Taken for *Grant*-ed: Assessing the Short-Comings of the *Grant* Test's Application to the Evidence Obtained from Personal Devices

LAUREN-JEAN OGDEN*

ABSTRACT

Section 24(2) of the *Canadian Charter of Rights and Freedoms* provides a remedy for individuals who suffer harm to their constitutionally protected rights during evidence collection.[1] The framework for a section 24(2) analysis has three distinct steps, the last being a determination of whether the admission of the evidence in question would bring the administration of justice into disrepute. Since 2009, the three-step test laid out by the Supreme Court of Canada in *R v Grant* has been used to arrive at a conclusion on the third factor.[2] However, with the advent of new "types" of evidence the sufficiency of the current application of the *Grant* test must be revisited. In particular, it appears the *Grant* test is inept at handling evidence obtained from personal devices.

In this paper, I explore how judges have taken the unique nature of personal device content for granted, leading to the frequent inclusion of evidence which would have been excluded had it existed in the form of a paper document. This has led to a section 24(2) regime that does not fulfill its purpose of protecting the good repute of the justice system, and instead communicates the justice system's condonation of the violation of

* Lauren-Jean Ogden holds an undergraduate degree from Carleton University, and obtained her JD from the University of New Brunswick in 2022. She is currently an articling clerk at McInnes Cooper. She would like to thank Nicole O'Byrne for providing feedback throughout the writing process.

1 *Canadian Charter of Rights and Freedoms*, s 24(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

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

individual's rights against unreasonable search and seizure, so long as the ends justify the means.

I. Introduction

For centuries, the overarching principle of common law evidence was that the search for truth is best served when all relevant evidence is seen, heard, and considered. To serve this purpose, common law courts developed a practice of allowing evidence regardless of the manner it was obtained. It was not until 1974 that legislation was enacted to exclude certain evidence obtained via wiretap. Eight years later, with the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, the Canadian legal system gained its first general remedy for the exclusion of illegally obtained evidence under section 24(2).[3]

Since 1982, the law around the exclusion of illegally obtained evidence has shifted in many ways. In *R v Collins*, a 1987 Supreme Court case, Justice Lamer laid out three weighted factors to help judges guide their decision on whether illegally obtained evidence should be admitted.[4] The *Collins* factors remained the law until 2009. Then, the decision in *R v Grant* was rendered, creating a new test to determine if admitting illegally obtained evidence would bring the administration of justice into disrepute.[5] This test, often called the *Grant* test, has been instrumental in hundreds of cases in the years since its creation. In 2021, Justice Moldaver affirmed the *Grant* test and its stringent application.[6]

While the justice system continues to rely on the *Grant* test, the reality of modern society is at a crossroads with it. As technology changes and develops, so too do the types of evidence triers of fact find before them. Text messages, computer documents, browser histories, information caches, and similar information are becoming common place in criminal trials. The question, however, is whether the *Grant* test is sufficient to handle these new types of evidence.

In this paper, I will examine the evolution of section 24(2) and the *Grant* test, and how they are applied to evidence obtained from the content of personal devices. In particular, I will examine several post-*Grant* cases

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3 *Charter*, *supra* note 1.

4 *R v Collins*, 1987 SCC 11 [*Collins*].

5 *Grant*, *supra* note 2..

6 See *R v Reilly*, 2021 SCC 38.

dealing with illegally obtained evidence from laptop computers and cell phones and use them to demonstrate the potential shortcomings of the *Grant* test when handling evidence obtained from personal devices.

II. Illegally Obtained Evidence

A. Historically

Philosopher and social reformer Jeremy Bentham wrote that there is "one mode of searching out the truth: ... see everything that is to be seen; hear everybody who is likely to know anything about the matter."[7] Bentham's words are reflective of his overarching philosophy: that all relevant evidence should be presumed admissible. For centuries, the English common law, appearing to be informed by the Benthamite perspective, adopted the principle that the administration of justice would be "obstructed where otherwise relevant evidence would not be admissible."[8]

Early evidence rules demonstrated the preference of common law judges for finding the truth by considering all evidence relevant to the matter. In effect, the manner evidence was obtained was paid no mind by judges.[9] Consequently, improperly or illegally obtained evidence, so long as it was relevant, was not tainted by the means used to obtain it. Rather, it was admissible even if acquired by the most ludicrous methods. In fact, in *R v Leatham*, Justice Crompton wrote, "it matters not how you get [evidence]; if you steal it even, it would be admissible in evidence."[10] Justice Crompton's sentiment captured the legal system's disregard for the means used to obtain the evidence. This attitude was reflected in the common law for at least a century following *Leatham*.

In the years following *Leatham*, Canadian law followed English common law in holding that the means of obtaining evidence had little bearing on the admissibility of the evidence.[11] In fact, the principle from

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7 Jeremy Bentham, *Rationale of Judicial Evidence: Specifically applied to English Practice: from the manuscripts of Jeremy Bentham*, vol 5 (London: Hunt and Clarke, 1827) at 743.

8 Hugh McKay and Nicola Shaw, "Whatever Means Necessary" Gray's Inn Tax Chambers (31 October 1997) at 2, online (pdf): <taxbar.com/wp-content/uploads/2016/01/1452434391Whatever_Means_Nicola_Shaw.pdf> [perma.cc/7K38-CM7H].

9 *Ibid.*

10 *R v Leatham*, (1861) 8 Cox CC 498 at 501.

11 McKay and Shaw, *supra* note 8.

Leatham remained the state of the law for over one hundred years. In 1970, the Supreme Court of Canada affirmed this when a decision was rendered in the case of *R v Wray*.[12]

In *Wray*, the respondent was accused of the 1968 shooting death of Donald Comrie. The Ontario Provincial Police were able to connect the accused to the rifle used in the homicide, and Wray was subsequently asked to accompany an inspector to the Police Headquarters in Peterborough, Ontario. While present at the Police Headquarters, Wray signed a statement "in the form of questions and answers" written by the Inspector. The statement alleged that Wray had concealed the rifle in a swamp near Omomee, and that he would take the police to the location of the rifle. At trial, it was concluded that the statement was involuntary and therefore inadmissible. The Ontario Court of Appeal upheld the decision, ruling that the trial judge had the requisite discretion to reject the evidence. The question of whether the Ontario Court of Appeal erred in law in upholding the trial decision was granted leave to the Supreme Court of Canada.[13]

In giving his reasons for the *Wray* decision, Justice Martland of the Supreme Court of Canada wrote that he was "not aware of any judicial authority ... which supports the proposition that a trial judge has discretion to exclude admissible evidence because...its admission would be calculated to bring the administration of justice into disrepute."[14] Following *Wray*, a meagre handful of trial level decisions shifted course and recognized that trial judges could exercise discretion to exclude evidence where an abuse of process existed.[15] The prohibition of discretion to exclude evidence that was obtained by improper or illegal means, however, remained intact.

Four years after *Wray*, the Canadian Parliament introduced legislation to specifically handle the inadmissibility of evidence obtained by wiretaps and interceptions of private communications.[16] The novel legislation amended section 178 of the *Criminal Code* in such a manner that gave trial judges the discretion to include evidence of intercepted private

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12 *R v Wray*, [1971] SCR 272.

13 *Ibid.*

14 *Ibid* at 287.

15 See *R v Hawke*, (1974) 2 OR (2d) 210 (ONHCJ); *R v MacLean*, [1975] BCJ No 1017, 27 CCC (2d) 57 (BCCC); *R v Smith*, [1974] BCJ No 776, 22 CCC (2d) 268 (BCSC).

16 Canada, Law Reform Commission of Canada, *Evidence 10: The Exclusion of Illegally Obtained Evidence, a Study Paper Prepared by the Law of Evidence Project* (Ottawa: Justice Canada, 1975) at page 9.

communications where not including the same would result in an impediment to the administration of justice.[17] For the first time, the newly amended *Criminal Code* allowed for the exclusion of a narrow category of improperly obtained evidence.

B. Section 24(2)

In 1982, the discretion to exclude evidence provided in section 178 of the *Criminal Code* was finally extended to any evidence that was obtained as the result of *Charter* infringing state conduct under section 24(2) of the *Canadian Charter of Rights and Freedoms*.[18] Evidence obtained improperly or illegally was at risk of being omitted from trial. Section 24(2) effectively created a limitation on the common law's general inclusivity rule.

The purpose of section 24(2) is ultimately to protect the public confidence in the administration of justice. Where there is a breach of the *Charter*, there has already been a "diminishment of administration of justice."[19] When state actors breach the constitutional rights of citizens, justice is not being properly administered. Where evidence is collected as a result of the improper administration of justice, allowing its admission at trial may indicate that the justice system condones improper conduct of state actors so long as it yields relevant evidence. This may damage the public perception of the justice system. By providing a remedy for excluding such evidence, the *Charter* protects the "good repute" of the justice system.

There are three requirements for an accused to avail themselves of the section 24(2) remedy.[20] First, the individual's *Charter* rights must have been limited or denied by a state actor. This requires the identification of a specific *Charter* right or rights which have been breached. To satisfy the first requirement, the limitation or denial of *Charter* rights cannot be justified under section 1 of the *Charter*. An example of a situation that may satisfy this condition is one where an individual is arbitrarily detained and searched by a police officer.[21]

The second requirement is that the evidence in question must have been obtained in a way that unjustifiably limited or denied a *Charter* right.[22]

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17 Bill C-176, *Protection of Privacy Act*, 1st Sess, 29th Parl, 1973.

18 *Charter*, *supra* note 3.

19 *R v Le*, 2019 SCC 34 at para 140 [*Le*].

20 *Ibid*; *Collins*, *supra* note 4.

21 *Grant*, *supra* note 5.

22 *Collins*, *supra* note 4.

Generally, this includes the same infringement as the first requirement. Notably, however, there need not be a strict causal connection between the *Charter* infringement and the obtention of evidence, but rather, there must only be some connection. For example, in *R v Strachan*, evidence was obtained by way of a search warrant, but the accused was arrested at the time of the search and denied his section 10(b) *Charter* right to consult with legal counsel. Despite that the same evidence would have been found even if the breach had not occurred, the evidence seized during the search was found to be inadmissible under section 24(2).[23]

The third and final requirement is that the admission of the evidence must bring the administration of justice into disrepute.[24] Between 1982 and the 2008, several criminal cases attempted to identify the correct way to examine this condition.[25] For several decades, the framework for analysing the third requirement consisted of three weighted factors laid out by Justice Lamer in *R v Collins*. Under *Collins*, a court grappling with illegally obtained evidence was to determine the possibility of bringing the justice system into disrepute by considering 1) factors affecting fairness of the trial, 2) factors relevant to the seriousness of the violation, and 3) factors relevant to the effect of excluding evidence.[26]

In 1997, the case of *R v Stillman* came before the Supreme Court of Canada. [27] In *Stillman*, the teenaged appellant, Billy Stillman, was arrested for the murder of 14-year-old Pamela Bischoff after her body was discovered in the Oromocto River in April of 1991.[28] Stillman was taken to the RCMP headquarters in Fredericton, where his attorneys provided a letter indicating that the accused was advised not to consent to the provision of bodily samples or any statements relating to the death of Bischoff.[29] Despite this letter, the RCMP took bodily samples and conducted two interviews without the presence of Stillman's attorneys "in an attempt to obtain a statement."[30] The trial judge found that the evidence obtained by the RCMP was admissible and should not be excluded under section 24(2) of

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23 *R v Strachan*, [1988] 2 SCR 980, 56 DLR (4th) 673.

24 *Collins, supra* note 4.

25 *Collins*, *supra* note 4; *R v Stillman*, [1997] 1 SCR 607, 144 DLR (4th) 193 [*Stillman*].

26 *Collins*, *supra* note 4at paras 35-39.

27 *Stillman, supra* note 25.

28 *Ibid* at para 2.

29 *Ibid* at para 5.

30 *Ibid* at para 7.

the *Charter* – a decision which was upheld at the New Brunswick Court of Appeal.[31] The Supreme Court of Canada was tasked with determining whether the Court of Appeal erred in its application of section 24(2) to the facts.

In applying the *Collins* factors to the *Stillman* case, Justice Cory, writing for the majority, further refined the first set of factors by developing a two-step approach to determining the impact of the admission of evidence on the fairness of the trial. This approach required the court to classify the evidence as either conscriptive or non-conscriptive, and then draw a conclusion about whether, if conscriptive, the evidence could have been discovered by some other non-conscriptive means.[32]

In her dissent in *Stillman*, Justice McLachlin opined that there is a need for a more flexible approach to illegally obtained evidence which "preserves the consideration of 'all the circumstances.'"[33] Justice McLachlin goes on to conduct a three-step analysis in her dissent, which emphasized the seriousness of the *Charter* breach, the seriousness of the "affront to the appellant's privacy and dignity," and a balance of the factors favouring exclusion and those favouring admission.[34] Justice McLachlin argues that this approach allows for a more flexible and nuanced analysis than the traditional *Collins* test. Despite Justice McLachlin's proposed approach to section 24(2) in *Stillman*, Justice Lamer's three weighted factors in *R v Collins* remained the law until 2009.

C. *R v Grant*

In 2009, Chief Justice McLachlin (as she then was) used her dissent in *Stillman* to reconfigure the application of the third criteria of the section 24(2) analysis in *R v Grant*.[35] The revision stemmed from several criticisms about the *Collins* test, including the complaint that the test was not consistent with the "language and objectives of s. 24(2)."[36] To respond to these concerns, Chief Justice McLachlin, writing for the majority, assessed the merits and shortcomings of *Collins*. Noting that the focus of section

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31 *Ibid* at para 17.
32 *Ibid* at paras 113-116.
33 *Ibid* at para 258.
34 *Ibid* at paras 265-268.
35 *Grant, supra* note 5at para 60.
36 *Ibid*.

24(2) is "not only long-term, but prospective" and targeting "systemic concerns," Chief Justice McLachlin created a revised framework for the third step of the section 24(2) analysis.[37] This framework became known as the "*Grant* test."

Much like the larger section 24(2) test, the *Grant* test has three components that must be considered. The first is the seriousness of the *Charter*-infringing state conduct; the second is the impact on the *Charter* protected interests of the accused; the third and final component is society's interest in an adjudication on the merits.[38] The findings of these considerations must be balanced to determine whether the administration of justice may be brought into disrepute.

1. Seriousness of Charter Infringing Contact

The first line of inquiry that should be pursued per *Grant* is the seriousness of the *Charter*-infringing conduct. According to Chief Justice McLachlin, this factor requires an assessment of whether the administration of justice would be brought into disrepute by "sending a message to the public that courts…condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct."[39] In essence, this line of inquiry is concerned primarily with preserving public confidence in the overall administration of justice.

The seriousness of the *Charter*-infringing conduct is likely to be the highest where the conduct of the state actor shows a blatant disregard for the *Charter* protected rights of the accused. For example, in the Alberta Court of Queen's Bench case *R v Croft*, an RCMP officer sought and executed a warrant which expressly allowed him to refuse to disclose the reasons for the accused's detention – a clear violation of the accused's section 10(a) right to know the reasons for his arrest.[40] At trial, Justice Burrows noted that citizens of Canada are entitled to expect police officers to make decisions affecting their liberty and privacy with "careful regard."[41] Similarly, in the Supreme Court of Canada case *R v Le*, Justice Karakatsanis agreed that the seriousness of the *Charter* infringing conduct is closely tied

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37 *Ibid*, at paras 69-70.

38 *Ibid*.

39 *Ibid* at 72.

40 *R v Croft*, 2014 ABQB 215 at para 52 [*Croft*].

41 *Ibid* at para 59.

with the expectation that state actors ought to know and follow the law to the greatest extent possible.[42]

This does not mean that police or other state actors are expected to never impede on *Charter* rights. Conduct which seriously infringes an accused's *Charter* rights may be permissible in exigent circumstances of urgency or necessity.[43] The exigent circumstances, however, must be genuine. They cannot be fabricated by officers to justify the breach.[44] In other words, the seriousness of the *Charter* breach may be mitigated if warranted in the actual circumstances. Therefore, it may be concluded that the first *Grant* factor is directly related to whether the state conduct is a flagrant disregard for the *Charter* rights, or an incidental infringement done in good faith.

2. Impact on Charter Protected Interests

The second factor of the *Grant* test is the impact of the conduct on the *Charter* protected interests of the accused. Completing this assessment requires a judge to consider the "extent to which the breach actually undermined the interests protected by the rights infringed."[45] In doing this, it is necessary to consider separately the interests which are protected by the right in question and the extent to which they were actually impacted.

Failing to consider this factor independently from the first factor may lead to an incorrect application of the *Grant* test. It is quite possible for the *Charter* infringing conduct to be serious while the impact on the *Charter* protected interests is not. Such was the case in the abovementioned *R v Croft*: despite the seriousness of the police officer's conduct there was no actual impact on the section 10(a) rights of the accused.[46] The *Croft* analysis is notable for two reasons: first, it demonstrates that evidence can be eligible for exclusion under section 24(2) where there is no impact on the *Charter* rights of the accused; second, it evinces the fact that the first and second lines of inquiry are independent of one another.

3. Society's Interest in Adjudication on the Merits

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42 *Le, supra* note 19at para 149; see also *R v Truduce*, 2014 ONCA 547 at para 57.

43 See *R v Burlingham*, [1995] 2 SCR 206 at para 46, 124 DLR (4th) 7.

44 *Ibid.*

45 *Grant, supra* note 5at para 76.

46 *Croft*, *supra* note 40 at paras 52, 61.

The third and final line of inquiry is society's interest in the adjudication of the matter on its merits. This naming of this factor is perhaps misleading – society will almost always have an interest in the adjudication of a criminal matter, whether it be for the purposes of public safety, deterrence, or other reasons. Instead, this factor may be more aptly described as a determination of "whether the truth-seeking process is better served by the admission or exclusion of the evidence."[47] This final line of inquiry brings new life to the Benthamite common law perspective that the administration of justice may be obstructed where relevant and otherwise admissible evidence is excluded.

This factor requires judges to consider "the fact that the evidence…may facilitate the discovery of truth… weighed against factors pointing to exclusion."[48] In other words, it must be determined whether the merits of remedying the *Charter* breach outweigh the toll the exclusion would take on the "truth-seeking goal of the criminal trial."[49] To make this determination, a judge must consider, for example, the importance of the evidence to the matter, the seriousness of the offence, and the reliability of the evidence. Then, these considerations must be balanced with the purpose of section 24(2) and the need to demonstrate that the justice system does not condone unjustified infringement on *Charter* protected interests.

4. Finding Balance

The above three factors of the *Grant* test must be balanced to determine whether the admission of the evidence in question would bring the administration of justice into disrepute.[50] Completing this balancing act requires judges to complete two steps. The first step is to consider the conclusion drawn on each of the three factors and determine whether it weighs in favour of inclusion or exclusion. The second step is to balance all three factors.[51]

In the recent 2021 Supreme Court of Canada decision *R v Reilley*, Justice Moldaver admonished the failure of trial judges to complete a full and proper balancing of the three factors. The oral decision emphasizes that

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47 *Grant*, *supra* note 5at para 79.

48 *Ibid* at para 82.

49 *Ibid*, citing *R v Kitaitchik*, [2002] OJ No 2476, 166 CCC (3d) 14 (ONCA).

50 *Grant*, *supra* note 5.

51 *Grant*, *supra* note 5at para 71

conducting a balancing of only two of the factors serves to "[undermine] the purpose and application of section 24."[52] In response to the risk of trial judges undermining the purpose of section 24(2), the Supreme Court of Canada cautioned judges to ensure they were balancing all three factors, lest they "[water] down any exclusionary power these factors may have."[53] This serves as a reminder that all three factors of the *Grant* test are of equal importance, and ought to all be considered in the same capacity.

III. SUFFICIENCY OF THE *GRANT* TEST

Section 24(2) appears to be a compromise between the common law perspective that all relevant evidence is admissible no matter how it was obtained and the automatic exclusion of illegally or improperly obtained evidence.[54] The purpose of such a compromise is to ensure the balance of collective interests and individual rights. The question that remains to be answered is whether section 24(2) and *Grant* are sufficient to achieve this purpose.

Today, there are constant and rapid shifts in technology. In the last three decades, lawmakers have been faced with several new forms of "evidence" including text messages, online private messages, internet search histories, and metadata caches. Each of these forms of evidence are primarily accessed using personal devices, such as phone and laptops. It is possible to obtain warrants to seize such personal devices. It is unclear, however, if the either the common law or the *Criminal Code* require a separate warrant or authorization to access the content on the devices once seized. As a result of unclear law in the area, it is not uncommon for warrantless searches of this content to be conducted. So how does this practice affect the application of 24(2) and the *Grant* test?

A review of recent case law indicates that the *Grant* test is ill-suited to balance collective interests and individual rights when faced with new types of evidence. In fact, several post-*Grant* cases indicate that the current framework developed for the application of section 24(2) is skewed in favour of the admission of improperly obtained evidence which might otherwise be excluded if it existed in another form. For example, text message communications that are obtained or intercepted without a

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52 *R v Reilly*, 2021 SCC 38 at para 2.

53 *Ibid*.

warrant may be admitted when the same content, found in a paper document, may be excluded.

The reasons for the insufficiency of the *Grant* may be twofold: first, the "egregiousness or good faith" standard under the first factors of *Grant* test may set a bar that is far too low for warrantless searches of personal device content; second, evidence obtained from personal devices will almost always be relevant to proving the *mens rea* or intent of the accused. The veracity of both statements is demonstrated in cases dealing with the admission of illegally obtained evidence from cell phones and laptops. Both of these facts, which are inherent to the nature of evidence from personal devices, may lead to an application of the *Grant* test that favours the admission of the evidence, regardless of the content.

A. Defining a Personal Device

For the purposes of this paper, a "personal device" includes both cell phones and laptop computers. Such devices, by virtue of their intended use, their portability, and their functions, tend to harbour a great deal of information about an individual. As a result, they are more and more frequently becoming the subject of searches for evidence in criminal matters. Given their nature, however, such devices are significantly different than other physical evidence recovered in searches.

The primary difference between a cell phone or laptop and most other types of evidence is that recovering useful evidence from a personal device requires two "types" of searches. First, an initial search must be done to recover the actual device from the accused's person, car, home, or otherwise. Second, the content of the device itself must be searched to find valuable evidence such as text messages, e-mails, photos, etc. In fact, in *R v Vu*, Justice Cromwell wrote that "computers differ in important ways from the receptacles governed by the traditional framework [for search and seizure]."[55] Justice Cromwell went on to say that "the privacy interest implicated by computer searches are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets."[56] The justification provided by Justice Cromwell in differentiating traditional receptables from computers is that the personal computers provide access to "vast amounts of information that users cannot control, may not even

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55 *R v Vu*, 2013 SCC 60 at para 2 [*Vu*].

56 *Ibid* at para 24.

be aware of or may have chosen to discard."[57] Cell phones, by nature, are similar to computers in this way. As a result, the differentiation in *Vu* between traditional receptacles and laptop computers can be imputed to all personal devices this paper addresses.

Given the above information, it is generally settled that personal devices, and their content, are much different than other receptacles and their content. Despite this, they are still governed largely by the same evidentiary rules. This includes the same framework for a *Grant* analysis. As a result, it is important to inquire as to whether analytical frameworks like *Grant* are appropriate in their current form for personal device content, or whether they are insufficient to properly handle such evidence.

B. Accessing Content on Personal Devices

Section 8 of the *Charter* provides individuals with a protection against unreasonable search or seizure.[58] The primary purpose of this *Charter* guarantee is to protect people against "unjustified intrusions upon their privacy."[59] This is the *Charter* right which is most often infringed in cases of improperly obtained evidence from personal devices. Determining whether section 8 has been engaged requires a court to ask whether there was a search or seizure, and if so, whether the search or seizure was reasonable.

Canadian courts define "search" as conduct that interferes with a person's reasonable expectation of privacy.[60] It is therefore necessary to determine whether the accused has an expectation of privacy in the thing or location searched. Courts generally find that individuals have a reasonable expectation of privacy in content on personal devices, including personal laptops, work computers and cell phones.[61] While the existence of such case law does not guarantee an expectation of privacy in such devices, it is reasonable to conclude that it is likely that an individual can generally

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57 *Ibid*.

58 *Charter*, *supra* note 3, s 8.

59 See *Hunter et al v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641 [*Hunter*].

60 See *R v Grossman*, [1998] BCJ No 62 (BCSC) at para 33; see also *R v Evans*, [1996] 1 SCR 8, 131 DLR (4th) 654.

61 See *R v Reeves*, 2018 SCC 56 [*Reeves*]; *R v Cole*, 2012 SCC 53 [*Cole*]; *R v Marakah*, 2017 SCC 59 [*Marakah*]; *BC Hydro & Power Authority v International Brotherhood of Electrical Workers, Local 258 (Petersen Grievance)*, [2017] BCCAAA No 135 (BC Collective Agreement Arbitration) [*BC Hydro v IBEW Local 258 (Petersen)*]; *R v Fearon*, 2014 SCC 77 [*Fearon*].

expect to enjoy a reasonable expectation of privacy in the content on their personal devices.

If there is an expectation of privacy in the content of a personal device, then the conduct of a state actor accessing the content without the consent of the owner is likely to constitute an intrusion on the privacy interest. For example, if a person has a reasonable expectation of privacy in their personal text message communications, then a peace officer accessing those text messages without permission of the owner will amount to an intrusion. Notably, the content need not be downloaded to constitute an encroachment on the expectation of privacy, simply looking at the content is sufficient to be classified as an intrusion.[62]

Where an intrusion is found, it must be justified to avoid being classified as "improperly obtained evidence." Generally, three elements must be present for a search to be justified or reasonable: 1) prior authorization, 2) granted by a neutral and impartial arbiter capable of acting judicially, and 3) based on reasonable and probable grounds to believe that an offence has been committed and there is evidence to be found.[63] It is quite possible for an officer to obtain prior authorization in the form of a lawful warrant to search the content on a personal device; in such a case, the search is likely to be "reasonable," and there is no need to consider the section 24(2) framework. An issue arises, however, when the search of a cell phone or laptop is not explicitly authorized but is ancillary to a lawful search.

Traditionally, once the search of a place was authorized by a warrant, the police executing the warrant were empowered to search that place for evidence wherever it may reasonably be.[64] This meant that officers were authorized to open drawers, cupboards, cabinets and any other closed receptacle within reason. In *R v Vu*, however, Justice Cromwell concluded that personal devices are different than receptacles contemplated by the traditional legal framework and therefore must be treated differently.[65] *Vu* dealt with the search of a property that was alleged to be the site of electricity theft. In the basement of this property, the searching officers

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62 See *R v Moran*, [1987] OJ No 794, 36 CCC (3d) 225 (ONCA).

63 *Hunter*, *supra* note 59at page 146-147; Government of Canada, "Section 8 – Search and Seizure" (2021) online: *Charterpedia* <www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art8.html> [perma.cc/2X9F-F5E3].

64 *Vu, supra* note 55.

65 *Ibid* at para 2.

discovered a marijuana grow operation on the basement level of the building. Officers subsequently discovered a computer. An illegal ancillary search of the computer was conducted to identify the owner of the property. During the ancillary search, the officers discovered photographs of an undisclosed subject matter, which the prosecution was able to enter as evidence of the accused's knowledge and control of the grow operation.[66] The Court was faced with a question about whether the search of a cell phone or computer was conducted illegally. In rendering a decision on the question, Justice Cromwell wrote that while a personal device may be seized during a lawful search, a further search of that device cannot be conducted unless and until it is expressly authorized in a warrant.[67] The holding in *Vu* is significant, because it signals that a search of a personal device, within the definition of section 8, is illegal unless explicitly authorized, even where the search leading to the seizure of the personal device is lawful.

A later Supreme Court of Canada decision *R v Fearon* may complicate the holding in *Vu*.[68] In *Fearon*, the Court assessed with evidence obtained from a cell phone that was searched incidentally to the accused's arrest. A search incident to arrest is a common law power provided to peace officers which exempts them from the need to obtain a warrant to conduct a search upon arrest The common law power also empowers peace officers to seize evidence once they have discovered it.[69] In *Fearon*, Justice Cromwell opined that to be legally obtained, the search and seizure of a cell phone incident to arrest must be limited to that which is "truly incidental to the arrest."[70] In other words, the discretion of the officer to search the personal device is restricted, and should only include the most recent activity which is related to the arrest.[71]

Much like the decision in *Vu*, *Fearon* provides parameters for when evidence may be illegally obtained and subject to section 24(2). However, Cromwell's decision in *Fearon* may complicate the understanding of when the search of a personal device is conducted legally. When read in sequence, *Vu* and *Fearon* suggest that a search of a personal device is illegal unless explicitly authorized, including where the search of the device is incident

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66 *Ibid* at para 73.

67 *Ibid*, at para 49.

68 *Fearon*, *supra* note 61.

69 *R v Morrison*, 1987 CanLII 182 (ONCA), 35 CCC (3d) 437.

70 *Fearon*, *supra* note 61at para 78.

71 *Ibid* at paras 78-82.

to an arrest. However, the two decisions may complicate situations where a search and subsequent arrest are authorized, but a personal device is seized in the course of the search. In such circumstances, it may be unclear whether an ancillary search of the personal device is legal. This uncertainty may create a gray area about when a search is reasonable or justifiable.

Despite this, the law is clear that if an illegal search is conducted on a personal device, it becomes "illegally obtained evidence," and any evidence discovered during the search becomes subject to a section 24(2) exclusion. If it is determined that the illegal search was unjustifiable, and that its admission would bring the administration into disrepute, then it should, in theory, be excluded. Problematically, however, evidence obtained by an illegal search of this nature appears to be admitted into evidence into evidence seemingly by default.[72]

C. Searching in Good Faith

One of the most evident reasons that evidence obtained by an illegal ancillary search of a cell phone is often not excluded, is that it the conduct of the officer often does not meet the threshold of being an "egregious" breach of the accused's rights. This is due, in part, to the ambiguity of the law in this area and the grey area of "reasonable" searches resulting from the interaction of decisions like *Vu* and *Fearon*. In fact, the threshold for an "egregious" breach appears to be lower when the content of personal devices is involved. The fact that the conduct was not outrageous goes to the first line of inquiry from the *Grant* test – the seriousness of the *Charter*-infringing conduct. Where the conduct is not considered egregious, or it is considered to have been done by the offending officer in good faith, it is much less likely to bring the administration of justice into disrepute. Therefore, the analysis of the evidence is more likely to be skewed towards its admission simply by virtue of the nature of the evidence.

In *Vu*, Justice Cromwell noted the significance of the expectation of privacy in personal devices. With relation to computers, specifically, Justice Cromwell writes "computers…give [access] to vast amounts of information that users cannot control, that they may not even be aware of or may have

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[72] Note: There are, of course, instances where evidence obtained illegally from cell phones and laptop computers is not admitted into evidence. These cases, while they do exist, are uncommon in comparison to cases where evidence is admitted. Furthermore, many of them appear to rely on the same reasoning and arguments for their admission – this may indicate a systematic admission of evidence of this type.

chosen to discard and which may not be, in any meaningful sense, located in the place of the search."[73] Consequently, the accused's privacy interest in the content of their personal devices is high. However, even after recognizing that a warrant authorizing the search of such personal devices is constitutionally required, Justice Cromwell does not find that the unauthorized search of Vu's computer is sufficiently "egregious" to favour exclusion of the evidence.[74] In fact, Justice Cromwell writes that since there was uncertainty in "the state of the law with respect to the search of a computer found inside a premises," the officers executing the warrant "carried out the search in the belief that they were acting under the lawful authority of the warrant."[75]

Vu demonstrates the lower standard of egregiousness applies to content from personal devices, and how ambiguity in the law contributes to the perception of illegal seizures of such information as less "blatant." In fact, Justice Cromwell specifically cites uncertainty in relation to the state of the law as the reason for allowing the admission of the evidence. While the intention of Justice Cromwell's decision in *Vu* was intended to clarify the law and avoid such uncertainties, subsequent cases illustrate the persistent nature of this issue.

The Ontario Superior Court decision *R v Page* is another case related to a warrantless seizure and subsequent search of a cell phone. In this case, the detective responsible for the search and seizure had no prior authorization but alleged that exigent circumstances required the seizure and search of the cell phone immediately.[76] The holding from *Vu* would suggest that explicit authorization is required in order to search a personal device; however, much like the common law power to search incident to arrest, explicit authorization may not be necessary where there are "exigent circumstances." The caveat to this exception is that the exigent circumstances must not have been authored or created by the police.[77]

In delivering the decision in the *Page* case, Justice Raikes opined that the detective had purposely authored and instigated the exigent circumstances by her own intentional actions.[78] Despite this, Justice Raikes

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73 *Vu, supra* note 55at para 24.

74 *Ibid*, at para 69.

75 *Ibid.*

76 *R v Page*, 2016 ONSC 713 at para 58 [*Page*].

77 See *R v Silveira*, [1995] 2 SCR 297, 124 DLR (4th) 193.

78 *Page, supra* note 76 at paras 57, 61.

held that he was not "prepared to say that [the detective] acted in bad faith," writing that he believed the detective had simply "jumped the gun."[79] To punctuate this conclusion, Justice Raikes writes: "police officers work under enormous pressures where the demands of the public and those of the Courts often prove overwhelming," then added: "the finding that this conduct is a violation should inform future police practices and introduce a note of caution."[80] In brief, the *Page* decision holds that the overwhelming nature of police work makes it difficult to properly assess the reasonableness of a search where the law is not entirely clear. As a result of this, courts appear to hold officers to a lower standard where they have illegally obtained evidence from a personal device if the law surrounding the authorization of such a search and seizure is ambiguous.

The same conclusion was arrived at in *R v Hill*. In *Hill*, an officer conducted a warrantless search of a cell phone. Provincial Court Justice Cardinal held that the search was "not undertaken for a valid objective related to the arrest, but rather for the purpose of furthering the police investigation. Such searches are not allowed."[81] Despite this, Justice Cardinal held "it was not an egregious error. Overall, [the officer] acted in good faith."[82] Despite that previous case law identifies a relatively high privacy interest in personal devices,[83] Justice Cardinal appears to add a layer of complication to the privacy interest by opining that "simply open[ing] the cell phone and [going] directly to the text messages" on a non-password protected phone is a more minor intrusion than a more detailed search or a search of a password protected phone.[84] Such degrees of expectation of privacy may create further ambiguity about the reasonableness or legality of the search, which perpetuates the issue of uncertainty in the law from *Vu*.

The above examples are representative of a larger body of case law, which indicates a much lower standard for what constitutes executing an illegal search in "good faith." *Vu* cites ambiguity in the law as a justification for illegal searches of personal devices. While the Supreme Court of Canada attempted to clarify such ambiguities in its decision in *Vu*,

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79 *Ibid* at para 65.

80 *Ibid* at paras 65, 67.

81 *R v Hill,* 2013 SKPC at para 33 [*Hill*].

82 *Ibid* at para 36.

83 See *Reeves*; *Cole*; *Marakah*; *BC Hydro v IBEW Local 258 (Petersen)*; *Fearon*, *supra* note 61; *Vu*, *supra* note 55.

84 *Hill supra* note 81 at para 36.

subsequent decision in cases like *Page* and *Hill* demonstrate that there are several opportunities for uncertainty to arise in cases dealing with evidence obtained from personal devices.

It is possible that the nature of personal devices renders it difficult to find clarity in the law. For example, the gray area created by the *Fearon* and *Vu* discrepancy may result in difficulty ascertaining when, or why, a warrant is necessary to search a personal device. Furthermore, the differing characteristics of personal devices may leave enough latitude for courts to find that the officer was conducting a warrantless search in good faith, regardless of how willful the disregard for section 8 protections was. For example, where a phone subject to an unauthorized search is not passcode protected, it may be easier for a judge to find that the officer was acting in good faith and under the belief that no privacy interest was intended.[85]

Given the demonstrably high threshold of "bad faith" in warrantless searches of personal devices, it is possible that the first line of inquiry of the *Grant* test is ill-suited to handle this type of evidence. It is challenging to reconcile the facts that accessing content on a personal device requires several intentional steps, and that officers are expected to know the law and act within it, and that illegally accessing this content is often not considered a "willful disregard" of the accused's constitutional rights. The difficulty in reconciling these facts may lead to diminishment of the good repute of the administration of justice, which defeats the purpose of section 24(2). It may be concluded that a different standard is required for handling this type of evidence.

D. Finding the Evidence is Important

Much like the first *Grant* factor, the third line of inquiry in *Grant* may be insufficient to handle evidence obtained by an illegal search of personal devices. This factor of the *Grant* analysis hinges on whether the evidence is relevant, whether it is reliable, and whether society has an interest in the adjudication of the case. That the determination of this factor is generally based on these three questions presents two identifiable issues: first, that the information contained on an accused's personal device will almost always be relevant to proving some issue, even if it is not the primary issue; second that the reliability of evidence from personal devices is often taken for granted.

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[85] Such was the case in *Hill*, where the officer "simply opened the cell phone."

To expand on the first issue, it is notable that courts tend to find evidence obtained from personal devices almost always relevant to the case in question. The activities individuals choose to carry out on their phones and computers provide some insight into their state of mind, their knowledge, or their intent. In some cases, courts have even allowed the admission of illegally obtained evidence of this nature where the point it proves is not relevant to the objective of the search in which it was discovered. *Vu* was one such case.

In *Vu*, the original search related only to a charge of "theft of electricity." The search warrant obtained by the officers authorized a search for documentation identifying the owners or occupants of the residence.[86] During the authorized search, the police discovered marijuana in the basement of the dwelling. Subsequently, illegal searches of Vu's computers were carried out which resulted in the discovery of documents and photograph indicating the accused's involvement in the production and possession of the marijuana. Although the illegally obtained evidence had no relation to the initial charge of theft of electricity, Justice Cromwell concluded that the documents and photographs retrieved from the accused's computer were "required to establish knowledge of and control over the marijuana found in the basement of his residence."[87] Despite that the evidence was obtained by what the majority earlier referred to as a breach of a "significant privacy interest," Justice Cromwell opined that there is a "clear societal interest" in adjudicating the charges of production and possession of marijuana for the purposes of trafficking.[88]

Justice Cromwell's decision on the third *Grant* factor is significant to the argument that the *Grant* test is ill-suited to handle evidence illegally obtained from personal devices. Unlike a physical document, there is no conceivable limit on the amount of information that can be obtained from searches of personal devices. The information obtained from personal devices, such as a search history or saved documents will nearly always contain some piece of evidence relevant to the real-world conduct of the accused. For example, an internet search for LED grow lights may be relevant to the accused's intention to grow marijuana. If all evidence obtained this way tends to be relevant, then using that relevancy as a justification for its admission may skew the conclusion of the *Grant*

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86 *Vu, supra* note 55.

87 *Ibid* at para 73.

88 *Ibid*.

application. This does not allow for a true assessment of the impact the evidence may have on the repute of the administration of justice and may therefore defeat the purpose of section 24(2).

The second issue presented by the third factor of the *Grant* test is the reliance on the reliability of the evidence. In *Page*, Justice Raikes notes that the evidence is reliable and important because it is "evidence which the accused...had a hand in creating and possessed."[89] Consequently, Justice Raikes concludes that the evidence should not be excluded. The concern with this conclusion is that nearly all evidence obtained from a personal device will, in theory, be evidence the accused "had a hand in creating and possessed." Search histories, data caches, digital communications, and even keystroke caches are all reservoirs of evidence that the owner or operator of the device may be perceived to have a "hand in creating." Courts appear to take this as an inherent indicator of the reliability of the evidence. This reliance leaves little room for considerations that individuals may share or have shared their device with another person, that malware may have placed files on a computer, that "click bait" ads may have wrongly placed websites in browser histories, or that a computer improperly recorded information.

There are several cases, much like *Page,* where the assessment of the third *Grant* factor turns on the reliability of the evidence, without any critical examination of what makes the evidence relevant.[90] These cases indicate the possibility that the application of the *Grant* test is skewed by the nature of the evidence from personal devices. The fact that information on personal devices may be less reliable than it is often perceived to be is a strong indicator that the third factor of the *Grant* test is not sufficient to handle this type of evidence.

IV. Conclusion

The current framework for exclusions of evidence under section 24(2) is incompatible with the nature of evidence obtained from personal devices. While the *Grant* test was originally developed to serve the purpose of section 24(2), its application to cases where evidence is obtained from

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89 *Page*, *supra* note 76at para 75.

90 See *Reeves*; *Cole*, *supra* note 61; *R v Townsend*, 2017 ONSC 3435; *R v Munton*, 2018 BCSC 581; R *v Allen*, 2017 ONSC 972.

personal devices fails in achieving this purpose. The reasons for this are at least two-fold.

Firstly, the first factor of the *Grant* test encourages judges to view conduct breaching *Charter*-protected rights as less serious if they are done in "good faith." The law on what constitutes an illegal search of a personal device, while seemingly settled, has created some gray area. This gray area leaves enough latitude to allow officers to believe they are acting in good faith and under authority of the law. As a result, it is possible to conclude that the first factor of the *Grant* test is insufficient to handle evidence of this nature.

Further, the third factor of the *Grant* test requires triers of fact to determine whether the justice system is better served by the inclusion or exclusion of the evidence in question. In several cases, courts have evinced that this determination may often hinge on the importance and reliability of the evidence. However, the problem is that evidence from personal devices tends to provide insight into the state of mind of the accused, the result therefore being that the evidence is nearly always important to some aspect of the case. Furthermore, there is a demonstrated tendency to mechanically find reliability in evidence from personal devices without any critical analysis of how the evidence came to exist on the device, or who created it.[91] Consequently, any determination on the third factor may be skewed towards inclusion based on the nature of the evidence alone.

If at least two of the three lines of inquiry in the *Grant* test are predisposed to a conclusion that the evidence should be admitted, then it is evident that the framework ought to be revisited. Until the *Grant* test is reconfigured to better handle evidence obtained from personal devices, there will continue to be a risk of injustices carried out by the justice system. It is this risk which threatens to diminish the good repute of the justice system, effectively defeating the purpose of section 24(2).

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[91] See *Reeves*; *Cole*, *supra* note 61; *R v Townsend*, 2017 ONSC 3435; *R v Munton*, 2018 BCSC 581; R *v Allen*, 2017 ONSC 972.