File Nos. 31892 & 32037

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Ontario and
(On Appeal from the Court of Appeal for Saskatchewan)

BETWEEN:

DONNOHUE GRANT

APPELLANT

-and-

CURTIS SHEPHERD

APPELLANT

v.

HER MAJESTY THE QUEEN

RESPONDENT

(ATTORNEY GENERAL OF ONTARIO – GRANT)
(ATTORNEY GENERAL OF SASKATCHEWAN – SHEPHERD)

- and-

ATTORNEY GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO, DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA, CANADIAN CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

INTERVENERS

FACTUM OF THE INTERVENER, ATTORNEY GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

MIKE BRUNDRETT
MARGARET A. MEREIGH
Ministry of Attorney General
Criminal Appeals
6th Floor, 865 Hornby Street
Vancouver, B.C. V6Z 2G3
Tel: (604) 660-1126
Fax: (604) 660-1133
E-mail: MBrundrett@gov.bc.ca

Counsel for the Intervener on Grant & Shepherd,
Attorney General for the Province of British Columbia

ROBERT HOUSTON, Q.C.
Burke-Robertson
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON K1P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
E-mail: kcollins@burkerobertson.com

Ottawa Agent for the Intervener on Grant & Shepherd,
Attorney General for the Province of British Columbia

(For names and addresses of the parties see inside cover page)

JONATHAN DAWE
Sack Goldblatt Mitchell LLP
Barristers & Solicitors
20 Dundas Street West
Suite 1130, P.O. Box 180
Toronto, ON M5G 2G8
Tel: (416) 977-6070
Fax: (416) 591-7333

Counsel for the Appellant, Grant

BRIAN A. CRANE, Q.C.
Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 786-0107
Fax: (613) 788-3500
E-mail: Brian.Crane@gowlings.com

Ottawa Agent for the Appellant, Grant

MICHAEL W. OWENS
Michael W. Owens Legal P.C. Ltd.
Barrister & Solicitor
704 – 222 4th Avenue South
Saskatoon, Saskatchewan S7K 5M5
Tel: (306) 665-8828
Fax: (306) 665-5519

Counsel for the Appellant, Shepherd

BRIAN A. CRANE, Q.C.
Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 786-0107
Fax: (613) 788-3500
E-mail: Brian.Crane@gowlings.com

Ottawa Agent for the Appellant, Shepherd

JOHN CORELLI
Attorney General of Ontario
720 Bay Street, 10th Floor
Toronto, ON M5G 2K1
Tel: (416) 326-2618
Fax: (416) 326-4656
E-mail: john.corelli@jus.gov.on.ca

Counsel for the Respondent, Grant

ROBERT HOUSTON, Q.C.
Burke-Robertson
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON K1P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
E-mail: kcollins@burkerobertson.com

Ottawa Agent for the Respondent, Grant

W. DEAN SINCLAIR
Attorney General for Saskatchewan
3rd Floor, 1874 Scarth Street
Regina, Saskatchewan S4P 4B3
Tel: (306) 787-5490
Fax: (306) 787-8878

Counsel for the Respondent, Shepherd

BRIAN A. CRANE, Q.C.
Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 786-0107
Fax: (613) 788-3500
E-mail: Brian.Crane@gowlings.com

Ottawa agent for the Respondent, Shepherd

JAMES C. MARTIN (*GRANT*)
& PAUL ADAMS (*SHEPHERD*)
Public Prosecution Service of Canada
5251 Duke Street
Suite 1400, Duke Tower
Halifax, Nova Scotia B3J 1P3
Tel: (902) 426-2484
Fax: (902) 426-7274
E-mail: james.martin@ppsc-sppc.gc.ca
E-mail: paul.adams@ppsc-sppc.gc.ca

Counsel for the Intervener on Grant & Shepherd
Director of Public Prosecutions Canada

FRANÇOIS LACASSE
Director of Public Prosecutions
284 Wellington Street
2nd Floor
Ottawa, ON K1A 0H8
Tel: (613) 957-4770
Fax: (613) 941-7865
E-mail: flacasse@ppsc-sppc.ga.ca

Ottawa Agent for the Intervener on Grant & Shepherd
Director of Public Prosecutions Canada

DON STUART
Queen's University
94 University Ave
140 Dunning Hall
Kingston, ON K7L 3N6
Tel: (613) 533-0000 Ext. 74272
Fax: (613) 533-6509

Counsel for the Intervener on Grant,
Canadian Civil Liberties Association

BRIAN A. CRANE, Q.C.
Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 786-0107
Fax: (613) 788-3500
E-mail: Brian.Crane@gowlings.com

Ottawa Agent for the Intervener on Grant,
Canadian Civil Liberties Association

MICHAL FAIRBURN
Attorney General of Ontario
720 Bay Street, 10th Floor
Toronto, ON M5G 2K1
Tel: (416) 326-4658
Fax: (416) 326-4656
E-mail: michal.fairburn@jus.gov.on.ca

Counsel for the Intervener on Shepherd,
Attorney General of Ontario

ROBERT HOUSTON, Q.C.
Burke-Robertson
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON K1P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
E-mail: kcollins@burkerobertson.com

Counsel for the Intervener on Shepherd,
Attorney General of Ontario

MARLYS A. EDWARDH
Ruby & Edwardh
Barristers & Solicitors
11 Prince Arthur Avenue
Toronto, ON M5R 1B2
Tel: (416) 964-9664
Fax: (416) 964-8305
E-mail: edwardh@ruby-edwwrdh.com

Counsel for the Intervener on Grant & Shepherd,
Criminal Lawyers' Association (Ontario)

HEATHER PERKINS-McVEY
Barrister & Solicitor
200 Elgin Street, Suite 402
Ottawa, ON K2P 1L5
Tel: (613) 231-1004
Fax: (613) 231-4760
E-mail: perkins-mcvey@sympatico.ca

Ottawa Agent for the Intervener on Grant &
Shepherd,Criminal Lawyers' Association (Ontario)

INDEX

PAGE

PART I - STATEMENT OF FACTS

1. The Intervener, the Attorney General for British Columbia (AGBC), takes no position with respect to the facts on either appeal as set out by the parties in their factums.

PART II - INTERVENER'S POSITION ON QUESTIONS IN ISSUE

2. The AGBC intervenes in these appeals for the sole purpose of addressing s. 24(2) of the *Charter* and the analytical approach that should inform its application to conscriptive evidence.[1] This is an issue of fundamental importance to the public interest in effective law enforcement.

3. Since ***R. v. Stillman***, [1997] 1 S.C.R. 607, trial courts have routinely presumed that the admission of conscriptive evidence will adversely impact trial fairness and that this should be the predominant factor for consideration under s. 24(2). As it relates to conscriptive evidence, trial fairness has been assigned a determinative role at the expense of all other relevant and competing interests. As a result, the exclusion of conscriptive evidence has become near-automatic. This presumption in favour of exclusion applies to all forms of conscriptive evidence, including statements, breath samples, and weapons or other tangible items that are derived through conscription. It bypasses consideration of the degree of state interference with the interests of the accused, the seriousness of the breach, and the significance of the evidence. Instead, the fact that the evidence meets the definition of "conscriptive" leads to the assumption that its admission will adversely engage fair trial interests. More often than not, the courts will proceed no further with the analysis. Yet, conscriptive evidence may be reliable and have significant probative value notwithstanding the method by which it was obtained. Moreover, the extent to which its admission will actually impact the fairness of the trial will vary with the circumstances. Routinely excluding conscriptive evidence from the determination of criminal culpability without regard to other factors undermines the truth-seeking function of the trial and the societal interest in the effective prosecution of crime.

4. It is respectfully submitted that the principles governing s. 24(2) in its application to conscriptive evidence require clarification. The AGBC urges this Court to articulate a framework for s. 24(2) that removes any notion of automatic exclusion even where trial fairness is engaged.

---

[1] "Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples": ***Stillman***, at ¶80.

As with non-conscriptive evidence, the admission of conscriptive evidence should be determined having regard to all the circumstances as set out in ***R. v. Collins***, [1987] 1 S.C.R. 265 at pp. 283-284.

PART III - STATEMENT OF ARGUMENT

A. Overview and Language of s. 24(2)

(i) Overview

5. The narrow issue engaged by the ***Grant*** and ***Shepherd*** appeals is whether the admission of self-incriminating but nonetheless reliable and probative evidence could adversely affect the repute of the administration of justice. The AGBC submits that the exclusion of conscriptive evidence, where the *Charter* violation is minimal and trial fairness is not impacted in a significant way, actually has the effect of undermining the repute of the administration of justice. A reconsideration of the current approach to conscriptive evidence is necessary: the language and intent of s. 24(2) of the *Charter*; the problems associated with presuming trial unfairness; the need to recognize the community interest in the enforcement of rights; and an examination of comparative jurisprudence all dictate a return to a more balanced approach. Alternatively, if a broader approach to the admission of conscriptive evidence is not accepted, the AGBC submits that there are specific forms of conscriptive evidence, including breath samples and derivative physical evidence, which should be exempt from a rule in favour of exclusion given their inherent reliability and the minimally intrusive way in which they are obtained.

(ii) A Strict Exclusionary Approach is Not Faithful to the Language of Section 24(2)

6. The interpretation of s. 24(2) of the *Charter*, as it relates to both conscriptive and non-conscriptive evidence, must remain true to the actual words of the section itself:

> 24. (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.

7. Excluding evidence as a matter of course based on little more than its characterization as "conscriptive" is inconsistent with the language of s.24(2), which provides that evidence shall only be excluded where it is "established" that its admission could bring the administration of justice into disrepute. No test or standard is to be substituted for the words of s. 24(2): ***R. v. Therens***,

[1985] 1 S.C.R. 613 at p. 651; ***Collins***, at p. 286. The wording of s. 24(2) is open-ended and mandates consideration of "all the circumstances". This language is inconsistent with any approach which would elevate a single factor to a position of pre-eminence. Instead, a contextual analysis is required.

8. Section 24(2) does not say that evidence obtained in a manner which infringed or denied a *Charter* right shall be excluded if: (1) it is self-incriminatory; (2) it would not have been obtained or discovered but for the *Charter* infringement; or (3) its admission could render the trial unfair. The framers of the *Charter* could have made any of these considerations the test for the exclusion, but they did not. Instead, they chose to leave the provision open-ended and anchor the test for exclusion in the effect of admission on the reputation of the administration of justice. This necessarily invites considerations that go beyond the interests of the accused. As noted by this Court in ***R. v. Calder***, [1996] 1 S.C.R. 660 at ¶34, "the effect on the repute of the administration of justice is to be assessed by reference to the standard of the reasonable, well-informed citizen who represents community values". (emphasis added) In ***Collins***, Lamer J. stated that: "the concept of disrepute necessarily involves some element of community views, and the determination of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large". (at p. 281, emphasis added) "Community values", of course, include the public interest in effective law enforcement.

B. The Difficulties With A Presumptive Approach

(i) Near-Automatic Exclusion Based on a Presumption of Unfairness is Problematic

9. At first glance, ***Stillman*** appears to establish a fairly rigorous framework for addressing the admission of conscriptive evidence: (1) the first step is to consider whether the evidence is conscriptive; (2) if it is conscriptive, and the prosecution cannot establish on a balance of probabilities that the evidence was otherwise discoverable, its admission will render the trial unfair; and (3) once trial fairness is impacted, there is no need to consider the other ***Collins*** factors and exclusion is appropriate. (at ¶¶112-118) However, the articulation of this framework cannot be divorced from the context in which it arose. ***Stillman*** involved the compelled production of bodily samples. The police used force and threats to compel a young offender to provide bodily samples in blatant disregard of his rights and over clear objection from his lawyers. (at ¶¶123-124) In these circumstances, the Court was rightly concerned about the manner in which the evidence came about

and the impact its admission could have on both substantive trial fairness and the appearance of fairness. This same level of concern, though, may not arise in different circumstances. As Iacobucci J. stated in ***R. v. S.(R.J.)***, [1995] 1 S.C.R. 451, "the principle against self-incrimination may mean different things at different times and in different contexts." (at ¶107) In light of this reality, the ***Stillman*** framework should not be taken as precluding the admission of conscriptive evidence in all cases.

10. Several difficulties arise with a rule of near-automatic exclusion. First, by beginning the analysis with classification, other factors are effectively rendered irrelevant where trial fairness is impacted.[2] This prevents consideration of other factors even though competing interests such as truth-seeking might far outweigh the actual degree of prejudice brought about through admission of the evidence. In cases like ***Grant***, where the conscriptive evidence consisted of a loaded gun, a rule analytically biased toward exclusion means that the manner in which the evidence came about takes centre-stage, while the nature of the evidence and the effect of excluding it are ignored.

11. Second, presumptive exclusion presupposes prejudice and prevents a consideration of the degree of state compulsion. Self-incrimination comes in various forms. It may be fairly minimal as with the taking of a photograph or the preliminary questioning of a person on the street. The accused may participate cooperatively. As well, the principle of self-incrimination is more difficult to apply to derivative physical evidence since it does not owe its existence to a *Charter* breach or represent the same extent of interference with the individual as evidence that is created because of a breach. Routine exclusion of conscriptive evidence ignores these differences, even though they may be fundamental to a proper determination of whether admitting the evidence could bring the administration of justice into disrepute.

12. Third, near-automatic exclusion appears inconsistent with other pronouncements of this Court, including recently ***R. v. Orbanski; R. v. Elias***, [2005] 2 S.C.R. 3 (per Lebel J., at ¶93), indicating the *Charter* did not purport to establish a pure exclusionary rule; also, ***R. v. Buhay***, [2003] 1 S.C.R. 631, at ¶71. In fact, this Court has stated that the routine exclusion of essential evidence may itself bring the administration of justice into disrepute: ***R. v. Strachan***, [1988] 2 S.C.R. 980, at p. 1008. In ***Collins***, Lamer J. held that if the admission of evidence affects trial

[2] In ***R. v. Colarusso***, [1994] 1 S.C.R. 20 at p. 74, the Court affirmed that classification is not determinative.

fairness, it would "tend to bring the administration of justice into disrepute". At the same time, he specifically noted that this would be subject to consideration of other factors. (at pp. 284-285)

13. Compounding the problem is that since ***Collins***, the scope and rigidity of the "conscriptive" classification has expanded. ***Stillman*** adopted a broad, compulsion-based definition of conscriptive evidence. Physical evidence derived from conscription is now squarely within the category. The exception for inevitability of discovery has been narrowed: ***Stillman*** at ¶107. Trial fairness has thus assumed greater importance while reducing the need to balance competing interests.

14. Justice Lamer stated in ***Collins*** that the "nature of the evidence" sought to be admitted or excluded is relevant to assessing trial fairness. (at p. 284) This implies that some evidence, depending on its nature, might have a greater impact on trial fairness than other evidence. Yet, a rule in favour of excluding evidence based merely on its "conscriptive" label assumes that trial fairness is always impacted and in a negative way. What makes evidence "conscriptive" is the manner in which it was obtained. Concerns about police methods had formerly been the subject of the second category under ***Collins*** and the concern of trial fairness was "not so much the manner in which the right was violated." (at p. 284) Now, any self-incriminatory participation in evidence-gathering routinely plays a determinative role.[3] In many cases, the s. 24(2) analysis goes no further than classification of the evidence as conscriptive and presumed unfairness, without ever asking whether admission of the evidence will actually have an adverse impact on trial fairness or even, notwithstanding the impact, whether the administration of justice could be brought into disrepute.

15. As Laskin J.A. noted in ***Grant***, the near-automatic exclusionary approach has been the subject of "strong academic criticism." (at ¶50) In addition to lacking support in the language of s. 24(2), this approach: (1) eliminates reliability from consideration even where police conduct does not undermine evidentiary accuracy; (2) weakens the truth-seeking function of the trial; (3) ignores the nature of the evidence, applying with equal force to a loaded gun or a small amount of marihuana; and (4) fails to achieve proportionality between the remedy sought and the magnitude of police transgression. In ***Buhay***, Arbour J. stated that "[t]he decision to exclude evidence always represents a balance between the interests of truth on one side and the integrity of the judicial

[3] In her dissent in ***R. v. Burlingham***, [1995] 2 S.C.R. 206, L'Heureux Dubé stated the "grouping of too many factors under rubric of 'trial fairness'" has made trial fairness a "proxy" for the repute of the administration of justice. (at ¶¶76, 89).

system on the other...." (at ¶73) Speaking within the context of s. 7 of the *Charter*, this Court affirmed in ***R. v. Singh***, 2007 SCC 48, at ¶45, that *Charter* analysis in the criminal justice system requires a balancing of society's interest in uncovering the truth in criminal investigations and individual interests. The AGBC respectfully submits that presumptive exclusion of conscriptive evidence allows for no balancing at all.

16. A rigid exclusionary approach based on presumptions about trial fairness is difficult to justify. Exclusion does not directly punish the offending officer. It is a disproportionately drastic remedy where the *Charter* violation is minimal: ***R. v. Richfield*** (2004), 178 C.C.C. (3d) 23 (Ont. C.A.) at ¶18. There is little or no empirical evidence indicating that an exclusionary rule actually deters police illegality.[4] Automatic exclusion carries an especially high social cost where crimes involving public safety are concerned. Where police action is pursued in good faith, or where the *Charter* breach is minor, other remedies may be equally effective and offer a more proportional response.[5] Procedural safeguards built into the trial process such as cross-examination, the right to challenge the reliability of evidence, the burden of proof, and the right to full answer and defence may moderate an adverse impact on trial fairness. Given these difficulties with a rigid approach, it is essential to more precisely define the meaning of trial fairness as a justification for exclusion.

(ii) Trial Fairness Requires Greater Definition in the Context of Section 24(2)

17. Though trial fairness is a fundamental constitutional principle, and a substantive right in s. 11(d) of the *Charter,* its relevance to s. 24(2) requires greater explanation. Lamer J. did not engage in an in-depth analysis of the meaning of trial fairness in ***Collins***. Instead, he simply identified a number of factors that may be relevant to a determination of trial fairness, including the nature of the evidence and the nature of the right that was violated. (at p. 284) Trial fairness was used as a descriptive label applied as a matter of "personal preference" to these factors. In ***Stillman,*** trial fairness was similarly not analysed in great detail. Again, the majority specifically focused on the right against self-incrimination within the specific context of bodily samples. (at ¶73)

---

[4] ***U.S. v. Leon*** , 469 U.S. 897 (1984), 918. A review of 14 empirical studies concludes the American exclusionary rule is inadequate as a deterrent, contributes to a loss of public confidence in the system, and operates better at preserving judicial integrity than deterring police: L.T. Perrin, et al, "If it's Broken, Fix it: Moving Beyond the Exclusionary Rule" (1998) 83 Iowa L Rev 669 at 755.

[5] While ***Collins*** held that disrepute cannot be lessened by ancillary remedies (at p. 286), the AGBC submits the availability of other remedies militates against establishment of an automatic exclusionary rule.

18. The AGBC agrees with the Respondent in ***Grant*** that although trial fairness is an important consideration in the s. 24(2) analysis, it cannot be defined with exclusive reference to the interests of the accused. It must also "be looked at from the point of view of fairness in the eyes of the community": ***R. v. A.W.E.,*** [1993] 3 S.C.R. 155, at p.198. Trial fairness involves a balancing between the interests of the accused and the interests of society as a whole: ***R. v. Harrer,*** [1995] 3 S.C.R. 562 at ¶44, per McLachlin J. (as she then was) concurring; ***Buhay***, at ¶73.[6] The concept of fairness is multifaceted, and it has never been equated with perfection.

19. Given these competing interests, in deciding whether the administration of justice could be brought into disrepute based on fair trial concerns, the court should not presume the admission of conscriptive evidence will adversely affect the fairness of the trial. Rather, the court should ask itself how it is that admitting the evidence will make the trial unfair, either substantively or through an appearance of unfairness. If the actual impact or degree of unfairness brought about by admission is limited, it may well be that the other ***Collins*** factors mitigate any adverse impact on the repute of the administration of justice. In ***Harrer,*** it was recognized that fairness is a broad concept and its meaning will vary with the context in which it is invoked. (at ¶14) It cannot be assumed that because evidence was obtained in a manner that does not meet the "rigorous standards" of the *Charter,* its admission would lead to an unfair trial. (at ¶14) It may nonetheless be reliable. The degree of compulsion in obtaining the evidence may be minimal. The evidence itself may be of great significance in the case. Under s. 24(2), trial fairness must be examined in its proper context.

20. A distinction must be drawn between unfairness in the way evidence was obtained and an unfair process or trial: ***Harrer***, at ¶44, per McLachlin J. (as she then was). Where the concerns relate to the admission of unreliable evidence because of the way it was obtained, the classic concern is for substantive fairness. A trial may be rendered unfair by unreliable evidence that has a potential to mislead the trier of fact thereby outweighing such minimal probative value that it possesses: ***Harrer***, at ¶46. For example, the way in which a confession was obtained might carry sufficient concerns over reliability to warrant exclusion under s. 24(2). As Professor Hogg notes, "the core of unfairness encompasses evidence that is unreliable."[7] Where the reliability of

---

[6] The English approach also recognizes the community interest in a fair trial: ***Attorney General's Reference No. 3 of 1999***, [2001] 2 A.C. 91, per Lord Steyn; ***R. v. Smurthwaite***, [1994] 1 All ER 898, at 902-903.
[7] Peter Hogg, Constitutional Law of Canada. 5th ed. (Toronto: Carswell, 2007), at p. 41-11.

conscripted evidence is the concern, procedural protections such as cross-examination may suffice to address possible prejudice.

21. However, if the use of conscriptive evidence gives rise to the appearance of an unfair trial, it is not reliability but the integrity of the judicial process which is in issue. This broader sense of fairness carries no danger of convicting the innocent. Unfairness in the way evidence is obtained may be minor, rendered insignificant by other developments (e.g. inevitable discovery or acquiescence by the accused), or it may be more serious: ***Harrer,*** at ¶44. Laskin J.A. recognized degrees of unfairness depending upon the extent coercive participation in the creation of evidence gives rise to prejudice to the integrity of the judicial system. Absent concerns over reliability, and especially where the evidence is vital to the Crown's case, scrutiny of how egregious police conduct may affect the appearance of a fair trial converges with concerns underlying remedies for abuse of process under s. 24(1) of the *Charter* whereby consideration is given to competing interests, actual prejudice, and whether lesser remedies will suffice.

22. As noted by Laskin J.A. in ***Grant***, the impact on trial fairness can be assessed more precisely by the effect of the state's misconduct on the reliability of the evidence and the nature of the police conduct that led to the accused's participation in the obtaining of the evidence. (at ¶52) Whether self-incriminating evidence should be admitted must depend on both the degree of unfairness and the strength of the other *Collins* factors. Amongst other things, the court should examine whether the accused is able to demonstrate actual prejudice through the tendering of such evidence, whether procedural protections may lessen any prejudice, and whether other factors may ultimately work to counterbalance trial fairness concerns. If the appearance of unfairness is the primary concern, the nature of the right that was breached, the nature of the evidence at issue and the degree of state coercion in the investigation will all be relevant to the assessment. But again, it is the extent to which the trial might appear unfair that must be determined. Admission of evidence that impacts trial fairness does not necessarily bring the administration of justice into disrepute.

C. The Proper Approach is a Balanced, Flexible One

(i) All Factors Should Always be Considered

23. The AGBC submits that regardless of the method by which evidence was obtained, all of the ***Collins*** factors should be considered under s. 24(2). While the conscriptive nature of the

evidence may mean that trial fairness takes on added significance in some cases, the actual impact on the trial should be precisely measured and the analysis carried through for both the seriousness of the breach and the effect of exclusion. Irrespective of the nature of the evidence -- whether conscriptive or not -- the s. 24(2) analysis should be the same. This approach is not only true to the wording of the provision, but allows for increased flexibility in addressing varied circumstances, as well as a full balancing of state and individual interests. This Court has held that trial courts are the preferred forum for determining s. 24(2) issues: ***R. v. Hynes***, [2001] 3 S.C.R. 623 (S.C.C.) at ¶40. A flexible but structured approach would provide trial courts with the discretion to engage in a balancing of interests with reference to "all the circumstances" and to ensure the rights of an accused person, including fair trial concerns, are respected in the 24(2) determination.

24. A full s. 24(2) analysis, with reference to the whole of the ***Collins*** framework, ensures that the effect of exclusion on the administration of justice is considered in all cases. This is of particular importance because it is at this stage of the 24(2) analysis where compelling public interests often come into play. Excluding reliable evidence that is essential to the prosecution of a serious criminal charge has an adverse impact on the administration of justice: ***R. v. Belnavis***, [1997] 3 S.C.R. 341 at ¶45. This Court has considered the seriousness of the offence as a factor in favour of admission in relation to drug cases. Impaired driving cases are analogous in their seriousness to the "catastrophic effect" posed by the sale of hard drugs: ***R. v. Silveira***, [1995] 2 S.C.R. 297 at ¶¶142, 164. Within the context of s. 24(1), the Court stated in ***R. v. O'Connor***, [1995] 4 S.C.R. 411 that "it goes without saying" that the interest in a determination of guilt or innocence will increase commensurately to the seriousness of the charges against the accused." (at ¶81) If reliable evidence of alcohol consumption is routinely excluded, the regulatory response to impaired driving through driving prohibitions, treatment programs, ignition interlock programs and driver education programs will be inhibited. The AGBC submits that even with conscriptive evidence, the importance of the evidence to the prosecution and the seriousness of the offence are entitled to consideration, with due weight being assigned to these factors depending upon the nature of the evidence, the seriousness of the breach and the factual context of the case.

(ii) A Balanced Approach Consistent with the Trend in Other Jurisdictions

25. As McLachlin J. (as she then was) noted in ***Stillman*** (at ¶¶209-215), the Canadian approach to the exclusion of evidence is inconsistent with that of comparable justice systems throughout the

world. The American approach has traditionally been one of automatic exclusion where breach of a constitutional right is found.[8] But, it is subject to numerous exceptions including good faith, public safety, attenuation, and the independent source exception. Even the strict American rule is limited to statements and does not apply to real evidence: ***Schmerber v. California,*** 384 U.S. 757 (1966), 764. Additionally, statements that are excluded may still be used for impeachment purposes.[9] Recently, in ***Hudson v. Michigan***, 547 U.S. 586 (2006), the Supreme Court further retreated from a rule of automatic exclusion. The Court noted that citizens are now much more willing to seek relief in the courts for police misconduct and modern police forces take the constitutional rights of citizens seriously. (at p. 10) It stated the following regarding exclusionary deterrence:

> Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," *United States v. Leon*, 468 U.S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large. We have therefore been "cautio[us] against expanding" it, *Colorado v. Connelly*, 479 U.S. 157, 166 (1986), and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application," *Pennsylvannia Bd. Of Probation and Parole v. Scott*, 524 U.S. 357, 364-365 (1998) (citation omitted). We have rejected "[i]ndiscriminate application" of the rule, *Leon, supra,* at 908, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," *United States v. Calandra,* 414 U.S. 338, 348 (1974) – that is, "where its deterrence benefits outweigh its 'substantial social costs,'" (citation omitted) (at p. 7)

26. In the United Kingdom, courts have a statutory discretion under s. 78(1) of the *Police and Criminal Evidence Act 1984* (PACE), to refuse to admit evidence where its admission would have an adverse effect on the "fairness of the proceedings." Although recently the House of Lords accepted in ***A and Others v. Secretary of State for the Home Department***, [2005] UKHL 71, at ¶¶52-53 that ill-treatment falling short of torture may invite exclusion of a statement as adversely affecting the fairness of a proceeding, English courts have limited the principle against self-incrimination to communicative evidence and have refused to extend it to physical evidence, opting instead for a reliability-based approach.[10] In Australia, the courts have similarly confined the principle against self-incrimination to communications and have held that the admission of reliable evidence does not compromise trial fairness.[11] New Zealand recently rejected an established *prima facie* rule of exclusion of evidence obtained in breach of the *Bill of Rights Act 1990*, holding that a presumptive rule did not adequately address the interests of the community, especially where the

---

[8] ***Weekes v. U.S.***, 232 U.S. 383 (1914); ***Mapp v. Ohio***, 367 U.S. 643 (1961); ***U.S. v. Calandra***, 414 U.S. 338 (1974).
[9] ***Harris v. New York***, 401 U.S. 222 (1971); ***Oregon v. Hass***, 420 U.S. 714 (1975).
[10] ***R. v. Sang***, [1980] AC 402 at 437; ***R. v. Apicella*** (1985), 82 Cr. App. R. 295; ***R. v. Cooke*** (1995), 1 Cr. App. R. 456; D. Ormerod and D. Birch, "The Discretionary Exclusion of Evidence," [2004] Cr. Law Rev. 767 at 779.
[11] ***Sorby v. Australia*** (1983), 152 CLR 281 at ¶8; ***Bunning v. Cross*** (1978), 141 CLR 54 at ¶¶29, 34-35.

evidence is strongly probative of guilt of a serious crime: ***R. v. Shaheed***, [2002] 2 NZLR 377, at ¶143.

(iii) A Balanced Approach is Consistent with s. 24(1) Jurisprudence

27. The AGBC submits that this Court's s. 24(1) jurisprudence should inform its interpretation and application of s. 24(2), particularly with respect to the balancing of rights, fairness, and the integrity of the justice system. Section 24(1) confers upon the court a discretionary power to provide "such remedy as the court considers appropriate and just in the circumstances". The integrity of the administration of justice is the ultimate concern of both sections 24(1) and (2) of the *Charter*. Both provisions seek to address the infringement or denial of a *Charter* right and provide a remedy through consideration of the "circumstances". Both are concerned with fair process and preventing prejudice to the integrity of the judicial system: ***O'Connor***, at ¶82; ***Collins*** at p. 281.[12] The AGBC submits this Court's description of s. 24(1) in ***O'Connor*** as "a tool that may fashion, more carefully than ever, solutions taking into account the…concerns of fairness to the individual, societal interests, and the integrity of the judicial system", is as equally applicable to s. 24(2). (at ¶69)

28. Where evidence is essential to the Crown's case, exclusion of the evidence is directly analogous to a stay of proceedings under s. 24(1). Exclusion of decisive evidence and a stay of proceedings both result in effective acquittals. Despite this similarity, a stay of proceedings is "by no means automatic" and only appropriate in the "clearest of cases": ***O'Connor,*** at ¶68. Hence, the threshold for judicial intervention is much higher under s. 24(1). In ***R. v. Regan***, [2002] 1 S.C.R. 297 this Court noted the finality of a stay in language that is reminiscent of concerns about an overly strict approach to the exclusion of conscriptive evidence: "Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in court; society will never have the matter resolved by a trier of fact." (at ¶53) The test for termination of a prosecution under s. 24(1) was put as follows:

> Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
> (2) no other remedy is reasonably capable of removing that prejudice. (at ¶54) (emphasis added)

[12] Section 24(1), like s. 24(2), provides a remedy for government acts that violate the *Charter*. It must be read in conjunction with the scheme of the *Charter* as a whole: ***R. v. Ferguson***, 2008 SCC 6 at ¶¶61-63.

29. These guidelines were originally formulated by L'Heureux-Dubé J. in ***O'Connor***. (at ¶75) In choosing a remedy for non-disclosure, she held that the court should consider whether the underlying breach "has violated fundamental principles underlying the community's sense of decency and fair play and thereby caused prejudice to the integrity of the judicial system." (at ¶78). If such was the case, the court should then ask whether the prejudice is nonetheless remediable. The court must consider the seriousness of the violation and the "societal and individual interests in obtaining a determination of guilt or innocence." (at ¶78) Even after taking these factors into account, terminating the prosecution may not be warranted. In ***Canada v. Tobiass***, [1997] 3 S.C.R. 391, it was described this way:

> ... there may be instances in which it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits. This is not to say, of course, that something akin to an egregious act of misconduct could ever be overtaken by some passing public concern. Rather, it merely recognizes that in certain cases, where it is unclear whether the abuse is sufficient to warrant a stay, a compelling societal interest in having a full hearing could tip the scales in favour of proceeding. [at ¶92] [Emphasis Added]

O'Connor recognized the need for a balancing of societal and individual interests, even in the face of possible prejudice to a fair trial. A near-automatic rule of exclusion under s.24(2) precludes any sort of balancing. The AGBC submits that the inconsistency between approaches is obvious.

30. Section 24(1) jurisprudence also supports the need to more closely examine the degree of impact on trial fairness before making a determination under s. 24(2). In ***R. v. Dixon***, [1998] 1 S.C.R. 244, this Court considered whether the accused's s. 7 *Charter* right to make full answer and defence was violated by the non-disclosure of witness statements and warranted a new trial. Using language similar to the "degree of unfairness" spoken of by Laskin J.A. in ***Grant***, Cory, J. indicated that in fashioning a remedy under s. 24(1) "the degree of impairment or prejudice to the accused's rights must be assessed and considered in relation to the remedy sought." (at ¶35) (emphasis added) Like s. 24(1), the application of s. 24(2) should reflect a more precise balancing between the competing interests of the accused and society, the degree of prejudice and its actual impact on trial fairness, whether lesser remedies are available, and whether a fundamentally fair trial can still be had notwithstanding the *Charter* breach.

D. Even with Near-Automatic Exclusion, Some Evidence Should be Exempt

31. Although the AGBC urges a flexible approach to s. 24(2) for all forms of conscriptive evidence, if this Court does not embrace such an approach, the AGBC submits that at the very least the law should exempt certain types of evidence from presumed exclusion. In ***Stillman***, Cory J. specifically noted that the "general rule" against the admission of conscripted statements or bodily samples was subject to exceptions. (at ¶73) He limited the protection from compelled self-incrimination of the body by stating that evidence "obtained by a significant compelled intrusion upon the body without consent or statutory authorization should be considered, as a general rule, to adversely affect the fairness of the trial." (at ¶93) He further held that "a particular procedure may be so unintrusive and so routinely performed that it is accepted without question by society. Such procedures may come under the rare exception for merely technical or minimal violations...." (at ¶90) Cory J. cited both breath samples and fingerprinting as examples, stating that "the *Criminal Code* provisions pertaining to breath samples are both minimally intrusive and essential to control the tragic chaos caused by drinking and driving." (at ¶90) Similarly, in ***R. v. Feeney***, [1997] 2 S.C.R. 13, though fingerprint evidence was excluded on the facts of the case, Sopinka J. allowed that where an arrest is unlawful due to a technicality, fingerprints may still be admissible under s. 24(2) of the *Charter*. (at ¶60) In ***R. v. Evans***, [1996] 1 S.C.R. 8, the opening of a door in response to police knocking did not transform drugs discovered inside into conscriptive evidence since any participation by the accused was "minimal at best."[13] (at ¶29)

32. Evidence that is obtained through technical or minimal violations should be considered an exception to any presumption against admission of conscriptive evidence, and even more so where physical evidence discovered through conscription is concerned. The AGBC submits that procedures which do not involve the "significant compelled intrusion" described in ***Stillman*** might include things such as routine fingerprinting, identification procedures such as photographing or the revealing of scars and tattoos, hand washing for gunshot residue, or obtaining foot or palm prints. Such evidence does not go to the "biographical core of personal information" of the individual: ***R. v. Tessling***, [2004] 3 S.C.R. 432 (at ¶¶59-62). As noted by McLachlin J. in ***Stillman*** (at ¶212), under English law, the principle against self-incrimination has not been held to cover protection against the taking and use of "non-intimate" bodily samples such as saliva, hair other than pubic

[13] ***Evans*** was cited as an example of non-conscriptive evidence in ***Stillman*** at ¶79. See also ***R. v. Harper***, [1994] 3 S.C.R. 343 where a statement was admitted in part because the s. 10(b) breach was "a minor one." (at p. 354)

hair, mouth swabs, a swab of the body, or a footprint: *Police and Criminal Evidence Act 1984 (U.K.),* 1984, c. 60, ss. 62, 63, 65. Derivative physical evidence that is discovered as a result of conscription, of course, does not emanate directly from the person of the accused and may be of even less concern. The admission of conscriptive evidence obtained through minimally intrusive means does not bring the administration of justice into disrepute since the level of participation by the individual does not give rise to significant concern over the fairness of police methods.

33. While in ***R. v. Bartle***, [1994] 3 S.C.R. 173 breath test evidence following a violation of s. 10(b) of the *Charter* was excluded, this Court has applied a balanced, multi-factor approach in other rulings on the admission of breath sample evidence under s. 24(2). In ***R. v. Tremblay***, [1987] 2 S.C.R. 435, breath samples obtained in violation of a s. 10(b) right were admitted as the accused was actively obstructing the investigation, obnoxious, and was not diligent in the exercise of his rights. The Court considered the seriousness of the breach in measuring potential harm to the repute of the justice system. In ***R. v. Mohl***, [1989] 1 S.C.R. 1389, breath samples were admitted despite a s. 10(b) violation where the accused was too intoxicated to understand his right to counsel. In ***R. v. Dewald***, [1996] 1 S.C.R. 68, breath samples obtained after a s. 8 breach were admitted where an officer unjustifiably waited 15 minutes before administering a roadside screening device test. The Court found that the admission of the evidence did not render the trial unfair noting that "the breach of the *Charter* was technical and the police acted in good faith." (at ¶2) (emphasis added) In ***Tremblay***, ***Mohl***, and ***Dewald,*** which was decided after ***Bartle***, the Court was prepared to look at the whole of the circumstances and not merely the method by which the evidence was acquired.

E. Conclusion

34. While concerns over the means by which evidence is obtained from accused persons are legitimate and worthy of serious consideration, particularly when the right against self-incrimination is engaged, they are not in all cases presumptively more important than other considerations including the truth-seeking function of the trial and the societal interest in the effective prosecution of crime. For both conscriptive and non-conscriptive evidence, the AGBC submits that all of the ***Collins*** factors should be considered in deciding whether to admit evidence under s. 24(2). Consistent with the very wording of the provision, no one factor ought to dominate all others.

35. The near-automatic exclusion of conscriptive evidence should be abandoned. When faced with conscriptive evidence, the courts should no longer presume that its admission will render the trial unfair. Rather, the question must be asked: how will the trial be rendered unfair and to what extent? Only once that determination has been made can a proper balancing of interests occur, including an examination of the seriousness of the breach and the effect of exclusion. The ultimate question under s. 24(2) is whether admitting the evidence, in light of all relevant considerations, could bring the administration of justice into disrepute. As noted in ***Buhay,*** it is always a question of "balance". (at ¶73) The fact that the evidence is conscriptive should not preclude the courts from engaging in the exercise.

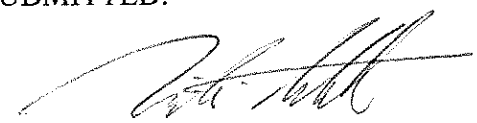
PART IV - SUBMISSIONS RESPECTING COSTS

36. The Intervener AGBC makes no submissions on costs.

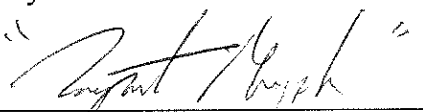
PART V - NATURE OF ORDER SOUGHT

37. The Intervener AGBC makes no submissions on the specific outcomes of the cases before the Court. It does submit that in both cases the impugned evidence was properly admitted under s. 24(2).

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Mike Brundrett
Counsel for the Intervener
Attorney General of British Columbia



Margaret A. Mereigh
Counsel for the Intervener
Attorney General of British Columbia

March 18, 2008
Vancouver, B.C.

PART VI - TABLE OF AUTHORITIES

Secondary Sources

PART VII - LEGISLATIVE PROVISIONS

Charter of Rights and Freedoms, Section 24

Enforcement

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 to obtain such remedy as the court considers appropriate and just in the circumstances.

(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.

Recours

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Police and Criminal Evidence Act 1984, c. 60

62. (1) An intimate sample may be taken from a person in police detention only—
(a) if a police officer of at least the rank of superintendent authorises it to be taken; and
(b) if the appropriate consent is given.

63.(1) Except as provided by this section, a non-intimate sample may not be taken from a person without the appropriate consent.

65. (1) In this Part of this Act—
"intimate sample" means—
(a) a sample of blood, semen or any other tissue fluid, urine or pubic hair;
(b) a dental impression;
(c) a swab taken from a person's body orifice other than the mouth;
"non-intimate sample" means—
(a) a sample of hair other than pubic hair;
(b) a sample taken from a nail or from under a nail;
(c) a swab taken from any part of a person's body including the mouth but not any other body orifice;
(d) saliva;
(e) a skin impression;

78. (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

New Zealand - Bill of Rights Act 1990

Section 27

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's right, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.