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Tainted Evidence Test Revisited: SCC

On July 17, 2009 the Supreme Court of Canada released judgments in four companion cases dealing with *Charter* challenges to the admission of evidence: *R. v. Grant*, 2009 SCC 32; *R. v. Suberu*, 2009 SCC 33; *R. v. Shepherd*, 2009 SCC 35; and *R. v. Harrison*, 2009 SCC 34. In *Grant* the court sets out a new s.24(2) framework for exclusion of illegally obtained evidence. Three issues are relevant to determining whether the admission of the evidence would bring the administration of justice into disrepute: (1) the seriousness of the *Charter*-infringing 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. Courts are tasked with balancing these concerns. (para.71)

In three out of four cases the Supreme Court allowed the admission of illegally obtained evidence, upholding lower court convictions for firearms offences (*Grant*) and possession of stolen property (*Suberu*), and dismissing an appeal from an order for a new trial on impaired driving charges (*Shepherd*). In *Harrison*, however, the court excluded evidence of a four million dollar cocaine seizure, finding that "the conduct of the police that led to the *Charter* breaches in this case represented a blatant disregard for *Charter* rights" which was "aggravated by the officer's misleading testimony at trial." (para.27). The court went on to hold that "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." (para.42)

Although there is consensus that the new approach is an improvement over the old rules of conscripted and non-conscripted evidence set out in *R. v. Collins*, [1987] 1 S.C.R. 265 and *R. v. Stillman*, [1997] 1 S.C.R. 607, commentators differ on how it will impact the criminal justice system. The following articles identify some of the issues and viewpoints:

Friday's Supreme Court of Canada Judgments: For Civil Libertarians, Like a Breath of Fresh Air by James Stribopoulos, posted July 20, 2009 on The Court

SCC decision in R. v. Grant: Do the ends justify the means? Slaw article by Edward Prutschi, posted July 17, 2009

Severing Ties: Grant's New Exclusionary Framework Applied in Harrison by Daniel Del Gobbo, posted July 22, 2009 on The Court

It's Not A Post-Racial World: R. v. Suberu and the Failure of Objectivity by Christopher Bird, posted August 14, 2009 on The Court

The SCC Focuses on a Section 8 Analysis in R. v. Shepherd by Sona Dhawan, posted August 3, 2009 on The Court

Case Report - SCC alters section 24(2) test...applies it in search and seizure case, posted July 19, 2009 on All About Information

New test for tainted evidence by Robert Todd, *Law Times* article, July 27, 2009

Lifchus Charge May Need Elaboration: SCC

In *R. v. Layton*, 2009 SCC 36 a majority of the Supreme Court upheld the Manitoba Court of Appeal decision (2008 MBCA 118) quashing a sexual assault conviction and ordering a new trial. At the original trial the judge responded to the jury's request for clarification on the standard of proof by repeating the standard *Lifchus* charge and by indicating that every attempt to explain the words "reasonable doubt" leads to more confusion. The Supreme Court agreed that the trial judge had erred in not providing a responsive answer and in discouraging further questions from the jury. This raised "a concern that the verdict may not have been based on a proper understanding of the standard of proof and that there was therefore a miscarriage of justice." (para.33) For a commentary on the case see:

R. v. Layton: Questioning Lifchus "Beyond a Reasonable Doubt" by Daniel Del Gobbo, posted August 12, 2009 on The Court

Discretion to Exclude Late Disclosed Evidence Constrained: SCC

In *R. v. Bjelland*, 2009 SCC 38 a narrow (4:3) majority of the Supreme Court of Canada introduced a new standard for the exclusion of late disclosed evidence under s.24(1) of the *Charter*. The majority held at para.24 that:

> a trial judge should only exclude evidence for late disclosure in exceptional cases: (a) where the late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) where exclusion is necessary to maintain the integrity of the justice system. Because the exclusion of evidence impacts on trial fairness from society's perspective insofar as it impairs the truth-seeking function of trials, where a trial judge can fashion an appropriate remedy for late disclosure that does not deny procedural fairness to the accused and where admission of the evidence does not otherwise compromise the integrity of the justice

system, it will not be appropriate and just to exclude evidence under s. 24(1).

Strong concerns about this development in the law are expressed in both the minority decision and in the following article:

Adjournment: The Only Remedy Available for Late Disclosure as Provided in R. v. Bjelland by Sona Dhawan, posted August 9, 2009 on The Court

Expanded Test for Unreasonable Verdicts Under s.686(1)(a)(i) CCC: Man. C.A.

In *R. v. Sinclair (T.)*, 2009 MBCA 71 (the manslaughter case in which a beating victim left on the road was later run over by a car), the Court of Appeal upheld the trial judge's application of the principles of causation, dismissing the conviction appeal of one of the accused. The court overturned the co-accused's conviction, however, finding that the trial judge had relied on mischaracterized evidence in reaching her verdict. In reaching this conclusion, the Court of Appeal opined that the majority view of the Supreme Court in *R. v. Beaudry*, 2007 SCC 5 expanded the scope of the unreasonableness test under s.686(1)(a)(i) of the *Criminal Code*:

> The majority view of the Supreme Court in *Beaudry* on unreasonableness under s. 686(1)(a)(i) where there are reasons of the trial judge is, in our opinion, so far as it applies to the present case, accurately reflected in the words of Deschamps J. in *Jackson*...." ("If the facts on which the judge relies are not in the record, the judge's reasons cannot serve as a basis for the verdict") (paras. 91 and 92).

Manslaughter Charge Dismissed in Rare Circumstances

In *R. v. Hernando*, 2009 MBQB 214, the court acquitted the accused of the manslaughter of her husband, who had died from a knife wound sustained during a domestic dispute. The court accepted the defence argument that the accused's possession of the paring knife to deter and dissuade the attack constituted an abatement of the public peace and not a danger to it. As a consequence, the accused could not be found to have possessed a weapon dangerous to the public peace and the Crown had not established beyond a reasonable doubt the requisite and stipulated predicate offence for the unlawful act of manslaughter. The court concluded, however, that it would be "rare indeed in an orderly and civil society that a death resulting from a knife possessed in the context of a domestic dispute will occur without a finding of some sort of criminal liability."

New Legislation

Manitoba is the first province to enact legislation addressing the issue of witness security. *The Witness Security Act*, S.M. 2008, c. 7, which supports the existing witness security program, came into force August 15, 2009. Among other things, it provides for such assistance as relocation, change of identity, counselling and financial support. It also sets penalties for disclosing the identity or location of a protected person.

Part 3 of *The Courts Administration Improvement Act*, S.M. 2005, c. 33 came into force July 31, 2009. The legislation amends *The Summary Convictions Act* to allow the province to place holds on vehicle registrations until individuals and businesses pay outstanding fines and fees for provincial offences. There is a three-month grace period on these provisions. In addition, the Act permits municipalities to set up screening officer programs, allowing for greater flexibility in administering their own bylaw

tickets. The practice of allowing courts to hear summary conviction guilty pleas via video technology is also enshrined in the new legislation.

Provincial Court Notices

The Provincial Court issued two new notices over the summer: Courtroom Decorum (July 6, 2009) and Judicial Case Management Conferences (July 7, 2009). The latter notice announces the implementation of a case management conference protocol applicable to all multi-day cases in Winnipeg and Portage la Prairie effective October 5, 2009. Procedures to be followed are outlined in the notice.

Publications

The following new publications may be of interest to criminal law practitioners:

Statistics Canada's *Police-Reported Crime Statistics in Canada, 2008*, published July 2009, includes information on both the volume and severity of police-reported crime in Canada. Among other things it reports that both the severity and the volume of crime in Canada (and particularly in Manitoba) went down in 2008.

Criminal Jury Trials: Challenge for Cause Procedures - Alberta Law Reform Institute Report, July 2009

DNA evidence can be faked, by Robert Todd, published August 24, 2009 on Law Times

Fall CPD Programs: LSM

The Law Society is offering several continuing professional development programs that will be of interest to criminal practitioners:

Frauds, Scams and Stings: Lawyers Beware! - Learn how to deal with the increasing threat of scams targeting lawyers at this lunch program, featuring law enforcement and insurance specialists who know what to do. The program takes place at the Law Society classroom from noon to 1:30 p.m. on September 23, 2009.

Feeling Conflicted? The Challenges of Conflicts in a Criminal Practice - A judge, Crown and defence counsel will discuss recent cases on conflicts in the criminal law context and offer practical suggestions for identifying and dealing with this growing problem before it is too late. The program takes place October 7, 2009, from 5:00 - 6:30 p.m. at the Law Society classroom.

Gathering and Preparing Evidence for Trial: 3rd Party Disclosure Applications - Experienced civil and criminal practitioners and a judge will share their expertise on preparing for trials and on applications for disclosure of third party records. The program takes place October 30, 2009 from 1:00 - 4:00 p.m.at the Law Society classroom.

The 2009 Isaac Pitblado Lecture looks at the future of law in Practising Law in the 21st Century: evolution or revolution. Keynote speakers include Professor Richard Susskind, OBE, author of *The End of Lawyers? Rethinking the Nature of Legal Services*, Jordan Furlong, editor of the *National* magazine and Dan Pinnington, practice advisor at LawPRO. The program takes place November 13 & 14, 2009 at the Fort Garry Hotel, Winnipeg. Register before September 15, 2009 to take advantage of the early bird discount.

Crown Defence Conference

The 7th Annual Crown Defence Conference takes place on September 17 and 18, 2009 at the Winnipeg Convention Centre. Among the topics to be addressed by speakers from across North America are: criminal gangs in Canada; the Goudge Inquiry; courtroom misconduct, and eyewitness memory and the effects of misleading information. For further information contact Heather Reay at 985-8189.