Section 24(2) Charter: Rule changes – the "revised framework."
Part 1

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Introduction

The Supreme Court of Canada changed the rules again, in a series of landmark decisions released on July 17, 2009. However, unlike the NHL, the criminal justice system cannot shut down for a year to re-group. Rule changes in frontline policing happen at an alarming rate and are on-going.

The landmark cases are:

- R. v. Grant[1]
- R. v. Suberu[2]
- R. v. Harrison[3]
- R. v. Shepherd[4]

The changes include:

1. A "revised framework" for determining the admissibility of evidence obtained after a Charter violation.
2. Re-wording of the definition of "detention."
3. Four points-of-reference regarding "how to apply" the revised framework.

Revised Framework

In R. v. Grant (2009), the SCC developed the following "revised framework," the new admissibility model for sec. 24(2) Charter:

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.

Grant joins Collins and Stillman to form a trilogy of cases that have shaped sec. 24(2) Charter decision-making models, the guidelines governing judges' discretion to admit or exclude evidence obtained after a Charter violation occurs. Section 24(2) Charter stayed the same; the decision-making model changed.

The new model modifies the Stillman guidelines in response to criticisms that included identifying the following faults:

1. Conscriptive searches are not equally intrusive. For example, plucking one hair from a suspect's head is not as intrusive as a full strip search and body cavity search. The SCC acknowledged that the Stillman "one size fits all" conscription

[1] R. v. Grant, 2009 SCC 32 (CanLII)
[2] R. v. Suberu, 2009 SCC 33 (CanLII)
[3] R. v. Harrison, 2009 SCC 34 (CanLII)
[4] R. v. Shepherd, 2009 SCC 35 (CanLII)

test, failed to recognize the different degrees of intrusive searches. Stillman wrongly lumped all conscriptive searches into one category.
2. Confessions and bodily substances are not equal evidence. Stillman wrongly lumped both together to be judged using the same conscriptive test.
3. The near-automatic exclusion of conscriptive evidence promoted by Stillman was wrong.

The revised framework uses old language to reach decisions about three factors: i) police officer's intent; ii) extent of intrusion on the accused's privacy, and; iii) the public's expectation about truth-seeking.

Factor #1. Severity of the Charter violation: The police officer's intent is the issue. Like criminal responsibility, this categorizes the Charter violation as intentional or unintentional (good faith). This issue determines whether the Charter violation will be classified as major or minor.

Factor #2. The impact of the Charter violation on the accused's rights: The extent of intrusion on the accused is classified next. In other words, the impact of the major or minor Charter violation on the accused's privacy.

Factor #3. Public interest in having the case adjudicated on its merit. The public's expectation is classified next. Which will best serve truth-seeking–admission or exclusion? The positive and negative impacts of both possibilities are explored.

The delicate balance act between protecting public safety and protecting the accused's rights remains the central issue. That has not changed. Neither has the wording and purpose of sec. 24(2) Charter. There is no automatic admission or automatic exclusion of tainted evidence. Admissibility remains dependent on the effect on the reputation of the criminal justice system. The only change is the decision-making model that will be used by judges to reach the final conclusion of admissibility.

Definition of Detention

The definition that emerged from Therens was both confirmed and clarified. The main points are:

- When does a consent interview change into a detention?
- What is the line between exploratory questioning with implied consent and a detention?
- When can a suspect walk away from questioning?
- Who can be questioned on mere suspicion?
- To what degree do citizens have to cooperate with the police?

Points-of-reference

The quartet of cases gives the first points-of reference of how the revised model works. These will be explained in detail in Parts 2-5 of this series of articles. In summary, in three cases, evidence was admitted. Evidence was excluded in only one case, the most controversial, R. v. Harrison. The SCC reversed an Ontario Court of Appeal decision to

admit seized drugs despite a “flagrant” Charter violation. The SCC, in reversing that decision, demonstrated that there are limits to police investigations. The police cannot do whatever they want.

A point that has gone largely unmentioned is whether the Charter violation was in fact “flagrant.” The Ontario Court of Appeal labeled the Charter violation as “flagrant” to send a message that the prosecution of major crimes, such as organized drug-dealing, will not be compromised because of a Charter violation. Like all labels, “flagrant” stuck, but may not have been warranted.

Regardless, the reversal of the Harrison decision is not an investigative apocalypse. It simply means that the word “flagrant” scares the courts. The court is assuring civil libertarians that it will not tolerate a Machiavellian approach to policing, even if the crime repulses the public.

Parts 2-5

The next four articles will explain the quartet of decisions, with the usual emphasis on practical application and the impact on frontline policing.

Readers are invited to submit comments/questions. The author may be contacted at: ginoarcaro@telus.blackberry.net