

# Case Law Update: R v Côté

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2011 SCC 46 (Released October 14, 2011)

## Constitutional law Canadian Charter of Rights and Freedoms s. 24(2) Exclusion of evidence

This majority decision considers the revised approach to the exclusion of evidence, as set out in *R v Grant* 2009 SCC 32, and marks an important development in the case law dealing with the protection of rights under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.

While investigating an attack against the appellant's husband, the police committed several serious and deliberate violations of her *Charter* rights. For example, police exceeded their right to enter and search the property; detained the appellant without telling her that she was a suspect; and systematically violated her right to silence. The trial judge found the breaches had been "flagrant and systematic" and excluded both the physical evidence and the appellant's statements to police because the admission of the evidence would bring the administration of justice into disrepute. The appellant was acquitted.

The Quebec Court of Appeal overturned the trial judge's decision to exclude the physical evidence on the basis that it had been obtained without the appellant's participation, the crime was very serious and the police had not deliberately acted in an abusive manner.

The Supreme Court reviewed the *Grant* analysis. The court must consider three factors: the seriousness of the *Charter*-infringing state conduct; the impact of the breach on the *Charter*-protected interests of the accused; and society's interest in adjudication of the case on the merits. The court must then determine whether "having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute." If a trial judge has considered the proper factors and has not made an unreasonable finding, a reviewing court should show considerable deference.

The Supreme Court found the Court of Appeal had exceeded its role by re-characterizing the evidence to find that police did not deliberately act in an abusive manner, and by re-considering the impact of the seriousness of the offence. There was no reason to interfere with the trial judge's findings.

The Court of Appeal also erred in placing undue weight on the discoverability principle, to support the finding that the evidence could have been obtained legally, without the appellant's participation. Discoverability may be relevant to the first and second stages of the *Grant* analysis but is not determinative. In this case, a warrant could have been obtained early in the investigation and the evidence could have been obtained legally. However, "this fact would not have changed the conclusion that the second branch of the *Grant* analysis militated in favour of exclusion, in light of the numerous other factors highlighting the serious impact on the appellant's privacy and dignity interests."

The Supreme Court allowed the appeal and restored the acquittal entered at trial.

Deschamps J. dissented. She agreed with the conclusion that the police had shown a serious disregard for the appellant's rights but found the trial judge did not evaluate the impact of the breach. If a warrant had been issued early in the investigations, the police could have obtained the same physical evidence obtained in the unauthorized search. Deschamps J. held that the intrusion on the appellant's privacy rights would have been the same with or without a warrant, and that she did not have "the highest expectation of privacy." The trial judge also erred in failing to consider the reliability of the physical evidence. The physical evidence was crucial because the appellant's statements to police the only other evidence had been excluded. In balancing the factors weighing in favour and against excluding the evidence, Deschamps J. concluded that it was possible for the Court to recognize the constitutional violations without excluding the physical evidence.

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