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Confusion in Exclusion: Inconsistencies in the Application of s. 24(2)

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The overarching purpose in the application of the *Grant* test is to determine whether the exclusion of evidence under section 24(2) of the *Charter* would "bring the administration of justice into disrepute." While maintaining the repute of the administration of justice is arguably a laudable concern, it takes for granted the fact that there are Canadians who might not view the Canadian legal system as reputable in any sense. People of colour, members of the LGBTQ2S community, Indigenous people, disabled people, homeless persons and immigrants and refugees can all expect more negative than positive interactions with police officers, the judiciary and the Canadian legal system as a whole. Given this notion, our perspective has been coloured as scholars examining the exclusion of evidence and its hinging upon the idea of maintaining a reputable judiciary in the eyes of the general public.

To summarize, the *Grant* test is composed of three factors: a) the seriousness of the *Charter*-infringing state conduct, b) the impact of the breach on the *Charter*-protected interests of the accused, and c) the societal interest in an adjudication on the merits. While theoretically the *Grant* test analysis is based on the objective perspective of the "reasonable person," in truth, decisions are made at the sole discretion of the judges with no specific parameters beyond pre-existing judge-made law (case law). Justice Fish J. once stated that the court "is less concerned with the particular case as it is concerned with the impact in the future of admitting evidence obtained in such an illegal manner." This is understandable given that the context is the common law as a whole. However, there is still a major issue regarding the fact that once precedent is set, it may be seen as difficult to change, or judges may see no need to make different rulings despite there being vast differences in the types of breaches that occur that would lead to evidence exclusion, the social-economic background of the accused, and the actual crime(s) for which the accused is being charged. What this ultimately results in are seemingly arbitrary reasons for the exclusion or lack thereof of evidence which render the primary purpose of the Grant test moot, or ones that rely upon outdated standards of the "reasonable person" that do not meet current socio-demographic realities and the opinions of people today. In order to illustrate this, one can compare the results of *R v Grant* and *R v Harrison*.

In *Grant* and *Harrison*, the SCC had to determine whether the accused had their *Charter* rights breached, and whether they were eligible to apply to have evidence related to the breach excluded under s. 24(2) of the *Charter*. Despite findings that his *Charter* rights under s. 9 and s. 10(b) had been violated, the evidence in Grant's case – his gun – was admitted on the basis that not doing so would negatively impact judicial reputation. Emphasis was placed upon the associated dangers and negative moral public perception of guns, but it is difficult to judge whether this would outweigh the public mistrust in law enforcement given common incidents of police brutality and discrimination. It may be reasonable to say that judicial bias played a part in this decision since it is presumably difficult for members of the judiciary to experience the type of fear towards law enforcement that certain demographics of the general population do. There are so few members of the judiciary who are people of colour and have had direct experiences of racism and prejudice; perhaps Grant's case would have gone differently if the "reasonable person" test was framed in a way where it is acknowledged that a large population of people, specifically in Toronto with a high proportion of people of colour, have reason to fear the police and behave in agitated or "suspicious" ways in reaction to police presence. However, the fact remains that the police misconduct in *Gran*t was excused as a mere misunderstanding on the part of the police officers who questioned and detained Grant.

Arguably, to allow the court to condone misconduct, the administration of justice is already brought into ill-repute as no public can be comfortable in a society where their rights can be blatantly disregarded by "the law." If judicial decisions are so far removed from the public perspective and only made in "ivory towers," then the purpose of upholding judicial reputation is futile. This inconsistency in the perspectives of the judiciary versus the average member of the public is further exacerbated by the discrepancy displayed in Harrison's case, where his evidence – cocaine – was excluded. Similarly to *Grant*, Harrison was apprehended by police purely on the basis of "suspicion" and had his *Charter* rights violated in the process. The only difference would appear to be that police in this instance could not as easily dress their actions as good faith, although this reasoning is shaky as it is highly dependent upon the circumstances or locale being a factor. Such a notion is discomforting for a variety of reasons: it makes little sense as a qualitative measure for crime, it potentially verges on being discriminatory, and there is opportunity for police to "game" the system. Likewise, it is interesting to note that

the evidence in this case had as equally a negative association as did the evidence in *Grant*, yet the court did not uphold this reasoning as the exception for inclusion. One has to wonder again if personal biases had an impact upon the decision here, and if so, how such decisions can come across as arbitrary or counterintuitive to the justice system.

When there is uncertainty in the law, public trust falters. How can there be justice when the law treats rights based on whims, and police misconduct is purportedly excused when it is able to do so? The court regards the Grant test components as a balancing act, but either way the judicial reputation is brought into disrepute as the standards to measure such a notion are the ones *contributing* towards it.

Sources:

R v Grant, 2009 SCC 32 [*Grant*].

R v Harrison, 2009 SCC 34 [*Harrison*].

R v Morelli, 2010 SCC 8 [*Morelli*].