

Electronic Search & Seizure: After the Breach

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Search and Seizure

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ELECTRONIC SEARCH & SEIZURE: AFTER THE BREACH

Electronic Evidence and Section 24 of the Charter

INTRODUCTION

We are currently experiencing shifts in the law of search and seizure as the courts deal with the increasing technological advances in the means of storing, transmitting, sharing, intercepting and encrypting electronic information, and its implications in the gathering of evidence in a criminal investigation. The law is struggling to keep up with the implications on privacy interests in this type of evidence, the ubiquitous nature of data sharing, and how law enforcement is able to lawfully investigate crimes and obtain electronic evidence.

As the law changes and the nature of privacy interests is further defined, how do the courts deal with the electronic evidence obtained by law enforcement contrary to *Charter* principles? In other words, what do we do after the breach?

The settling news is that while the law shifts in dealing with privacy and electronic evidence, the framework of analysis under s.24(2) of the *Charter* remains the same. The principles of *R. v. Grant*, 2009 SCC 32; [2009] 2 S.C.R. 353, continue to apply in determining the exclusion of evidence.

SECTION 24(2) PRINCIPLES

Heart of a *Charter* application is the request for a remedy under s.24

Before launching into any contested *Charter* application in court, sometimes parties need to remind themselves of the true nature of the application. Crown and defence will get caught up in the arguments whether there is a *Charter* breach or not. And when dealing with issues of the of electronic evidence and privacy interests, the arguments are novel, sophisticated and interesting.

However, it must be kept in mind that the point of the application is not merely to establish a *Charter* breach. Rather, it is to seek a remedy under s.24(1) or s.24(2). The *Charter* application is actually an application under s.24, not under s.8. Establishing a s.8 *Charter* breach is the means to apply for a s.24 remedy.

The above seems obvious, but it is surprising how often parties expend tremendous efforts on their positions whether there is or not a s.8 breach, and exert merely perfunctory efforts in the s.24(2) application. Keep in mind that the true purpose of a *Charter* application is for an eventual remedy under s.24 of the *Charter*.