R. v. Morelli – Unreasonable Search and Seizure (2010)

This article was written by a law student for the general public.

Introduction

An accused is charged with possession of child pornography. During his trial, the court applies the criminal standard of proof beyond a reasonable doubt. The evidence is clear. He is found guilty. And yet, the Supreme Court of Canada overturns the decisions of both the trial court and the Saskatchewan Court of Appeal, acquitting the accused.[1] How it is in the interests of justice to reverse a conviction that is almost certainly factually correct? The Supreme Court's decision in R. v. Morelli [2] shows that more is demanded of the criminal justice system than merely preventing and punishing crime. There are also constitutional rights at stake. Section 8 of the Canadian Charter of Rights and Freedoms protects personal privacy by guaranteeing the right to be secure against unreasonable search and seizure. Police officers executing a search and judges issuing search warrants need to know what constitutes a reasonable limitation on the privacy rights enshrined in the *Charter*. The test to determine when a search and seizure is a reasonable limitation on privacy is called "reasonable and probable grounds." Before a search warrant can be issued, the police must provide "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and there is evidence to be found in the place of the search."[3] In *R. v. Morelli*, the Supreme Court reviewed the evidence and reasoning behind the issuance of a search warrant for the accused's personal computer. The court came to a 4-3 split decision on the reasonableness of the search. The majority ruling, written by Justice Fish, found that the search was unreasonable and the evidence used to convict the accused must be excised. The dissenting opinion, written by Justice Deschamps, argued that the search was reasonable and the conviction ought to stand.

Facts of the Case

Urbain Morelli was unexpectedly visited in his home by an Internet service provider technician. The technician had come to install the broadband connection Morelli had ordered. Although he seemed surprised by the unscheduled visit, Morelli showed the technician to his personal computer.[4] The technician noticed several things that made him suspicious. Most significant were two links in Morelli's internet favorites bar to sites labeled "Lolita Porn" and "Lolita XXX." The computer desktop displayed a pornographic image, though not of a child. Also, there was a video camera pointing at a child's play area and various labeled and unlabeled video cassettes.[5] The technician was unable to complete his task and had to come back the following day. On his return, Morelli's home had been tidied, the video camera was turned away from the child's play area, and the

computer had been formatted, clearing it of all the links in the favourites menu. These two visits led the technician to suspect that Morelli possessed child pornography.[6] Two months later, the technician decided to report the incident to the child welfare agency, which in turn reported to the police. The police, wanting to search the Morelli's home and computer, applied to a justice of the peace for a search warrant.[7] This is when the case against Morelli was damaged beyond repair.

The Majority Decision: Unreasonable Search and Seizure

Justice Fish, writing for the Supreme Court majority, notes that "it is difficult to imagine a search that is more intrusive, extensive, or invasive of one's privacy than a search and seizure of a personal computer."[8] The *Charter* demands that intrusions into personal privacy must be justified by the exacting standard of "reasonable and probable grounds." A judge or justice of the peace determines whether there are "reasonable and probable grounds" based on the facts provided by the police. Thus, the police must make a "full and frank disclosure" of the facts. They have to be careful not to "pick and choose" amongst the facts, but to present "all material facts."[9] Justice Fish found that some of the information provided by police to the justice of the peace was misleading. The result was an impression that was more sinister than necessary.[10] Several passages from the police information contributed to this effect.

1. The police said that the technician "observed 'Lolita Porn' on the screen" and "returned the next day to find the porn removed." In fact, the technician did not actually see pornography, but merely "favorites" or "bookmarks" used to link to Internet sites.[11]
2. The police did not mention that the two damning links were anomalies in a large list of adult pornography websites. The failure to mention this fact created a misleading impression of Morelli's proclivities.[12]
3. There was great emphasis on the video camera pointing towards the child's play area, but no mention that the accused lived with his wife, the child was fully clothed, and there was no evidence of abuse.[13]

Justice Fish determined that a review of the reasonableness of the decision to issue the search warrant must begin by removing these three elements from the police application for the warrant. In other words, it must be determined if it would have been reasonable to issue a search warrant if this misleading information was not provided to the justice of the peace.[14] Next, Justice Fish examined generalizations made by the police about certain "types of offenders."[15]Rather than relying on evidence, the police resorted to stereotypes and prejudices about the proclivities of certain types of people. At most, these sorts of inferences provoke suspicion. "And, as a matter of law, suspicion is no substitute for

reasonable and probable grounds."[16] With the misleading passages and unsubstantiated suspicions removed, the basis for the search warrant "is reduced to scrutiny of two links," which does not amount to reasonable and probable grounds.[17]

The Majority Decision: Excluding Evidence

The remedy for evidence obtained in breach of the *Charter*'s section 8 is found in section 24(2) which demands the exclusion of evidence when its admission would bring the administration of justice into disrepute. In determining whether the evidence ought to be excluded, a court should look to three factors.

1. The seriousness of the breach: in this case the breach was not particularly egregious because the officers "did not willfully or even negligently breach the Charter."[18]
2. The impact of the breach on the privacy interests of the accused: Justice Fish says that it is hard to imagine a section 8 breach with greater impact.[19]
3. Society's interest in the adjudication of the case on its merits: exclusion of the evidence, in this case, would "undermine the truth-seeking function of the trial."[20]

In the final balancing of these considerations, Justice Fish concluded that justice would receive "a black eye" unless the evidence was excluded.[21]

The Dissent

While admitting that the information to obtain a search warrant was "less than perfect," Justice Deschamps agreed with the assessments of the trial court and Court of Appeal.[22]Essentially, the burden of proof on the police when seeking a search warrant should not be unduly onerous. Justice Deschamps says that it is not the task of the reviewing judge "to determine whether in his view the evidence is sufficient to support a finding of that the accused is guilty of the alleged offence. The question is simply whether there is a credible basis for issuing the warrant."[23] The *Criminal Code* requires "reasonable grounds to believe" that a search will turn up evidence of the commission of an offence.[24] "Reasonable grounds" in Canadian jurisprudence has been equated with "reasonable probability" or "reasonable belief."[25] In other words, it is "the point where credibly-based probability replaces suspicion."[26] Determining whether there are reasonable grounds to believe that evidence of an offence will be discovered by a search "does not involve parsing the facts and assessing them mathematically."[27] Justice Deschamps would have given more weight to the probative value of police officers' statements.[28]In her view, the officers were qualified to make an assessment about the "propensity of child pornography offenders." Their experience provides them with some measure of expertise that should not be discounted. Furthermore, the officers had no

apparent intention to mislead.[29] In Justice Dechamps's view, the evidence provided by the police to the justice of the peace was reliable and might reasonably be believed to provide "reasonable grounds" to issue a search warrant.

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[1] *R. v. Morelli*, 2008 SKCA 62. [2] *R. v. Morelli*, 2010 SCC 8. [3] *Ibid*. at para. 39. [4] *Ibid*. at para. 117. [5] *Ibid*. at para. 118. [6] *Ibid*. at paras. 119-120. [7] *Ibid*. at paras. 121 – 123. [8] *Ibid*. at para. 2. [9] *Ibid*. at para. 58. [10] *Ibid*. at para. 45. [11] *Ibid*. at para. 46. [12] *Ibid*. at paras. 52-53. [13] *Ibid*. at paras. 55-56. [14] *Ibid*. at para. 45. [15] *Ibid*. at para. 73. [16] *Ibid*. at para. 91. [17] *Ibid*. at para. 95. [18] *Ibid*. at para. 99. [19] *Ibid*. at para. 106. [20] *Ibid*. at para. 109. [21] *Ibid*. at para. 110. [22] *Ibid*. at para. 156. [23] *Ibid*. at para. 178. [24] *Ibid*. at para. 126. [25] *Ibid*. at para. 127. [26] *Ibid*. at para. 128. [27] *Ibid*. at para. 129. [28] *Ibid*. at para. 157. [29] *Ibid*. at para. 162.