Ubi jus, ibi remedium: Section 24(2) of *The Constitution Act, 1982*

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I. Introduction

Sopinka's *The Law of Evidence in Canada* opens by stating the purpose of the rules of evidence: "…to facilitate the introduction of all logically relevant facts 'without sacrificing any fundamental policy of the law which may be of more importance than the ascertainment of truth.'"[1] While *Sopinka* lists five distinct principles that underlie the law of evidence and influence the development of the rules, truth-seeking is the most prominent among them.[2] In Canada, the law of evidence is modified by federal and provincial statutes including *The Charter of Rights and Freedoms*.[3] However, the law of evidence in this country remains primarily a creature of the common law and follows a familiar, and often frustrating, refrain – all relevant evidence is admissible, unless it is not. Generally, the common law rules of admissibility – whether broad or specific – are founded on the concept of utility. In *Rationale of Judicial Evidence*, philosopher 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

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[1] Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5rd ed. (Toronto: LexisNexis, 2018) [hereinafter referred to as "*Sopinka*"], at 3, quoting C.A. Wright, "The Law of Evidence: Present and Future" (1942) 20 Can. Bar Rev. 714, at 715.

[2] "Search for Truth", "Ensuring an Accused Receives a Fair Trial", "Efficiency of the Trial Process", "Goals Outside of the Trial Process" such as solicitor-client privilege, and "Preserving the Integrity of the Administration of Justice": *Sopinka*, *supra*, §1.38 – 1.49.

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

matter."[4] For centuries, the common law has been informed by the utilitarian ethos that the administration of justice would be "obstructed where otherwise relevant evidence would not be admissible" for the purpose of truth-seeking.[5] In this era of 'principled' decision-making, judges are faced with making determinations based upon a myriad of factors involved in the search for truth. Further, they must fully consider *Charter* rights to give meaning to the maxim '*ubi jus, ibi remedium*' for without a remedy there is no right. The paradigm shift in section 24(2) jurisprudence from the deterministic 'two-box' Collins/Stillman framework to the more contextual approach in Grant presents a formidable challenge to judges who must grapple with determining questions of admissibility. In this paper, we analyse the historical and jurisprudential influences that inform contemporary interpretations of subsection 24(2) of *The Constitution Act, 1982*. At the end of the paper, we examine several current issues relevant to determinations of admissibility of illegally obtained evidence including electronic evidence, police (mis)conduct, and involuntary confessions.

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[4] 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. In *R.* v. *Leatham*, Crompton J. wrote, "it matters not how you get [evidence]; if you steal it even, it would be admissible in evidence." (1861) 8 Cox CC 498 at 501.

[5] Hugh McKay and Nicola Shaw, "Whatever Means Necessary" Gray's Inn Tax Chambers (31 October 1997) at 2, online (pdf): Whatever Means Necessary (taxbar.com) [perma.cc/7K38-CM7H].

II. The History and Purpose of Section 24(2)

Writing for the majority in *Mitchell* v. *Canada (Minister of National Revenue)*, McLachlin CJC stated the three principles underlying the rules of evidence:

> First the evidence must be useful in the sense of tending to prove a fact **relevant** to the issues in the case. Second, the evidence must be reasonably **reliable**; unreliable evidence may hinder the search for truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its **probative value** is overshadowed by its potential for prejudice [emphasis added]. [6]

All three of these principles – relevance, reliability, and probative value – undergird the primary goals of fact-finding. Due to the paramount importance of truth-seeking in the formulation evidentiary rules, judges have been traditionally unwilling to exclude from trial evidence illegally or unfairly obtained if that evidence would lead to a more accurate verdict.[7] And in most cases, the probative value of real evidence is not affected by the manner of its collection. These jurisprudential norms play an important role in understanding the wording of subsection 24(2) of the *Canadian Charter of Rights and Freedoms*:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction

[6] 2001 SCC 33, at ¶30.
[7] David. M. Paciocco and Lee Stuesser, *The Law of Evidence in Canada*, 5th ed. (Toronto: Irwin Law, 2008), 391.

> to **obtain such remedy as the court considers appropriate and just in the circumstances**.
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> (2) Where, in proceedings under subsection (1), a court concludes that evidence was **obtained in a manner** that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence **shall be excluded if** it is established that, having regard to all the circumstances, **the admission of it in the proceedings would bring the administration of justice into disrepute** [emphasis added].[8]

The text of subsection 24(2) marks a significant shift away from the Benthamite common law principle that all relevant evidence should be admissible. Prior to 1982, Canadian jurisprudence followed the well-established common law position that evidence procured unlawfully was still admissible if relevant.[9] Writing for the majority in *R.* v. *Wray*, Martland J opined that there was no judicial discretion at common law to exclude evidence on the ground that its admission would bring the administration of justice into disrepute. However, in the years leading up to the patriation of the constitution, various lawyers and academics argued that evidence gained from illegal conduct by the police during the course of an investigation

[8] *Canadian Charter of Rights and Freedoms*, s. 24, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Since the Supreme Court's decision in *R.* v. *Collins*, [1987] 1 S.C.R. 265, "would" has been read as "could" to favour the less onerous parallel French text of the *Charter*; see ¶ 54.

[9] [1971] S.C.R. 272, following *Kuruma* v. *The Queen* [1955] A.C. 197 (P.C.). See also Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007), §41.2. The notable exception to this principle of the common law was unlawfully obtained confessions, but again this was and is a principled exception based on the notion that confession evidence tainted by coercion or compulsion is inherently unreliable.

should not be admitted at trial.[10] Many common law jurisdictions including the United States, the United Kingdom, Australia, and some continental European jurisdictions such as Germany had adopted some form of exclusionary rule over the course the twentieth century, making Canada an outlier on the issue.[11] After much debate, the drafters of the *Charter* settled upon language that represents a compromise between the common law position as expressed in *R.* v. *Wray* and the very robust "fruit of the poisonous tree" American position regarding the exclusion of illegally obtained evidence.[12] The language of compromise embedded in section 24 has created interpretative challenges. There are at least three ambiguities built into s. 24(2): 1) whether exclusion of evidence is a permissible remedy under both subsections[13]; 2) whether the 'obtained in a manner' is sufficiently clear for

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[10] David M. Paciocco and Lee Stuesser, "Revisions to David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 5th ed. (Toronto: Irwin Law, 2008)", online: Canadian Law Books :: Irwin Law Inc. ("Paciocco, 'Revisions'"). <http://www.irwinlaw.com/content/assets/content-commons/521/LE5rev_09.pdf>, 2. See also D. W. Roberts, "The Legacy of Regina v. Wray", (1972) 50 Can. Bar Rev. 19, in particular at pp. 23-25, 37-38. In the wake of *R.* v. *Wray* professor Roberts questioned the Supreme Court's failure to consider the underlying principles of the rules of evidence, and in particular the failure to consider the principle of the repute of the administration of justice. Further, three of nine members of the Court in *R.* v. *Wray, supra*., were dissenting; see Spence J at p. 304: "I am most strongly of the opinion that it is the duty of every judge to guard against bringing the administration of justice into disrepute."

[11] See Morissette, *supra*., at pp. 523-525 for a summary of some of the initial international development and adoption of the exclusionary rule.

[12] The status of s. 24(2) exclusionary rule as a compromising one was observed by Dickson CJC, writing for the majority in *R.* v. *Simmons*, [1988] 2 S.C.R. 495, at ¶60. See also Peter Cory, "General Principles of *Charter* Exclusion," (1998) 47 UNB L.J. 229 at 230; Hogg at §41.2, n. 7. On the negotiations leading to the patriation see: Barry L. Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta), 2013.

[13] See *Sopinka, supra*., at §9.27 – 9.31.

assessing causation; and 3) the rationale or underlying policy rationale behind the exclusionary rule is not obviously discernible from the text. Arguably, the last factor has given rise to the most competing interpretations.

In *The Law of Evidence*, Paciocco and Stuesser have identified four competing theories behind the purpose of section 24: 1) a **remedial model** focused on restorative justice. The main purpose is to restore the accused to their situation immediately prior to the breach by excluding evidence obtained as a result of the breach; 2) an **enforcement model** whereby evidence obtained by the breach of an individual's *Charter* rights may be excluded to deter state officials from committing similar breaches in the future; 3) a **reputational model** in which the administration of justice is distanced from improper police conduct by a refusal to condone such conduct; 4) a **trial fairness** model in which the repute of the administration of justice as whole is the focus of the exclusion.[14] To date, these competing theories behind the purpose of the section have not been fully articulated by Supreme Court so various and competing interpretations have informed the jurisprudence. While the text of s. 24 addresses the possibility of "bringing the administration of justice into disrepute", the section is listed in the "remedies" section of the *Charter* and under the heading of 'Enforcement'. This

[14] Paciocco and Steusser, *The Law of Evidence,* 354-5.

sends mixed signals to any judge who is tasked with trying to purposively interpret the section. Further, there are many varying opinions about what would or would not "bring the administration of justice into disrepute" – a statement open to broadly subjective interpretation. The competing rationales for the exclusion of illegally obtained evidence coupled with the discretionary language of the section makes it difficult to predict whether evidence will be deemed admissible. Since the 1980s, the Supreme Court of Canada has provided guidance in a series of cases. We will now provide a brief overview of the relevant case law.

III. The *Collins*/*Stillman* Framework – The Two-Box Approach

Until 2009, the foundational case regarding the admissibility of illegally obtained evidence was *R.* v. *Collins*.[15] In *Collins*, the police surveilled the accused and subjected him to a warrantless search which produced evidence of narcotics on his person. The officer claimed to be acting under the authority of s. 10 of the federal *Narcotic Control Act* which allowed warrantless searches subject to a reasonableness requirement.[16] The trial judge found that the accused's rights under s. 8 of the *Charter* had been violated; however, the evidence was admitted because

[15] *Supra* at n. 6, ("*Collins*").

[16] At trial, the defence objected that the officer's evidence for reasonable grounds was hearsay evidence and inadmissible. The objection was unfounded, but the Crown failed to respond to the objection and the objection was not overruled by the judge, and so the Crown's burden of demonstrating the reasonableness of the search was not met. As a result, the facts of the case on appeal were that the search was warrantless.

it was deemed to not bring the administration of justice into disrepute. The Court of Appeal agreed. The Supreme Court allowed the appeal and held that the evidence should have been excluded. In his majority decision, Lamer J (as he then was) listed several relevant factors to consider when deeming admissibility for illegally obtained evidence. He then categorized the factors into three groups:

1. "[T]he effect of the admission of the evidence on the fairness of the trial"[17];
2. "the seriousness of the Charter violation"[18]; and
3. "the effect of excluding the evidence" on the repute of the administration of justice.[19]

The first two types of considerations tend toward the exclusion of evidence while the third tends toward admitting it. Lamer J's reasoning was influenced by Professor Yves-Marie Morissette's 1984 article, "The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What to Do and What Not to Do," in which the author proposed the following test regarding disrepute: "[C]ould the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully appraised of the

[17] *Ibid.*, ¶47.
[18] *Ibid.*, ¶49.
[19] *Ibid.*, ¶50.

circumstances of the case?"[20] *Collins* remained the foundational s. 24(2) case until *Grant* in 2009. However, the Collins factors and categories offered little practical guidance for judges and practitioners. To provide more certainty, the Supreme Court continued to modify the *Collins* version of the exclusionary rule in a series of cases.[21] The 1997 case *R.* v. *Stillman* stands out as one of the most important clarifications.[22], In *Stillman*, an accused young offender was charged with the murder of a 14-year-old female acquaintance. The RCMP obtained evidence in a manner not authorized by statute or the common law and which arguably violated the accused's ss. 7 and 8 *Charter* rights. The evidence was admitted at trial, and the accused was convicted. The accused appealed on the grounds that the evidence should have been excluded pursuant to s. 24(2) of the *Charter*. The Court of Appeal agreed that the accused's rights had been violated but that the trial judge properly exercised his discretion to exclude the evidence. The Supreme Court reversed this decision and ordered a new trial at which several items of evidence would be excluded.

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[20] Morissette, *supra*. See *Collins* at ¶33. Lamer J went on to say that a trial judge making the assessment on behalf of the reasonable person will have met the test if the judges of the Court of Appeal decline to interfere with the decision. See ¶34.

[21] *See: R.* v. *Burlingham*, [1995] 2 S.C.R. 206; *R.* v. *Evans*, [1996] 1 S.C.R. 8; *R.* v. *Stillman*, *supra.*; *R.* v. *Feeney*, [1997] 2 S.C.R. 13; *R.* v. *Belnavis*, [1997] 3 S.C.R. 341; *R.* v. *Caslake*, [1998] 1 S.C.R. 51; *R.* v. *Buhay*, *infra*. at n. 26; and *R.* v. *Orbanski*, [2005] 2 S.C.R. 3.

[22] [1997] 1 S.C.R. 607, ("*Stillman*").

In *Stillman,* the Court focused heavily on the trial fairness element of the *Collins* categories and established a framework for s. 24(2) that Paciocco and Stuesser have labelled the "two-box" approach.[23] This is widely known as the *Collins*/*Stillman* framework. In his majority decision, Cory J wrote: "[a] consideration of trial fairness is of fundamental importance. If after careful consideration it is determined that the admission of evidence obtained in violation of a *Charter* right would render a trial unfair then the evidence must be excluded without consideration of the other *Collins* factors." He went on, citing the majority reasons in *Collins,* to the conclusion that the point of considering the trial fairness factor "is to prevent an accused person whose *Charter* rights have been infringed from being forced or conscripted to provide evidence in the form of statements or bodily samples" because the admission of conscripted evidence would tend to render the trial unfair.[24] As a result of *Stillman,* the first step of the *Collins* test involved a classification exercise. If evidence was found to be conscriptive, it would generally (although not automatically) render the trial unfair and be subject to automatic exclusion. If the evidence was a non-conscriptive product of a *Charter* breach, then it would still be subject to the balancing approach of the second and third groups of *Collins* factors: the seriousness of the violation and the

[23] Paciocco and Stuesser, *The Law of Evidence*, 350.
[24] *Stillman,* at ¶73.

effect of the exclusion on the administration of justice. The meaning of "conscriptive" was itself the subject of further refinement in the post-*Stillman* case law. Paciocco and Stuesser summarise them as follows: Evidence is conscriptive if the accused is somehow compelled in the creation of it and it is (1) a statement, (2) a bodily sample, (3) evidence whose discovery involved "the use as evidence of the body" of the accused, or (4) derivative evidence that would not have been discovered but for the unconstitutional obtainment of other evidence falling into one of the first three categories (*e.g.* a gun obtained as a result of a compelled statement, as in *R.* v. *Wray*).[25]

The effect of *Stillman* and subsequent case law transformed the discretionary language of section 24 into more of a rule than a discretionary power. If defence counsel could make a convincing argument that the evidence was obtained by conscription, then it would likely be excluded on the basis of trial fairness. After *Stillman*, very little attention was paid to the second and third *Collins* groups of factors as trial fairness became the predominant consideration regarding the admissibility of illegally obtained evidence. In *R.* v. *Buhay* the Supreme Court reminded the legal community of the literal meaning of what it said in *Stillman* on the issue of non-conscriptive real evidence - it could be excluded pursuant to s.

[25] Paciocco and Stuesser, *The Law of Evidence,* 368.

24(2) if a *Charter* breach was serious enough to warrant the remedy.[26] The *Collins*/*Stillman* framework did not do away with the original *Collins*-style balancing of all factors pertinent to s. 24(2) exclusion on a standard of reasonableness. However, the preoccupation with trial fairness detracted from the balancing components of the interpretive framework.

By the early 2000s, there was much criticism of the *Collins*/*Stillman* framework. In *R.* v. *Orbanski*, a case which challenged the constitutionality of the *Collins*/*Stillman* approach, the court sidestepped the issue because they found that there had been no *Charter* violation and, thus, no reason to apply ss. 24(2). [27] However, in his dissent, LeBel J opined that the two-box *Collins*/*Stillman* framework was not supported by the wording of s. 24(2) or the intention of the drafters.[28] He outlined two significant problems: 1) useful evidence was being lost as consequence of "relatively modest" breaches, and 2) the framework was highly determinative about many issues were too subtle to warrant technical determinations such as discoverability and use of the body.[29] The Supreme Court would grapple with these issues in *R*. v. *Grant*.

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[26] 2003 SCC 30, at ¶71: "Section 24(2) is not an automatic exclusionary rule [. . .]; in my view, neither should it become an automatic inclusionary rule when the evidence is non-conscriptive and essential to the Crown's case."
[27] 2005 SCC 37, at ¶61.
[28] *Ibid.*, at ¶98.
[29] Paciocco and Stuesser, *The Law of Evidence*, 390-391.

IV. *R.* v. *Grant – A 'Revolutionary' Decision*

The Supreme Court's companion decisions *R.* v. *Grant* and *R.* v. *Harrison* marked a significant revision of the s. 24(2) exclusionary framework.[30] McLachlin J (as she then was) wrote a vigorous dissent in *R.* v. *Stillman*, and she resurrected the framework to provide the basis of her reasons in *R.* v. *Grant*. In her analysis, McLachlin revisits the wording of s. 24 and emphasizes the textual meaning of the section which includes the phrases "having regard to all the circumstances" and "the court considers appropriate and just in the circumstances." *Grant* may be considered a 'revolutionary' decision because McLachlin focusses on the original intent of the wording and the exercise of judicial discretion. This decision 'revolves' the meaning of the section back to its origins of compromise and balance as opposed to the focus on individual rights and trial fairness as evolved in the *Collins/Stillman* line of jurisprudence.

In *Grant*, police observed the 18-year-old accused walking in an area known for a high rate of robbery and drug offences. When the accused "fidgeted" in a manner that aroused their suspicions, the officers blocked his path and asked for his name and address. One officer stood in front of the accused's path on the sidewalk and asked for the accused's name and address. Two other officers

[30] *Supra.* The Court also examined the underlying purposes of s. 9 of the *Charter*, which is not relevant to this discussion, but which represents an important development on that front as well as to what constitutes a detention and why.

approached the accused and stood on either side of the first officer blocking the accused's path. When the first officer asked the accused if he "had anything he shouldn't", the accused admitted to having some marijuana and a gun. At trial, the judge found that there had been no breach of the accused's rights. At the Court of Appeal, the panel found that the accused had been arbitrarily detained in breach of s. 9. However, they held that the admission of the gun would not unduly undermine trial fairness and, therefore, it should not be excluded. Under the *Collins*/*Stillman* framework, the gun, as conscripted derivative evidence, very likely would have been excluded. However, the Supreme Court agreed with the Court of Appeal and admitted the gun by reformulating (or 'revolving') the law and then applying it to the facts of the case.

In her majority decision, McLachlin CJC does away with the distinction between conscriptive and non-conscriptive evidence and provides the following test for trial judges to apply when considering the admissibility of illegally obtained evidence:

1. The degree of seriousness of the state's *Charter*-infringing conduct: "The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct."[31]

[31] *Grant*, at ¶72.

2. The impact of the breach on the accused's protected interests: "The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive"[32]; and
3. The public interest in a decision based on the actual merits of the case: "[W]hether the truth-seeking function of the criminal trial process would be better served by the admission of the evidence, or by its exclusion. This inquiry reflects society's 'collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law.'"[33]

In *Grant*, the principle against self-incrimination no longer plays the central role it did in the *Collins*/*Stillman* framework. In a marked departure from the 'two-box' model, the court's approach in *Grant* requires a qualitative "all circumstances" contextual analysis in which trial judges must exercise considerable discretion in weighing all relevant factors. Writing for the majority, McLachlin CJC stated: "The balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision."[34] In her dissent in *R.* v. *Stillman*, McLachlin J (as she then was) relied upon the work of John Henry Wigmore[35] and rejected the classification of bodily evidence as akin to compelled testimony. She also criticized the "legalistic" character of the s. 24(2) jurisprudence to date and

[32] *Ibid.*, at ¶76.
[33] *Ibid.*, at ¶79.
[34] *Grant*, at ¶140.
[35] John Henry Wigmore was known as the "Supreme Commander of the Law of Evidence." In his influential treatise on Evidence, he argued that more principled reasons should be used to admit evidence as opposed to the reliance on technical categories. He dedicated his text to the utilitarian philosopher Jeremy Bentham. See: Andrew Porwancher, *John Henry Wigmore and the Rules of Evidence: The Hidden Origins of the Modern Law* (Columbia: University of Missouri Press, 2016).

advocated for an approach more literally concordant with the wording of s. 24(2): "In place of a principle of automatic exclusion, s. 24(2) asks judges to determine on a case-by-case basis whether, in the circumstances before them, admission of the evidence would bring the administration of justice into disrepute.[36] McLachlin CJC adopts this principled approach in *Grant*. In her decision, she relies on the approach to questions of admissibility advocated by American legal scholar John Henry Wigmore (1863-1943). Wigmore, who himself was influenced by the utilitarian philosopher Jeremy Bentham, argued that fact-finding should follow a principled basis in which the strict application of legalistic categories should be replaced by the application of judicial discretion based on usefulness and reason.[37]

V. The Shift from the *Collins/Stillman* Framework to the *Grant* Test

As previously discussed, *R*. v. *Grant* marked a significant departure in s. 24(2) jurisprudence. Initial reactions to the decision were mixed. Shortly after the decision was released, Professor James Stribopoulos wrote that *Grant* would lead to the exclusion of more evidence and that the Supreme Court had tipped the balance more in favour of civil liberties.[38] Other observers, such as prominent

[36] *Stillman*, at ¶194, 206-208, 234, 239.
[37] See: William L. Twining, *Theories of Evidence: Bentham and Wigmore* (London: Weidenfeld and Nicolson, 1985).
[38] James Stribopoulos, "Friday's Supreme Court of Canada Judgments: For Civil Libertarians, Like a Breath of Fresh Air", The Court, <

criminal defence practitioner Edward Prutschi, argued that the decision would have the opposite effect and encourage police officers to pursue investigations more aggressively with less concern for *Charter* protections. Further, Prutschi warned that the Supreme Court returned to a pre-*Charter* 'tough-on-crime' attitude and resurrected the ends of prosecution over the means of proper police conduct last seen in cases such as *R.* v. *Wray*.[39] At the time, prominent Evidence law professors David Paciocco, Lee Stuesser, and Don Stuart shared these concerns.[40] Since *R.* v. *Grant* was released in 2009, several academic commentators have examined the jurisprudential impact of the decision.[41] At a 2019 conference at Robson Hall, "Criminal Justice and Evidentiary Thresholds in Canada: The Last Ten Years," Professor Kent Roach delivered a keynote address in which he offered a comparative analysis on the admissibility of illegally obtained evidence in Canada,

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http://www.thecourt.ca/2009/07/20/friday%E2%80%99s-supreme-court-of-canada-judgments-for-civil-libertarians-like-a-breath-of-fresh-air/>.

[39] Edward Prutschi, "SCC decision in R. v. Grant: Do the ends justify the means?", Slaw, < http://www.slaw.ca/2009/07/17/scc-decision-in-r-v-grant-do-the-ends-justify-the-means/>

[40] Paciocco and Stuart, *The Law of Evidence*, 391; Don Stuart, "Threats to *Charter* Rights of Accused in Making the Test for Exclusion of Evidence under Section 24(2) More Flexible," (2007) 45 C.R. (6th) 262.

[41] See, for example: Patrick McGuinty, "Section 24(2) of the Charter: Exploring the Role of Police Conduct in the Grant Analysis" (2018) 41 Man L.J. 273-306; Benjamin Johnson, Richard Jochelson and Victoria Weir, "Exclusion of Evidence Under Section 24(2) of the Charter Post-Grant in the Years 2014-2017: A Comparative Analysis of 600 Cases," (2019) vol 67 Crim Law Q 57.; Lauren-Jean Ogden, "Taken for Grant-ed: Assessing the Short-Comings of the Grant Test's Application to the Evidence Obtained from Personal Devices," Manitoba L.J. (forthcoming)

Ireland, New Zealand, and the United States.[42] Since 2009, Adam Baker and I have been tracking the shift from the Collins/Stillman framework to the more contextual approach in Grant. The invitation to present at the Canadian Association of Provincial Court Judges is a wonderful opportunity to present this paper as our initial draft. As lawyers and legal historians, the goal of our project is two-fold: 1) to analyse the Grant decision in its historical and jurisprudential context; and 2) to identify potential challenges with the Grant framework. We welcome all comments at this stage in our project.[43]

As a consequence of its focus on trial fairness, the *Collins*/*Stillman* framework has been criticized for excluding much useful evidence for relatively minor *Charter* breaches. The benefit of the *Grant* approach is that it gives judges more flexibility to admit evidence which would have previously been classified as conscriptive so long as it did not bring the administration of justice into disrepute. The *Collins*/*Stillman* framework may have been over-inclusive; however, the focus on the exclusion of conscriptive evidence has a principled and historical basis. It has long been recognized in Anglo-American common law that it is inherently

[42] The keynote address has been published. See: Kent Roach, "Reclaiming Prima Facie Exclusionary Rules in Canada, Ireland, New Zealand, and the United States: The Importance of Compensation, Proportionality, and Non-Repetition," Manitoba Law Journal vol 43 issue 3(2020): 1-47.

[43] We presented a version of this paper, "You say you want a revolution? Chief Justice McLachlin and the Admissibility of Illegally Obtained Evidence," at the Robson Hall conference Criminal Justice and Evidentiary Thresholds in Canada: The Last Ten Years, 26 October 2022.

unfair for the state to be able to use evidence gleaned from self-incrimination.[44] One of the main purposes of *Charter* protections is to protect individuals from state incursions into personal liberty. The approach taken in *Grant* creates a greater possibility that an accused's will be convicted based on evidence gained from compulsion via a Charter breach.

Arguably, it is this concern that animated Cory J. reasoning in *R.* v. *Collins* and his focus on trial fairness. After all, what could bring the administration of justice into disrepute more than a reputation for unfair trials? A lecture given by Cory J at the University of New Brunswick a year after he wrote the majority reasons for *Stillman* reveals the reasons for his preoccupation with trial fairness and the rights of the accused to not be compelled to help the state make its case.

> No free and democratic society can countenance an unfair trial. As the majority held in *Stillman*, "a conviction resulting from an unfair trial is contrary to our concept of justice; to uphold such a conviction would be unthinkable; it would indeed be a *travesty of justice*". Therefore, where the impugned evidence fails the trial fairness branch of the *Collins* test, in other words where the admission of the evidence would render the trial unfair, the evidence *must* be excluded, without reference to the other *Collins* factors.[45] [emphasis in original]

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[44] The principle against self-incrimination has a long history in the Anglo-American common law and has been constitutionalized in section 13 of *The Canadian Charter of Rights and Freedoms*. See: John H. Langbein, "The Historical Origins of the Privilege against Self-Incrimination at Common Law," 92 Michigan Law Review 1047 (1993-94).

[45] Cory, *supra*., at 234.

The principles behind the *Collins*/*Stillman* framework are laudable; however, as we have seen, they led to a highly technical and determinative set of rules. In *Grant,* the Supreme Court of Canada resets the jurisprudence by permitting judges more latitude to weigh and balance the various relevant factors that go into determinations of admissibility. Given the history and purpose of section 24(2), this change in direction may be sensible. However, the greater flexibility given to trial judges comes at the cost of a reduction in certainty. And uncertainty in the law tends to generate more litigation.

VI. Some Current Issues in Section 24(2) Jurisprudence

A. Electronic Evidence

Electronic evidence is largely governed by rules and legislation which developed prior to the digital age. The antiquated sections of the *Canada Evidence Act* governing the admission of electronic evidence are ill-equipped to handle the distinct issues associated with electronic evidence.[46]

One such issue is the presumption that electronic evidence is highly reliable. Both the legal community and the public assume that evidence produced by a computer is accurate. This phenomenon is known as "guilt by machine."[47]

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[46] *Canada Evidence Act*, R.S.C. 1985, c. C-5, s.30.
[47] Ken Chasse, "Guilt by Mobile Phone Tracking Shouldn't Make 'Evidence to the Contrary' Impossible" (2016) Independent at 2 [Chasse].

However, the reliability of evidence produced by an electronic system is dependent on the reliability of the system itself.[48] In *R v Oland*, a Call Detail Record (CDR) containing cellphone tower location data was a key piece of evidence in the prosecution's case.[49] When a phone call is placed from a mobile device, the cellphone tower located nearest to the device directs the call from the mobile phone.[50] The location of the cell tower that directed each call is automatically produced and stored by the records management software. The information is stored in a centralized electronic database.[51]

In *Oland*, the records produced by the electronic records management system (ERMS) were deemed to be admissible under both section 30 of the *Canada Evidence Act* as well as the business records exception to the hearsay rule.[52] However, the software errors and vulnerabilities prevalent in this technology were not properly considered. Unlike paper documents, there is an absence of an "original" in the digital environment.[53] Electronically stored data is often altered through system updates. Undetected software errors are highly

[48] *Ibid* at 14.
[49] *R v Dennis James Oland*, 2015 NBQB 245 at ¶8-10.
[50] Chasse, *supra* at 2-3.
[51] *Ibid*.
[52] *Oland*, *supra* at ¶89-91.
[53] Luciana Duranti, Corrine Rogers & Anthony Sheppard, "Electronic Records and the Law of Evidence in Canada: The uniform Electronic Evidence Act Twelve Years Later" (2010) 70 Archivia 95 at 97-98.

prevalent in electronic systems.[54] Furthermore, the system itself is readily accessible by many people. As such, these records are vulnerable to corruption. Due to the complexity of digital information systems, it is impossible to definitively determine whether an electronic document has been modified.[55]

In the context of *R v Grant*, the third line of inquiry in the test often hinges on the reliability of the evidence.[56] As such, this presumed reliability of electronic evidence can lead to the admission of evidence that has been illegally obtained. Additionally, the *Grant* test is skewed towards the admission of evidence collected from personal electronic devices. The concept of "relevant information" obtained from devices such as cellphones and computers tend toward admission; it can be difficult to determine whether the information was "illegally obtained" under the first branch of the test. The high standard for bad faith in obtaining search warrants for personal devices further skews towards admission of the evidence.

The law defining "illegally obtained evidence" collected from a personal electronic device is relatively unclear. In *R v Vu*, the Crowell J broadly defined the "relevance" of evidence obtained from an electronic device.[57] Evidence that is not

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[54] US Department of Commerce, "Software Errors Cost US Economy $59.5 Billion Annually – NIST Assesses Technical Needs of Industry to Improve Software Testing" (June 2002) online at http://www.abeacha.com/NIST_press_release_bugs_cost.html
[55] *Ibid.*
[56] 2009 SCC 32.
[57] 2013 SCC 60.

relevant to the original crime is still "relevant" if it leads to another charge.[58] However, the information obtained from personal devices relates to nearly every aspect of a person's life, and as such will almost always be deemed "relevant" to some aspect of the case. Furthermore, in *Vu*, the Supreme Court held that an officer's mistaken belief that they are acting under the authority of a valid warrant amounted to good faith and was not a serious breach under the first branch of the *Grant* test.[59]

B. Police (Mis)Conduct

Empirical research by Patrick McGuinty suggests that the first line in the Grant analysis, the police conduct inquiry, is the determinative factor in the analysis.[60] However, the concept of good faith policing is not clearly defined. As such, good faith policing encompasses a broad scope of conduct, resulting in the admission of evidence that would otherwise be excluded.[61]

In *Grant*, McLachlin CJ stated that breaches committed by police officers in good faith diminish the need for the courts to disassociate themselves from

[58] *Ibid* at 8.
[59] *Ibid* at ¶69-71.
[60] Patrick McGuinty, "Section 24(2) of the Charter: Exploring the Role of Police Conduct in the Grant Analysis" (2018) 41 Man L.J 273-306.
[61] *Ibid* at 273.

unlawful police conduct.[62] However, a recurring theme in good faith policing is the honest and mistaken belief that a search was authorized by a valid warrant.[63]

In *R v Fearon*, illegally obtained evidence obtained from the accused's cellular device was found to be admissible.[64] Cromwell J held that the breach was committed in good faith due to the uncertainty in the law regarding police powers to search a cell phone incident to arrest. However, Cromwell J acknowledged that two conflicting authorities existed with regards to police powers to search cellphones incident to arrest.[65] Due to the unclear nature of this developing area of jurisprudence, evidence is regularly considered to be obtained in "good faith." Ultimately, this lack of clarity in the law combined with the broad concept of good faith policing skews the *Grant* test towards admission of electronic evidence.

C. Certainty v. Flexibility

The competing principles of certainty versus flexibility in legal analysis have received significant debate among legal scholars.[66] Proponents of the certainty principle argue that a rigid application of the law ensures that all

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[62] *Grant, supra* at ¶75.
[63] See *R v Cole* 2012 SCC 53; *R v Aucoin* 2012 SCC 66; *R v Spencer* 2014 SCC 43.
[64] 2014 SCC 77.
[65] *Ibid* at ¶93-95.
[66] Peter Sankoff, "The Search for a Better Understanding of Discretionary Power in Evidence Law" (2007) 32 Queens L.J. 487.

individuals are treated equally. Proponents of flexibility argue that a flexible approach is better suited when applying the law to an infinite variety of factual circumstances.[67]

While both ideologies have considerable merit, there are dangers associated with allowing a flexible approach to govern interactions between individuals and the state. If the police are aware that any evidence obtained during an investigation has the potential to be included at trial, this encourages them to push boundaries beyond their acceptable limits. The possibility that any evidence obtained may be admissible encourages the police to cast a wide net when conducting investigations.

The deterrence effect of section 24(2) has been recognized in several decisions by the Supreme Court. In *Collins*, Lamer stated that exclusion is, at least in part, designed to "oblige law enforcement authorities to respect the exigencies of the Charter" and to "promot[e] the decency of investigatory techniques."[68] While the jurisprudence has explicitly stated that preserving the repute of the administration of justice is the main purpose of section 24(2), the deterrent effect plays an important role in preserving this reputation.

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[67] Lisa Dufraimont "Realizing the Potential of the Principled Approach to Evidence" (2013) 39:1 Queens L.J. at 11-40.
[68] *Collins* supra at 35.

Professor Steven Penney has convincingly argued that this deterrence effect is the most important objective of an exclusionary rule, stating that the "[c]ourt should adopt a bright-line rule that encourages police to become reasonably well-informed about their constitutional obligations and signals to them that intentional and negligent violations will always result in exclusion."[69] The United States provides the most significant evidence of the deterrence effect associated with a strict exclusionary rule. Following the decision in *Mapp v Ohio*[70], the case that imposed an exclusionary rule on any state that had not adopted its own exclusionary principles, the number of warrants filed in the country increased dramatically.[71] This increase in warrants suggests that the exclusionary rule can be used to influence police behaviour.

D. The Origin and Purpose of Section 24(2)

The interpretation of section 24(2) has sparked significant discussion among the legal community. The debate surrounding the application of section 24(2) is

[69] Steven Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter," (2004) 49 McGill L.J. 105.
[70] 367 US 643 (1961).
[71] Michael J Murphy, "Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments" (1966) 62 Ky L.J. 681 at 708.

rooted in the origins of its drafting, as there is little evidence to show that the drafters of the *Charter* had a clear vision with regards to its application.

The first public draft of the *Charter* expressly stated that no exclusionary remedy could be developed to enforce these legal rights.[72] This position was strongly contested by public-interest groups who favored the adoption of an automatic exclusionary rule.[73] Ultimately, the drafters of the *Charter* provided a compromise between the two opposing ideologies with section 24(2). This compromise was suggested by The Canadian Civil Liberties Association, who strongly favored an automatic exclusionary rule.[74] The drafters of the *Charter* ultimately conceded to this compromise. However, neither side provided commentary with regards to the specific application of an exclusionary rule that could only be applied in some cases.[75]

The first issues in interpreting section 24(2) involved the determination of its primary purpose. The three major purposes of excluding evidence are to deter future violations, to provide a remedy for violations, or to maintain the repute of

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[72] The "August 28th Draft" provided, in s. 22(b): "Nothing in this *Charter* affects the admissibility of evidence or the ability of Parliament or a legislature to legislate thereon." See David M Paciocco, "The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule" (1990), 32 Crim L.Q. 326, at pp 354 [Judicial Repeal of s.24(2)].
[73] D Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell 1986) at 222-223 [The Law of the Charter].
[74] The Law of the Charter supra at 223.
[75] Ibid at 222-223.

the justice system.[76] While there are distinct differences between these three purposes, there is also significant overlap in their objectives. Providing a remedy to individuals whose rights have been violated would serve to deter police misconduct and strengthen the validity of the *Charter*. However, there are situations where these objectives may conflict, particularly in cases involving serious crimes where the repute of the justice system may be harmed by failing to prosecute violent criminals.

In *R v Therens,*[77] the Supreme Court majority determined that the primary purpose of the section was to maintain the repute of the administration of justice. Writing for the majority, Justice Le Dain stated: "The central concern of s. 24(2) would appear to be the maintenance of respect for and confidence in the administration of justice, as that may be affected by the violation of constitutional rights and freedoms."[78]

E. Involuntary Confessions

One of the primary benefits of the causation approach to admissibility is that it allows for the exclusion of all "real" evidence that is obtained as a result of an

[76] Judicial Repeal of s.24(2) supra at 332.
[77] [1985] 1 S.C.R. 613.
[78] Ibid at ¶75.

involuntary confession. The common law confessions rule states that involuntary statements are inadmissible.[79] However, involuntary statements can be used to obtain search warrants, and the evidence obtained in those searches can be admissible. This encourages the police to illicit involuntary confessions in the hopes of obtaining a search warrant.

Chief Justice McLachlin addressed this concern in *Grant*, stating: "The s. 24(2) judge must remain sensitive to the concern that a more flexible rule may encourage police to improperly obtain statements that they know will be inadmissible, in order to find derivative evidence which they believe may be admissible."[80] Despite this warning, this problem with abandoning the *Collins/Stillman* causation analysis became clear only two years later.

In *R v Côté*,[81] the police obtained a search warrant through a series of significant *Charter* breaches. The police went to Ms. Côté's home for the purposes of investigating a potential shooting. They told her that they were simply searching the home for her safety. After entering the home under false pretenses, a firearm was found.[82] The police transported Ms. Côté to the station without

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[79] The common law confession rule originates from the privy council in the case of *Ibrahim v the King (Hong Kong)* [1914] AC 599. It has been restated in the Canadian context in *R.* v. *Hebert* [1990] 2 S.C.R. 151 and *R.* v. *Oickle* [2000] 2 SCR 3.
[80] *Grant* supra at para 128.
[81] [2011] 3 S.C.R. 215.

[82] *Ibid* at paras 15-16.

informing her that she was under investigation. She was interrogated for 11 hours until she confessed to the shooting. The police used this involuntary confession to obtain a search warrant and retrieve the murder weapon, which had been located during their initial illegal search.[83]

This sequence of events shows the tactics that law enforcement can use to circumvent *Charter* rights. While the weapon was obtained legally, it was obtained as the direct result of many significant *Charter* breaches. The trial judge ruled that all evidence obtained in this investigation should be excluded. However, this decision was overturned by the Court of Appeal of Quebec.

The automatic exclusion of conscriptive evidence served to preserve *Charter* rights by closing the loophole associated with involuntary confessions. The return to a more rigid rule based in the principle of causation would deter the police from using involuntary confessions to circumvent the *Charter*.

[83] *Ibid* at ¶17-20.