousness of the violation will require a potentially far-reaching examination of police conduct and what the police knew or ought to have known. In some cases, a *R. v. McNeil* application for disclosure of an officer's disciplinary records may be relevant.

In *Grant*, a gun that could have previously been classified as conscriptive evidence because it was derived from an unconstitutionally obtained statement was admitted in large part because the law regarding investigative detention was unclear at the time of the violation.

The court's exclusion of 35 kg of cocaine in *R. v. Harrison* (2009), 245 C.C.C. (3d) 86 demonstrates that it would be wrong to think that reliable and determinative evidence will no longer be excluded in serious cases. The

court found that the officer's blatant violation was aggravated by his misleading evidence at trial. Query whether this may make the police more willing to admit and explain their mistakes in court? In any event, most *voir dire*s will consider competing perspectives on the seriousness of the violation and police conduct.

The court affirmed that the relevant reference point for exclusion is a reasonable person concerned with the long-term repute of the administration of justice. The reasonable person, however, remains elusive and controversial. The traffic stop and search that affirmed the officer's suspicions about a rental car in Ontario two days out of Vancouver in *Harrison* may strike some reasonable people as less serious than the aggressive investigative stop and detention of a 17-year-old African Canadian near a high school by three police officers in *Grant*.

The discretion of the trial judge emerges as a more important factor under *Grant* than under *R. v. Stillman*, [1997] 1 S.C.R. 607. The court held that "no overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible . . . Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to [the] ultimate determination." (*R. v. Grant*, at para. 86).

But how will appellate discretion to the trial judge's balance of competing factors play out in practice? The court's subsequent decision in *R. v. Bjelland* (2009), 246 C.C.C. (3d) 129 suggests that there may be no easy or consistent answers to this question. *Bjelland* did not involve s. 24(2), but whether evidence of two witnesses could be excluded under s. 24(1) as a remedy for delayed disclosure in another case involving large amounts of cocaine.

Rothstein J. (McLachlin C.J.C., Le Bel and Deschamps JJ.) held that the trial judge had erred by excluding the witnesses' testimony because exclusion of evidence, like stays of proceedings, should only be ordered where less intrusive remedies such as adjournment or disclosure orders would not remedy unfairness in the trial process or where exclusion is necessary to maintain the integrity of the justice system: *ibid.*, at para. 24.

On the facts of the case, Rothstein J. held that the accused was not denied a fair hearing simply because late disclosure meant that he could not cross-examine the witness at the preliminary inquiry and after election. Judicial integrity was not engaged because the trial judge found that Crown counsel had not been unethical or malicious in delaying disclosure because of concerns about witness safety and an ongoing investigation.

Fish J. (Binnie and Abella JJ. concurring) dissented. He stressed that the court should have deferred to the trial judge's exercise of discretion. On the merits, he concluded that it was wrong to impose a more rigid test on the exclusion of evidence under s. 24(1) than the court had imposed under s. 24(2) in *Grant*, and he stressed that exclusion of evidence was a less drastic remedy than a stay of proceedings.

What does *Bjelland* tell us about *Grant*? It tells us that the underlying attitudes of judges towards exclusion of relevant and reliable evidence because of Charter violations will make a difference. Moreover, they will vary from judge to judge. The *Bjelland* majority placed a higher priority on the truth-seeking function of the trial than the minority. Indeed, the minority explicitly warned that the determination of truth in the criminal process may come at too high a cost: *ibid.*, at para. 65.

Bjelland also indicates some of the practical difficulties that appellate courts will face in reviewing discretionary decisions whether to exclude evidence. The majority seemed to succumb to the temptation to find an error of law in the face of an exclusionary decision that resulted in an acquittal for a serious offence. The court in *Harrison* also had no problem in finding a legal error in the trial judge's decision because it was scandalized by the seriousness of the Charter violation.

The legal test in *Grant* as it stands now is relatively clear, but appellate courts will be tempted to add to it to justify intervention. Areas such as discoverability, the general rule for exclusion of unconstitutionally obtained statements, the relevance of the seriousness of the offence and the test for determining when the police ought to know the legal limits of their powers are some obvious candidates for appellate refinement of the *Grant* test.

Appellate deference is easier to profess in the abstract than to practice. The *Bjelland* minority professed that it did not have to "defend the trial judge's choice of remedy". A judge could equally have chosen a disclosure order and an adjournment as the appropriate remedy, and the appellate courts should defer to either exercise of appellate deference: *ibid.*, at para. 57.

But the sustainability of such an agnostic position is doubtful. The minority seemed happy with deferring to the exercise of remedial discretion because it seemed to support exclusion in this case. In any event, the *Bjelland* majority seemed to stand against the hard rule of appellate deference under s. 24(1). There is no reason why the *Bjelland*-qualified approach to appellate deference will not be applied to s. 24(2). *Harrison* underlines that trial judges will not necessarily have the last word in striking the s. 24(2) balance.

The combined result of *Grant*, *Harrison* and *Bjelland* is that lawyers will have to learn new legal tests that govern the exclusion of evidence under either s. 24(1) or s. 24(2) of the Charter. Appellate deference is a part of both tests, but it will be qualified not only by appellate judges' concerns about the application of the relevant legal tests, but by their impressions of the justice of the particular decision made at trial.

To be sure, the new legal tests for the exclusion of evidence matter. But these cases also suggest that the underlying attitudes of both trial and appellate judges towards exclusion matter as well.