Court File No. 31892 and 32037

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

DONNOHUE GRANT

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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

Interveners

(ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN)

BETWEEN:

CURTIS SHEPHERD

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ONTARIO and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

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PART I
STATEMENT OF FACTS

a. Overview

1. In the early stages of *Charter* interpretation, the circumstances often involved serious and fundamental violations of entrenched *Charter* rights. In such cases, this Court rightly stepped in with strong statements as to the importance of *Charter* protected rights and the consequences of violating such rights. However, as *Charter* rights became more defined and the outer limits of *Charter* protection more difficult to determine, the analysis became more delicate. With apologies for the clumsy paraphrase, not all *Charter* violations are created equal. With lawyers, academics and judges struggling to draw the line between a "violation of the Constitution" and permissible police conduct, it is understandable that police may, often during dynamic circumstances, fail to appreciate where that line is drawn. It is in these situations that the broad and flexible wording of s. 24(2) of the *Charter* is fully appreciated.

2. The Appellants advocate a virtually automatic exclusionary rule with respect to "conscriptive evidence" obtained as a consequence of a *Charter* violation. The framers of the Canadian constitution were fully aware of the harm inflicted on the repute of the administration of justice by the application of an automatic exclusionary rule in the American constitutional context.[1] As a result, s. 24(2) expressly provides for a comprehensive remedial approach that requires the consideration of "all the circumstances" in determining whether the admission of evidence would bring the administration of justice into disrepute. A pure exclusionary rule with respect to "conscriptive evidence" would preclude such an inquiry. The seriousness of the *Charter* breach and the severity of the consequences of excluding the evidence would be rendered irrelevant—a result that is contrary to the plain wording of s. 24(2).

3. At its core, the Appellant's position is that the admission of "conscriptive evidence", by definition, results in an unfair trial. With respect, this approach fails to recognize that an accurate

[1] See *Weeks v. United States*, 232 U.S. 383 (1914), and *Mapp v. Ohio*, 367 U.S 343 (1961). The American 'exclusionary rule' has evolved into a balancing exercise as well, with considerations similar to those under s. 24(2) of the *Charter*. For a recent application of the rule see: *United States of America* v. *Herring*, 492 F.3d 1212 (2007), leave to appeal to the U.S.S.C. granted February 19, 2008

conception of "trial fairness" requires a balancing of individual and state interests in the proper administration of justice. Defining "trial fairness" with exclusive reference to the rights of an accused will inevitably produce disproportionate remedies and do serious damage to the repute of the administration of justice. A consideration of the factual circumstances in both *Grant* and *Shepherd* illustrates the consequences of adopting such an artificially compartmentalized approach to s. 24(2) analysis. An automatic exclusionary rule that isolates one factor in the *Collins*[2] test, to the exclusion of all others, is not an appropriate way forward for a *Charter of Rights* that remains under development.

4. Also at issue in the *Grant* appeal is the proper application of ss. 9 and 10 of the *Charter* to police-citizen interactions. The "concept of detention" must not become a glass wall through which the police can only observe and where any police request or direction engages the full panoply of *Charter* protections. As noted by the Respondent, the Attorney General of Ontario, the *Charter* was never intended to separate the police from the citizens they are duty bound to protect. Although appreciating that limits must be placed on police authority, those limits must be defined in a manner that balances individual rights against the need to gather information, identify dangerous conduct and respond to emergencies. Determining whether an individual is detained within the meaning of ss. 9 and 10 of the *Charter* requires an objective assessment of all the circumstances surrounding the encounter. An approach that attempts to define a precise moment in time at which a police-citizen encounter engages *Charter* protections is doomed to failure. In particular, a request by police to keep one's hands in sight cannot, without more, be determinative of whether an individual is detained pursuant to the *Charter*.

b. Statement of Facts

5. The Director of Public Prosecutions relies upon the facts as stated by the parties to these appeals and takes no position with respect to any factual disputes between them.

[2] *R. v. Collins*, [1987] 1 S.C.R. 265

PART II
ISSUES

6. There are two fundamental questions posed in these appeals upon which the Director of Public Prosecutions intervenes.

> **Issue 1:** Should this Court adopt an automatic exclusionary rule under s. 24(2) for all cases where the evidence obtained as a result of a violation is characterized as conscriptive evidence?

10 7. The Director of Public Prosecutions urges that any automatic exclusionary rule would profoundly and negatively alter the purpose and application of the remedial provision entrenched in s. 24(2) of the *Charter*. Such a rule would wrongly shift the focus under s. 24(2) to the characterization of the evidence rather than the appropriate ultimate question of the effect of admission of the evidence on the repute of the judicial system. The extent to which the admission of "conscriptive evidence" affects trial fairness is a matter of degree. To accurately assess whether the admission of such evidence would bring the administration of justice into disrepute, the impact on trial fairness must be balanced against the seriousness of the *Charter* breach and the consequences of exclusion.

> **Issue 2:** What is the framework through which a particular set of circumstances
20 involving an interaction between the police and an individual is defined as a "detention" pursuant to ss. 9 and 10 of the *Charter*?

8. It is not possible to identify a point in time or a single determinative factor to describe when a detention occurs for *Charter* purposes. The Director of Public Prosecutions supports a process where all the circumstances of an encounter between police and an individual, founded on the admissible evidence, be considered in making that determination. However, this must be an objective assessment free from presumptions based on any identifying characteristics of either the officer or the individual and in recognition of officer safety concerns.

9. The Director of Public Prosecutions, in keeping with the application to intervene, takes no position with respect to the other issues raised in these appeals.

PART III
ARGUMENT

I INVESTIGATIVE DETENTION

10. Canadian courts have recognized that police must be able to speak to citizens without engaging the citizen's ss. 9 and 10 *Charter* rights.[3] There is therefore a continuum of police-citizen interaction along which this Court is required to define the constitutional duties of the police and the constitutional protections of an individual. As this Court noted in *Mann*:

> "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint. [4]

a. Significant Restraint of Liberty is the Issue

11. The "significance" of the physical or psychological restraint is the determining factor. In identifying whether the restraint is "significant", Justice Laskin correctly observes that courts have eschewed a "bright-line approach" as unattainable because of the myriad of circumstances under which police-citizen interactions occur.[5] The Intervener, the Director of Public Prosecutions agrees. Identifying a point in time or a particular statement as determinative of detention will, in the long run, prove inadequate to assist lower courts in judging this issue.

12. Detention can be both physical and psychological. Le Dain, J. in *Therens* sets out the scope of "detention" for the purposes of ss. 9 and 10 of the *Charter*. "Detention" occurs where there is:

> 1. deprivation of liberty by physical constraint;
>
> 2. assumption by an officer of the state of control over a person's movement by a demand or direction connoting a significant legal consequence and impeding access to counsel; or

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[3] Reasons for Judgement (Ont. C.A.) *Appellant's Record*, Vol. I., also reported *R. v. Grant* (2006), 209 C.C.C. (3d) 250 (Ont. C.A.), at para. 10. *R. v. Orbanski; R. v. Elias*, [2005] 2 S.C.R. 3, 2005 SCC 37, *per* Charron, J. for the majority at para. 30

[4] *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCR 52, at para. 19

[5] *R. v. Grant, supra*, at para. 13. See also *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.), at para. 62 [appeal discontinued, SCC Bulletin, 20 October 2000, p. 1839]. By inference see *R. v. Suberu* (2007), 218 C.C.C. (3d) 27 (Ont. C.A.), at para. 51, leave to appeal to the SCC granted August 16, 2007

> 3. psychological compulsion when, following a demand or direction by an officer, the individual acquiesces because he reasonably believes that he has no choice but to submit.
>
> The common denominator is that "there must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action." [6]

13. The significance of the detention must be measured by the degree to which "liberty or freedom of action" has been restricted. The most difficult circumstances to assess are those, as in *Grant*, involving claims of psychological detention. There are few, if any, objective signs of the intentions of the police and in most situations, just as little external evidence of the understanding of the individual.

14. Several factors have been identified to assist in deciding whether this contact is significant. These include: the existence of a "demand or direction" or a "request"; language used or tone of voice; place of contact; statement by police indicating an ability to stay or leave; individual's awareness of the underlying reasons for the interaction; improper motive such as harassment or profiling.[7] Additionally, the stage of the investigation, whether reasonable grounds to believe existed that the individual was committing an offence at the time of the conversation; the individual's subjective belief as to whether he/she was detained; and the individual's personal circumstances, have all been identified as factors to be considered.[8] There will be other factors, dependant on the unique facts in each case, but none should, in law, be paramount.

b. The Standard is Objective

15. Although the belief of the accused is a factor in the characterization of an encounter as a detention, it is not the determinative one. The objective reasonableness of the circumstances is the appropriate test.[9] An individual's age, education or other personal circumstances are to be considered when identifying their subjective belief. However the final analysis must be a measure of all the factors against an objective assessment of whether the person is psychologically detained.

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[6] *R. v. Therens,* [1985] 1 S.C.R. 613, at paras. 51-57, as summarized by Fichaud, J.A. in *R. v. Lewis* (2007), 217 C.C.C. (3d) 82 (N.S.C.A.), at para. 21
[7] *R. v. R.H.(C.)* (2003), 174 C.C.C. (3d) 67 (Man.C.A.) at paras. 28-49
[8] *R. v. Rajaratnam* (2006), 214 C.C.C. (3d) 547 (Alta C.A.), at para. 14
[9] *R. v. Therens, supra*, at para 54; *R. v. R.H.(C), supra*, at paras. 28-30; *R. v. Moran* (1987), 36 C.C.C. (3d) 225 (Ont.C.A.), at p. 259; *R. v. Lewis, supra*, at para. 26

c. "Demand or Direction" cannot include Officer Safety Issues

16. Requests by the police to an individual to show his hands cannot as a matter of law be determinative of a detention pursuant to ss. 9 or 10 of the *Charter*. Justice Laskin considered the police statement to Mr. Grant to keep his hands in front of him to be a "demand or direction" that "established the atmosphere" of the interaction and weighed heavily in favour of a determination that the encounter was a detention.[10] The show of hands was conclusive of the status of the police-citizen encounter as a detention in *Harris*.[11] Unfortunately, situations arise where encounters, both casual and investigative, can quickly turn into dangerous and even violent confrontations between individuals and the police. This Court has appreciated this concern in the context of allowing a pat-down search where a lawful detention has occurred.[12]

17. The potential seriousness of these incidents requires a declaration by this Court that a simple request of a "show of hands", without more, be permitted in all police-citizen encounters without amounting to 'detention'. Some additional indicia of restraint of liberty must exist to heighten the restriction to the "significant" standard. Tone of voice, relative age and experience of the individual, physical control by the police officer and location of the incident, may elevate the direction of a show of hands to a "detention". However, a simple request to show hands, only, should not.

18. The facts in *Grant* are illustrative. This was not a late night, back-alley encounter as a result of a report of shots fired. Rather, it was a noon-day stroll along the sidewalk, close to a number of schools by an individual who was only marginally suspicious, who happened to be carrying a loaded handgun.

19. Although some may dismiss the "officer safety" mantra as a convenient reason to discover otherwise unlawfully obtainable evidence, there is no doubt that this perfunctory request was a prudent step in the circumstances, not just for the police, but also for Mr. Grant and the community. Another individual, differently constituted than Mr. Grant, may have panicked at the risk of being discovered for this or some more serious offence and proceeded on a course of conduct that could have ended tragically. It is a depressing reality that the police cannot feel secure in approaching a lone pedestrian in broad daylight on a public street. Experiences, like this

[10] *R. v. Grant*, *supra*, at paras. 24 and 29
[11] *R. v. Harris*, 2007 ONCA 574, at para. 22, *per* Doherty J.A. for the majority
[12] *R. v. Mann*, *supra*, at para. 43; *R. v. Clayton*, 2007 SCC 32

one, reflect an inability to accurately anticipate the results of even a brief encounter with an individual in the middle of the day.[13]

20. A contrary position would create an unacceptable dilemma. Either the police would have to unreasonably risk their safety in approaching anyone knowing that they cannot request a show of hands, or every encounter where the police believe that the circumstance required a show of hands would constitute a detention. The constitutionally protected liberty of the Canadian public can withstand this limited and reasonable intrusion for sound public policy reasons.

d. Conclusion

21. The adjudication of claims of unlawful detention under ss. 9 and 10 of the *Charter* will be fact specific based on the entirety of the circumstances surrounding the interaction between the police and the individual. This Court must ensure that the threshold is not set in a manner that will inhibit the police from fulfilling their constitutional duties in the investigation of crime and the protection of society.

II REFINING SECTION 24(2) ANALYSIS

22. Defining the nature and scope of *Charter* rights and protections is a process. As the scope of *Charter* rights are defined with more precision, the application of s. 24(2) has become an increasingly "delicate and nuanced" exercise.[14] There are circumstances such as those in *Stillman*[15] where the correct result of s. 24(2) analysis may be more readily apparent. That is particularly so if one considers Justice Cory's description of the *Charter* breaches in *Stillman* as "lengthy and intrusive", "flagrant", "reprehensible" and "intolerable".[16] However, as the analysis moves to the outer reaches of *Charter* protections, finding the right answer is more difficult. It requires an analytical framework that can respond to situations where "the 'murky' line between legitimate questioning and arbitrary detention" has been crossed.[17]

23. This Court has not adopted a pure exclusionary rule with respect to "conscriptive evidence" having any impact on "trial fairness". Rather, the Court has been careful to maintain the

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[13] See also the facts in *R. v. L.B.*, 2007 ONCA 596, where the young person was seated at the top of the slope on school property carrying a bag that was later discovered to contain a loaded .22 calibre handgun. For more dangerous circumstances see *R. v. Sibblies,* (2006) CanLII 20094 (Ont.S.C.J.)
[14] *R. v. Orbanski; R. v. Elias*, *supra*, at para. 94
[15] *R. v. Stillman*, [1997] 1 S.C.R. 607
[16] *R. v. Stillman*, *supra*, at paras. 91 and 123-124
[17] *R. v. L.B., supra,* at para. 76

flexibility required for "a rich, contextual appraisal of the competing priorities and interests" under s. 24(2).[18] This is evident from a reading of the majority reasons in *Stillman*[19] and has been reiterated more recently in *Orbanski*.[20] Implicit has been the recognition that entrenching an axiomatic or formulaic approach to the admissibility of "conscriptive evidence" would inevitably distort what must be the central inquiry under s. 24(2), i.e., whether the admission of the evidence would bring the administration of justice into disrepute.

24. The factual circumstances in both *Grant* and *Shepherd* demonstrate the need to resist a categorical approach to the admissibility of "conscriptive evidence". Whether Mr. Grant was "detained" as contemplated by the *Charter* is a contentious issue before this Court, as it was before the Ontario Court of Appeal. Dealing with the same issue in *R. v. Dolynchuk*, Huband J.A. (dissenting) noted that, "the nature of the detention and the thinness of the evidence to support such a finding are themselves factors to be considered in determining whether the evidence is admissible under s. 24(2)."[21] Similarly, whether police had the requisite reasonable grounds to make a breath demand in *Shepherd* is an issue upon which judges have disagreed. The application of an automatic or quasi-automatic exclusionary rule would eliminate these factors from consideration. Instead, it would mandate the exclusion of reliable/probative evidence of a serious criminal offence due to what can fairly be described as a marginal *Charter* violation.

25. To avoid such disproportionate consequences when it comes to the admissibility of "conscriptive evidence", a framework for s. 24(2) analysis must be built on two basic propositions. First, the concept of "trial fairness" is a "rich and complex one" that "concerns the rights not only of the accused, but also of society, to the proper administration of the law".[22] "Trial fairness" cannot be defined in absolute terms. It represents a balance between competing interests. Therefore, assessing the impact of admitting "conscriptive evidence" on "trial fairness" in a given set of circumstances will necessarily be a question of degree. Second, the analysis must not artificially isolate one factor, "trial fairness", to the exclusion of other considerations of fundamental importance to s. 24(2) analysis - such as the seriousness of the *Charter* violation.

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[18] David M. Paciocco, "Stillman, Disproportion and the Fair Trial Dichotomy under Section 24(2)" (1997), 2 Can. Crim. L.R. 163, at 175
[19] *R. v. Stillman, supra,* at paras. 86, 89-92 and 98
[20] *R. v. Orbanski; R. v. Elias, supra,* at paras. 92-98. See also: *R. v. Buhay,* [2003] 1 S.C.R. 631, at para. 49; *R. v. Law,* [2002] 1 S.C.R. 227, at paras. 33-34; *R. v. Burlingham,* [1995] 2 S.C.R. 206, at para. 148; *R. v. Dewald,* [1996] 1 S.C.R. 68, at para. 2
[21] *R. v. Dolynchuk* (2004), 184 C.C.C. (3d) 214, at para. 85 (Huband J.A., dissenting)
[22] *R. v. Orbanski; R. v. Elias, supra,* at para. 97

Recognizing these propositions does not require the creation of an "entirely new test" or a "radical re-writing" of *Charter* precedent as the Appellant suggests.[23] Nor does it require abandoning or minimizing the importance of the principle against self-incrimination. Rather, it simply opens the door to a "direct focus on the inquiry specified by s. 24(2)."[24]

a. Meaning of Trial Fairness

26. To say that an unfair trial brings the administration of justice into disrepute is to beg the question. Under a virtually automatic exclusionary rule for "conscriptive evidence", "trial fairness" is defined exclusively from the perspective of the individual, to the exclusion of that of the community.[25] As stated by McLachlin J., as she then was, in her dissenting reasons in *Stillman*, under an automatic exclusionary rule, any "potential trial unfairness arising from the fact that the accused has been required to incriminate himself - - is conclusive in the sense that if established, it mandates exclusion of the evidence regardless of any other factors or circumstances."[26] Justice McLachlin went on to state the problem as follows:

> … it erroneously assumes that anything that affects trial fairness automatically renders the trial so fundamentally unfair that other factors can never outweigh the unfairness, with the result that it becomes unnecessary to consider other factors.[27]

27. The inherent flaw in the automatic exclusionary approach is its failure to acknowledge that the extent to which the admission of "conscriptive evidence" affects "trial fairness" is a matter of degree. This Court's recognition that there are different degrees of "unfairness"[28] neither began nor ended with the *Stillman* decision. In *Harrer*, Justice La Forest noted that broad concepts like "fairness" do not involve "absolute or immutable requirements":

> … these concepts vary with the context in which they are invoked; see *Lyons*, at p. 361. Specifically here, one is engaged in a delicate balancing to achieve a just accommodation between the interests of the individual and those of the state in providing a fair and workable system of justice; see my remarks in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1

[23] Appellant's Factum (*Grant*), at paras. 1-2
[24] Richard Mahoney, "Problems with the Current Approach to s. 24(2) of the Charter: An Inevitable Discovery" (1999), C.L.Q. (Vol. 42) 443, at 445
[25] *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 45
[26] *R. v. Stillman, supra*, at para. 234
[27] *R. v. Stillman, supra*, at para. 250
[28] *R. v. Stillman, supra*, at para. 258

> S.C.R. 425, at p. 539. … It follows that, in the present context, evidence may be obtained in circumstances that would not meet the rigorous standards of the *Charter* and yet, if admitted in evidence, would not result in the trial being unfair.[29]

28. Also in *Harrer*, Justice McLachlin stated:

> Even where every effort is made to comply with the law, aspects of the process may, in hindsight, be argued to have been less than fair. Sometimes the unfairness is minor or rendered insignificant by other developments (for example, that the police would probably have obtained the evidence anyway) or by other aspects of the case (for example, that the accused waived or acquiesced in the unfairness). Sometimes the unfairness is more serious. The point is simply this: unfairness in the way evidence is taken may affect the fairness of the admission of that evidence at trial, but does not necessarily do so. This is true for *Charter* breaches; not every breach of the *Charter* creates an unfairness at trial which requires exclusion of the evidence thereby obtained: *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 284.[30]

29. More recently, LeBel J. echoed those comments (with reference to the *Harrer* decision) in *Orbanski*:

> The concept of fairness is a rich and complex one. It concerns the rights not only of the accused, but also of society, to the proper administration of the law, as McLachlin J. (as she then was) pointed out in *R. v. Harrer*, [1995] 3 S.C.R. 562:
>
> > At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362, *per* La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused. [para. 45][31]

30. "Trial fairness" cannot be accurately understood with exclusive reference to the principle against self-incrimination. It must reflect an appropriate balance between the interests of the individual and those of society. The analysis should begin by recognizing the distinction between

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[29] *R. v. Harrer, supra*, at para. 14
[30] *R. v. Harrer, supra*, at para. 44
[31] *R. v. Orbanski; R. v. Elias, supra*, at para. 97

unfairness in the way the evidence is obtained and *an unfair trial*.[32] This allows for a contextual analysis of the degree to which the admission of evidence will affect the fairness of a trial. The analysis would include the direct consideration of all relevant factors including the nature of the right violated, the degree of coercion or compulsion involved, the nature and reliability of the evidence, whether the evidence was created by the *Charter* breach or merely discovered or located as a result and whether the evidence was otherwise discoverable.[33] The decision of the Ontario Court of Appeal in *Grant* is an example of this approach.[34] Acknowledging this broader conception of "trial fairness" allows a more realistic and "nuanced" assessment of whether the admission of evidence would bring the administration of justice into disrepute.[35]

10 ***b. Compartmentalized Analysis***

31. The application of an automatic exclusionary rule has been the subject of considerable academic criticism.[36] A central theme of that criticism has been that such a "narrow bright-line rule"[37] artificially compartmentalizes s. 24(2) analysis. That is, it isolates a single factor as determinative in a way that prevents, or at least distorts, what should be the central inquiry. Rather than a "direct focus on the inquiry mandated by s. 24(2)", the analysis is transposed to an inquiry into the fairness of the trial.[38] This transformation is at the expense of what Professor Paciocco describes as the "principle of proportionality". By this he means the balancing of the seriousness of the *Charter* violation and the severity of the consequences of excluding the evidence.[39] Under the terms of an automatic exclusionary rule for "conscriptive evidence", there
20 is no room for the consideration of such factors. They are disposed of as inconsequential to determining whether the admission of the evidence would bring the administration of justice into disrepute.

32. The consequences of doing so are apparent. First, it adopts an analytical framework that is inconsistent with the "structure and wording of s. 24(2)"[40] and "is the antithesis of the balancing

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[32] *R. v. Harrer*, *supra*, at para. 44; *Stillman*, *supra*, at para. 257
[33] *R. v. Collins*, *supra*, at 284; *R. v. Wise*, [1992] 1 S.C.R. 527; Don Stuart, "Questioning the Discoverability Doctrine in Section 24(2) Rulings", 48 C.R. (4th) 351
[34] Another example can be found in the dissenting reasons of Huband J.A. in *R. v. Dolynchuk*, *supra*, at paras. 85-93
[35] See : *R. v. Padavattan* (2007), 223 C.C.C. (3d) 221 (Ont.S.C.J.), at paras. 46-55
[36] See: *R. v. Orbanski; R. v. Elias*, *supra*, at para. 92; *R. v. Dolynchuk*, *supra*, at paras. 48-51
[37] *R. v. Orbanski; R. v. Elias*, *supra*, at para. 92
[38] Mahoney, *supra*, at pp. 445 and 449
[39] Paciocco, *supra*, at pp. 165-166
[40] *R. v. Orbanski; R. v. Elias*, *supra*, at para. 98

envisioned by the framers of s. 24(2)."[41] As has been stated by this Court, s. 24(2) places the onus on the party resisting the admission of evidence "to establish an *overall sense* that its admission would bring the administration of justice into disrepute".[42] Whether that onus is met must be assessed "having regard to all of the circumstances". Secondly, and perhaps more fundamentally, it is trite to say that the seriousness of a *Charter* breach is one of the most important factors to consider in a proper application of s. 24(2).[43] Any version of s. 24(2) analysis that eliminates the seriousness of the *Charter* breach as a factor invites disproportionate remedies that are contrary to its central purpose. Professor Paciocco put it this way:

> The fact is that so long as proportionality is eschewed completely in "fair trial" cases, even minor, technical violations will result in the loss of critical evidence against serious offenders. What public interest is there in doing that? The fair trial dichotomy is simply too rigid to allow for the rational assessment of the competing interests that are presented when exclusionary decisions come to be made.[44]

33. The strong link between "trial fairness" and the principle against self-incrimination has been firmly established by this Court.[45] As noted by LeBel J. in *Orbanski*, the Court "is constantly concerned about the potential impact of the admission of conscriptive evidence in breach of a *Charter* right on the fairness of a criminal trial."[46] Protecting the integrity of the justice system "requires a strong emphasis on assuring the fairness of the criminal trial" and any negative impact in that regard will often be determinative.[47] The majority judgment in *Stillman* is amongst this Court's strongest statements as to the fundamental importance of the principle against self-incrimination. Even then, however, Cory J. left room for situations, albeit "rare exceptions"[48], where countervailing factors might outweigh "trial fairness" concerns.

34. The approach taken by the Ontario Court of Appeal in *Grant* (and endorsed by the majority of the Saskatchewan Court of Appeal in *Shepherd*) does not undermine this Court's s.7 jurisprudence with respect to the principle against self-incrimination. As the Respondent, the Attorney General of Ontario, correctly points out, there is no axiomatic relationship between the

[41] *R. v. Stillman, supra,* at paras. 244-252
[42] *R. v. Bartle,* [1994] 3 S.C.R. 173, at 213
[43] Mahoney, *supra,* at pp. 459 and 476
[44] Paciocco, *supra,* at p. 172
[45] *R. v. Buhay, supra; Law, supra; R. v. Feeney,* [1997] 2 S.C.R. 13, at paras. 65; 71; *R. v. Burlingham, supra*
[46] *R. v. Orbanski; R. v. Elias, supra,* at para. 93
[47] *R. v. Orbanski; R. v. Elias, supra,* at para. 96
[48] *R. v. Stillman, supra,* at para. 90

principle against self-incrimination and the exclusion of evidence. Rather, this Court has maintained a flexible and "contextually sensitive" approach to determining both the scope of the principle and the admissibility of self-incriminatory evidence pursuant to s. 24(2).[49]

35. Simply put, a pure exclusionary rule is not necessary to confirm the fundamental importance of the principle against self-incrimination.[50] The s. 24(2) jurisprudence developed by this Court has "sufficient teeth" to properly protect "trial fairness" without entrenching an automatic exclusionary rule.[51] The decisions in *Grant* and *Shepherd* do not diminish or abandon the significance of this core principle. They simply acknowledge that there is no necessary equation between admitting evidence having any impact on "trial fairness" (no matter the degree) and bringing the administration of justice into disrepute. By doing so, this preserves the flexibility necessary to avoid disproportionate *Charter* remedies.

c. Conclusion

36. A realistic application of s. 24(2) must acknowledge that the impact of admitting "conscriptive evidence" on "trial fairness" is a matter of degree. Assessing that impact requires the consideration of all relevant facts and should represent a balancing of individual and societal interests in "a fair and workable system of justice".[52] The result can then be balanced against the seriousness of the breach and the consequences of exclusion. This process allows "a proper balance between the competing interests and values at stake in the criminal trial, between the search for truth and the integrity of the trial."[53] This approach is faithful to the wording and intent of s. 24(2). In fact, as noted by Justice LeBel in *Orbanski*:

> In some cases, the second stage of the procedure, at which the seriousness of the breach is evaluated, is difficult to divorce from the first stage of the analysis, which addresses the nature of the infringement of rights and of the evidence. *It may well be impossible to properly balance the competing interests at stake in the evaluation of the fairness of the criminal trial and in the final judgment call as to whether to allow the inclusion of the evidence without considering the seriousness of the infringement and its impact.* It may be impossible to divorce the different stages of the

[49] *R. v. Hebert*, [1990], 2 S.C.R. 151, at pp. 187-188; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at paras. 96-108; *R. v. White*, [1999], 2 S.C.R. 417, at paras. 45-46
[50] Mahoney, *supra*, at pp. 452-453
[51] Paciocco, *supra*, at pp. 173-174
[52] *R. v. Harrer, supra*, at 573
[53] *R. v. Orbanski; R. v. Elias, supra*, at para. 94

> analysis, given the logical and factual interplay between them in many cases.[54] [Emphasis added]

37. In *Burlingham*, L'Heureux-Dubé J. worried that adopting a pure exclusionary rule for conscriptive evidence would amount to "digging ourselves into a hole" that risked "frustrating the text of s. 24(2)".[55] Similarly, Professor Mahoney saw it as "steering the inquiry down a cul-de-sac from which we are still seeking an exit …".[56] To avoid such consequences, one can do no better than commend the following statement from Professor Stuart:

> Accepting that the court is committed to the *Collins* test, it should insist that, even where the evidence affects trial fairness in the sense that the accused were "conscripted against themselves in the creation of evidence, there must be a full consideration of the other *Collins* factors of seriousness of violation and the repute of the administration of justice.[57]

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[54] *R. v. Orbanski; R. v. Elias*, *supra*, at para. 99
[55] *R. v. Burlingham*, *supra*, at p. 108. See also: *R. v. Stillman*, *supra*, at para. 184
[56] Mahoney, *supra*, at p. 449
[57] Stuart, *supra*, at p. 355

PART IV
COSTS

38. This Intervener makes no submissions as to costs.

PART V
REQUEST TO PRESENT ORAL ARGUMENT and POSITION OF THE INTERVENER

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39. As requested in the Motion to Intervene, the Director of Public Prosecutions, requests an opportunity to present oral argument at the hearing of these appeals.

40. It is the position of the Director of Public Prosecutions that the issues should be answered in accordance with these submissions, namely:

a) An automatic exclusionary rule for conscriptive evidence obtained as a result of a *Charter* violation is contrary to the wording and purpose of s. 24(2) and would, in the long term, cause disrepute to the administration of justice; and

b) The determination of when an individual is "detained" within the meaning
20 of ss. 9 and 10 of the *Charter*, must be based on an objective assessment of all of the particular circumstances of the case, including the need for officer safety and the requirement for fluid interaction between the police and the public. All factors must be supported by an evidentiary record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 14th day of March, 2008.

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Director of Public Prosecutions

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40 Director of Public Prosecutions

PART VI
AUTHORITIES

Cases Cited

Other References

PART VII
STATUTES / REGULATIONS / RULES

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

9. Everyone has the right not to be arbitrarily detained or imprisoned.

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right;

10. Chacun a le droit, en cas d'arrestation ou de détention:
(a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;
(b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;

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.

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) 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.

(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.