

Section 24(2) Charter: the “revised framework” for determining the admissibility of evidence

Part 4.1: Investigative detention not justified on a “hunch”

*R. v. Harrison (2009)*¹

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I. The sec. 24(2) Charter Pendulum Swings Back

On July 17, 2009, the SCC reversed a controversial Ontario Court of Appeal decision in *R. v. Harrison* which dealt with the police seizure of 35 kg of cocaine during a traffic stop. Despite a “flagrant” Charter violation, the Ont. CA had admitted the seized cocaine because the offence was more severe than the Charter violation. This ruling marked a significant sec. 24(2) Charter pendulum swing.

However, in July of this year, by applying the new sec. 24(2) Charter decision-making model established in *R. v. Grant (2009)*, the Supreme Court of Canada excluded the drugs, allowed the accused’s appeal, and acquitted the accused.

II. Review

Offence: Trafficking cocaine

Circumstances: Following a fight with his wife in Toronto, the accused flew to Vancouver with a friend. After arriving in Vancouver, he reconciled with his wife during a telephone conversation and decided to return home.

The accused rented an SUV at the Vancouver airport and began the drive to Toronto with his friend. They drove continuously, sharing the driving. The accused did not check whether his own travel bag was in the car when he left Vancouver, nor did he notice two cardboard boxes in the rear of the vehicle.

Two days into the drive, the accused was driving near Kirkland Lake. A uniform police officer, with four years experience, saw the SUV leading a line of eight or nine vehicles. The SUV was driving at the speed limit but it was missing a front licence plate. The officer decided to stop the vehicle. He activated his emergency lights and positioned himself directly behind the SUV. At that time he noticed that the SUV had an Alberta licence plate. Although the officer knew that it was not an offence to drive a vehicle without a front licence plate in Alberta, he decided to stop the vehicle. His reasons for stopping the car were explained during the following testimony at the voir dire: (from the transcript):

The Court: I just have one question, and that is, when you determined that the vehicle, or the operator of the vehicle, wasn’t committing any offence, why did you pull him over?

Officer: Ah, continuation of the, ah, the traffic stop. I had my emergency lights already going, um, the, ah, the vehicles behind me. I had been pulling over. Um, my integrity was,

¹ SCC 34 DOCKET: 32487 DATE: 20090717

ah, was there, the integrity for police, and also now to check up on, to make sure that this person is eligible to drive in the Province of Ontario.”

After stopping the vehicle, the officer asked the driver (the accused) for his driver's licence, ownership, insurance, and rental agreement. The accused produced everything except his driver's licence. While the accused searched for his driver's licence, the officer noticed that the SUV was messy and littered with food and drink containers, giving it what he termed a “lived-in look.” He inferred that the occupants of the SUV had been travelling virtually “non-stop,” with only quick breaks to obtain food.

The questioning continued. The accused told the officer his address and his date of birth, and indicated that he had met his friend a few months earlier, through a mutual friend. During this questioning, the officer saw clothing and bags on the back seat of the SUV and a silhouette of two boxes and bags in the rear compartment.

The officer then questioned the accused's friend separately. He identified himself with an Ontario driver's licence and told the officer he had travelled with the accused to Vancouver three days earlier and he had known the accused, through a friend in Vancouver, for a “year or more.” This version of how they knew each other contradicted the accused's version.

The officer conducted CPIC and PARIS checks that revealed the accused was a “suspended driver-served.” The accused's driver's licence had been suspended and he had been served with formal notice of the suspension by an O.P.P. officer eight days earlier.

The officer arrested the accused for driving while his driver's licence was suspended. He decided to search the vehicle incident to the arrest because the accused had not “identified himself properly in the search for a driver's licence,” which he believed “could be contained within the motor vehicle.” The officer told the accused that he was going to search for the missing licence.

The officer asked the accused if there were drugs or weapons inside the vehicle. The accused said no. The reasons why the officer asked this question were significant. From the transcript:

Q. Was there a reason why you asked that question?

A. Ah, just for personal safety reasons. Um, just like prior to, ah, arresting an individual on the street, I'll ask if they have any drugs or weapons on them for my own safety. I don't want to be, ah, pricked by a needle, or, um, pull a trigger on a handgun or anything like that, that I don't know is around.

Q. All right. Were there other factors that you thought of, apart from safety reasons, to mention to Mr. Harrison that there were drugs or weapons inside the vehicle.

A. Well, I know from my, ah, training experience, um, including and being inside the Highway Drug Interdiction Course, that, um, Vancouver, being a port city is a city where plenty of drugs are imported into Canada. I also know that Toronto is a destination city where the drugs can be distributed from. Ah, there was a short trip; the rental vehicle

was from, ah, Thursday; um, the stop was on Sunday, which, ah, would mean that they had to drive straight through from Vancouver without stopping. Ah, this raised my suspicion, ah, that there could be a possibility of, ah, drugs or weapons, ah, cash, or a combination of all three inside that vehicle.

Next, the officer asked the accused's friend what was in the two boxes in the vehicle's rear compartment. He said they contained dishes and books for the friend's mother. The officer examined by lifting the boxes, which were taped shut. He told the accused's friend that the boxes seemed solid and he could not hear anything that sounded like dishes. The officer again asked the friend if there were weapons or drugs. From the transcript:

Q. What was [the friend's] reaction to your question?

A. Um, he didn't really have ... an answer to the question. And then I, I repeated the question – if there was any drugs or weapons. And he kind of in a really nervous way, looked down at the ground, and, ah, and kicked the dirt, and he just said, “yeah.” And, ah, I asked him what was in it, and he flagged that he was not sure what was inside these boxes.

The officer opened one of the boxes and saw “two bricks of a white substance believed to be cocaine.” He arrested both the accused and his friend for possession of cocaine for the purpose of trafficking and seized 77 pounds of cocaine. He read the accused the standard caution. According to the officer, “Harrison advised me that he didn't know about, ah, about the cocaine. He said that, ah, [the friend] had offered to give him a ride to Ontario. He agreed and drove with him. Ah, he also said that the boxes were there from [the friend].”

Trial: The accused was convicted. The trial opened with a *voir dire*. Three officers testified: the arresting officer and two back-up officers. Neither accused testified.

The trial judge ruled that two *Charter* violations had occurred:

- i. s. 9 *Charter* violation: the two accused persons were arbitrarily detained, and
- ii. s. 8 *Charter* violation: the search of the vehicle was unreasonable.

The severity of these *Charter* violations were “extremely serious.” A *Collins*² analysis followed resulting in the admission of the drugs because the *Charter* violations “**pale in comparison to the criminality involved in the possession for the purposes of distribution of 77 pounds of cocaine....**”

Later in the trial, following a motion for a directed verdict, the accused's friend was acquitted because the trial judge concluded that there was no evidence that he exercised control over the boxes in the vehicle. However, the accused was convicted because:

- i. the accused had knowledge and control of the drugs when stopped by the police,
- ii. the story provided by the accused was, “so unlikely and incredible that I find that I must reject it entirely.”

² R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.).

Not only was the accused fully aware of the contents of the boxes, the trial judge stated that any failure to investigate would have been negligent, constituting wilful blindness.

III. Ontario Court of Appeal

The accused's appeal was denied. The trial judge's decision was upheld.

IV. SCC decision

Applying the new sec. 24(2) Charter decision-making model from *Grant* (2009), the SCC allowed the accused's appeal, excluded the drugs, and acquitted the accused. The reasons were as follows:

1. The *Charter* violations in this case were "clear." Sections 8 and 9 *Charter* were violated by the detention and search.

Translation: The circumstances did not authorize an investigative detention.

2. *"The officer recognized prior to the detention that the appellant's S.U.V. did not require a front licence plate, he should not have made the initial stop."*

Translation: It should be noted that the officer should not have made the initial stop for that reason. The HTA of Ontario authorizes a traffic stop to check for sobriety and to determine if the driver is licensed.

3. *"A vague concern for the "integrity" of the police, even if genuine, was clearly an inadequate reason to follow through with the detention. The subsequent search of the S.U.V. was not incidental to the appellant's arrest for driving under a suspension and was likewise in breach of the Charter. While an officer's "hunch" is a valuable investigative tool – indeed, here it proved highly accurate – it is no substitute for proper Charter standards when interfering with a suspect's liberty."*

Translation: The end does not justify the means when the belief constitutes only a "hunch."

4. *"Breaches of the Charter established, the question is whether the evidence thereby obtained should be excluded under s. 24(2) of the Charter. The test set out in s. 24(2) is simply stated: would the admission of the evidence bring the administration of justice into disrepute? Grant identifies three lines of inquiry relevant to this determination. Once again, they are: (1) the seriousness of the Charter-infringing state conduct (2) the impact of the breach on the Charter-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits."*

Translation: The Ont. CA admitted the drugs using the old model. However, the new model applies.

Applying the "New Model"

Step #1. Classify the severity of the *Charter* violation.

In this case, it was major because the trial judge described it as “*brazen, “flagrant” and “very serious”*”.

Police misconduct has a “*spectrum*” of classifications that include: (a) blameless conduct (b) negligent conduct (c) conduct demonstrating a blatant disregard for *Charter* rights

“Here, it is clear that the trial judge considered the Charter breaches to be at the serious end of the spectrum. On the facts found by him, this conclusion was a reasonable one. The officer’s determination to turn up incriminating evidence blinded him to constitutional requirements of reasonable grounds. While the violations may not have been “deliberate”, in the sense of setting out to breach the Charter, they were reckless and showed an insufficient regard for Charter rights. Exacerbating the situation, the departure from Charter standards was major in degree, since reasonable grounds for the initial stop were entirely non-existent.

As pointed out by the majority of the Court of Appeal, there was no evidence of systemic or institutional abuse. However, while evidence of a systemic problem can properly aggravate the seriousness of the breach and weigh in favour of exclusion, the absence of such a problem is hardly a mitigating factor.

I note that the trial judge found the officer’s in-court testimony to be misleading. While not part of the Charter breach itself, this is properly a factor to consider as part of the first inquiry under the s. 24(2) analysis given the need for a court to dissociate itself from such behaviour. As Cronk J.A. observed, “the integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s. 24(2) of the Charter. Few actions more directly undermine both of these goals than misleading testimony in court from persons in authority” (para. 160).

In sum, the conduct of the police that led to the Charter breaches in this case represented a blatant disregard for Charter rights. This disregard for Charter rights was aggravated by the officer’s misleading testimony at trial. The police conduct was serious, and not lightly to be condoned.

Translation: The Charter violation was deliberate. This is a point-of-reference of the worst type of Charter violation.

Step #2. Classify the *impact on the Charter-Protected Interests of the Accused*
The impact was “significant, although not egregious...”

Step #3. Classify *society’s interest in truth-seeking*.

In this case, society’s interest was strong, favouring admission of the drugs. Step #3 is determined by factors including reliability of the evidence and its importance to the Crown’s case.

The drugs were “highly reliable” and were “critical evidence, virtually conclusive of guilt on the offence charged.” But, “the evidence cannot be said to operate unfairly having regard to the truth-seeking function of the trial.”

“While the charged offence is serious, this factor must not take on disproportionate significance. As noted in Grant, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, the public also has a vital interest in a justice system that is beyond reproach, particularly where the penal stakes for the accused are high. With that caveat in mind, the third line of inquiry under the s. 24(2) analysis favours the admission of the evidence as to do so would promote the public’s interest in having the case adjudicated on its merits.’

Balancing the Factors

From the judgment: *“I begin by summarizing my findings on the three factors in Grant. The police conduct in stopping and searching the appellant’s vehicle without any semblance of reasonable grounds was **reprehensible**, and was aggravated by the officer’s misleading testimony in court. The Charter infringements had a significant, although not egregious, impact on the Charter-protected interests of the appellant. These factors favour exclusion, the former more strongly than the latter. On the other hand, the drugs seized constitute highly reliable evidence tendered on a very serious charge, albeit not one of the most serious known to our criminal law. This factor weighs in favour of admission.*

*The balancing exercise mandated by s. 24(2) is a **qualitative one, not capable of mathematical precision**. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.*

In my view, when examined through the lens of the s. 24(2) analysis set out in Grant, the trial judge’s reasoning in this case placed undue emphasis on the third line of inquiry while neglecting the importance of the other inquiries, particularly the need to dissociate the justice system from flagrant breaches of Charter rights. Effectively, he transformed the s. 24(2) analysis into a simple contest between the degree of the police misconduct and the seriousness of the offence.

The trial judge placed great reliance on the Ontario Court of Appeal’s decision in Puskas. However, the impact of the breach on the accused’s interests and the seriousness of the police conduct were not at issue in Puskas; Moldaver J.A. opined that if there was a breach of s. 8, it was “considerably less serious than the trial judge perceived it to be”, the police having fallen “minimally” short of the constitutional mark

(para. 16). In those circumstances, the public interest in truth-seeking rightly became determinative.

This case is very different. The police misconduct was serious; indeed, the trial judge found that it represented a “brazen and flagrant” disregard of the Charter. To appear to condone wilful and flagrant Charter breaches that constituted a significant incursion on the appellant’s rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it. In this case, the seriousness of the offence and the reliability of the evidence, while important, do not outweigh the factors pointing to exclusion.

As Cronk J.A. put it, allowing the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis “would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the Charter and, in effect, declare that in the administration of the criminal law ‘the ends justify the means’”(para. 150). Charter protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences. In relying on Puskas in these circumstances, the trial judge seemed to imply that where the evidence is reliable and the charge is serious, admission will always be the result. As Grant makes clear, this is not the law.

*Additionally, the trial judge’s observation that the Charter breaches “pale in comparison to the criminality involved” in drug trafficking risked the appearance of turning the s. 24(2) inquiry into a contest between the misdeeds of the police and those of the accused. The fact that a Charter breach is less heinous than the offence charged does not advance the inquiry mandated by s. 24(2). **We expect police to adhere to higher standards than alleged criminals.***

In summary, 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. It should have been excluded.

Translation: “Flagrant” Charter violations are more serious than society’s interest in the truth. Despite the severity of the drug offence, the drugs were excluded to send a message to the police – *don’t be “brazen.”*

V. Conclusion

Justify your belief with legitimate, concrete reasons and authorities.

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