Court File No. 31892

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N

DONNOHUE GRANT

Appellant (Appellant)

– and –

HER MAJESTY THE QUEEN

Respondent (Respondent)

APPELLANT'S FACTUM

[*Rules of the Supreme Court of Canada,* Rule 42]

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The main issue in this appeal is whether this Court should overturn its prior s. 24(2) *Charter* jurisprudence on "conscriptive evidence", including its landmark judgment in *R. v. Stillman, infra*. In the judgment on appeal, the Ontario Court of Appeal directed Ontario trial courts to apply an entirely new test. This new test conflicts with this Court's current s. 24(2) jurisprudence in two ways:[1]

(i) Under this Court's established s. 24(2) analytic framework, evidence that would render the trial unfair *must* be excluded without regard to the remaining *Collins* factors. In contrast, the Court of Appeal's new test instructs judges to "balance" the resulting unfairness against the other *Collins* factors, and will often result in evidence being admitted *even though* this makes the trial unfair;

(ii) This Court's s. 24(2) jurisprudence strongly links "trial fairness" to the principle against self-incrimination. In contrast, the Court of Appeal's new test treats the self-incriminatory character of evidence as unimportant and emphasizes other unrelated considerations, such as its reliability. or whether it was obtained through exceptionally abusive police misconduct.

On both of these points, the Court of Appeal's new test is contrary to the *Stillman* majority judgment and takes a position strongly reminiscent of views of the *Stillman* dissenters.

R. v. Stillman, [1997] 1 S.C.R. 607
R. v. Collins, [1987] 1 S.C.R. 265
R. v. S.(R.J.), [1995] 1 S.C.R. 451

2. The central question in this appeal, therefore, is whether this Court should follow the Ontario Court of Appeal's lead and reverse its holdings on these issues in *Stillman* and other s. 24(2) cases. The Appellant's position is that there are no "compelling circumstances" that might justify such a radical re-writing of established *Charter* precedent. Further, this Court cannot drastically alter its approach to the admission under s. 24(2) of compelled statements and otherwise undiscoverable derivative evidence – the particular type of "conscriptive evidence" at

[1] This issue is discussed in detail at paras. 9-23, *infra*.

issue in the case at bar – without also implicitly reversing a decade of s. 7 self-incrimination jurisprudence.

B. Statement of Facts

1) The Detention and Search of the Appellant

3. One afternoon in November, 2003, two plainclothes officers, PC Worrell and PC Forde, were on patrol in the Greenwood and Danforth area of Toronto. They were not investigating any particular crime, and had no information that any crime had recently been committed. They noticed the Appellant, an 18 year old black male who was a stranger to them, walking down the sidewalk. While the officers said they became "suspicious" when they saw the Appellant "fidgeting with his coat" and "staring" at them in an "unusual" manner, it was undisputed that they had no grounds to lawfully arrest him or detain him for investigative purposes.

R. v. Mann, [2004] 3 S.C.R. 59
Testimony of P. Worrell, *Appellant's Record,* Vol. II, pp. 107-113; 121-60, 164-79; Testimony of R. Forde, *Appellant's Record,* Vol. II, pp. 254-58, 268-74

4. Worrell and Forde directed a nearby uniformed officer, PC Gomes, to "have a chat" with the Appellant and "see what's up with him". Gomes left his vehicle and approached the Appellant, directing him to "keep his hands in front of him" in plain view. The Appellant complied, and Gomes proceeded to question him about where he was going, what he was doing, and whether he had ever been arrested. This questioning lasted for approximately six minutes. About two minutes into this interrogation, Worrell and Forde left their vehicle and joined Gomes on the sidewalk, standing behind him and blocking the sidewalk in the direction the Appellant had been walking. When Gomes asked whether the Appellant "had anything on him that he shouldn't", the Appellant initially replied "No", but then admitted that he had "a small bag of weed" in his coat pocket. Gomes then asked "Is that it?". The Appellant hung his head and replied: "Well, no". After further questioning from Gomes, the Appellant eventually admitted: "I have a firearm". The three officers then arrested and searched him, finding a loaded revolver in a waist pouch under his coat, and a small bag of marihuana in his coat pocket. When Worrell asked the Appellant why he had a gun, he replied that he was "just dropping it off …up the road". The Appellant with charged with a variety of firearms offences.[2]

[2] The Crown ultimately proceeded on six charges (Counts 1-2, 4 & 6-7). Counts 3 & 5 were withdrawn. Count 2 was stayed pursuant to the *Kienapple* principle.

Information of C. Perreira, sworn November 18, 2003, *Appellant's Record,* Vol. II, pp. 76-81
Testimony of P. Worrell, *Appellant's Record,* Vol. II, pp. 113-21, 134-99; Testimony of J. Gomes, *Appellant's Record,* Vol. II, pp. 200-52; Testimony of R. Forde, *Appellant's Record,* Vol. II, pp. 258-300

2) The Judgments Below

5. The Appellant's defence at trial was primarily *Charter* based: he argued that the police infringed his ss. 8, 9 and 10(*b*) *Charter* rights when they stopped and questioned him, and sought to have both his inculpatory responses and the seized gun excluded under s. 24(2). Since it was undisputed that the police did not have sufficient grounds to lawfully "detain" or "search" the Appellant before he answered their questions, the central issue was whether this initial questioning constituted a "search" or gave rise to a "detention". The trial judge concluded that the Appellant was not detained, characterizing the police questioning as mere "chit chat", and found no violations of his *Charter* rights. The Ontario Court of Appeal disagreed, concluding that the Appellant was arbitrarily detained during the initial questioning.

Ruling on Charter Motion (Harris J.), pp. 3-27, *Appellant's Record,* Vol. I, pp. 4-28
Reasons for Judgment (Ontario Court of Appeal) at ¶ 16-30, *Appellant's Record,* Vol. I, pp. 47-55

a) Section 24(2) of the *Charter*

6. The officers all testified that they <u>would not</u> have searched the Appellant and found the gun but for his inculpatory responses to their questions. The Ontario Court of Appeal (*per* Laskin J.A.) agreed that in these circumstances the statement and the gun were both properly classified as "undiscoverable conscriptive evidence", and that their admission into evidence rendered the Appellant's trial unfair. In *R. v. Stillman, supra*, the majority held that this conclusion required the evidence to be excluded under s. 24(2). However, Laskin J.A. declined to follow this approach, stating that "some recent decisions" of this Court, particularly LeBel J.'s concurrence in *R. v. Orbanski*, *infra,* "seem to signal that the Supreme Court of Canada is willing to moderate the strictness with which it has applied the trial fairness factor". He extracted "three important propositions" from LeBel J.'s *Orbanski* concurrence (at para. 52):

> First, the admission of all conscriptive evidence, including derivative evidence, will have some impact on trial fairness. Second, if we do not have an automatic exclusionary rule for conscriptive evidence, then we must recognize that even though the admission of conscriptive evidence compromises trial fairness, its admission will not always bring the administration of justice into disrepute. And third, whether conscriptive evidence should be admitted will depend both on the resulting degree of trial unfairness and on the strength of the other two *Collins* factors.

Laskin J.A. proposed that the admissibility of evidence affecting trial fairness should be determined based on two criteria (at para. 53):

> [1] the potential effect of the state's misconduct on the reliability of the evidence, and [2] the nature of the police's conduct that led to the accused's participation in the production or obtaining of the evidence.

He concluded that in the case at bar, "though the admission of the evidence would have had some impact on trial fairness, that impact would have been at the less serious end of the scale". Accordingly, he ruled the evidence admissible and upheld the Appellant's convictions.

> Reasons for Judgment (Ontario Court of Appeal) at ¶ 46-47, 52, *Appellant's Record,* Vol. I, pp. 60-61, 63-68
> *R. v. Stillman,* [1997] 1 S.C.R. 607
> *R. v. Collins,* [1987] 1 S.C.R. 265
> *R. v. Orbanski*; *R. v. Elias*, [2005] 2 S.C.R. 3

b) The interpretation of s. 100 of the *Criminal Code*

7. After the evidence was admitted at trial, the Appellant conceded liability on most of the charges against him, but argued that he should be acquitted of the s. 100(1) "possession for the purpose of weapons trafficking" offence (Count 4), on the grounds that there was insufficient evidence that he had intended to "transfer" the gun to another person. In particular, he argued that his statement that he was "just dropping off" the gun somewhere "up the road" was too ambiguous to amount to an admission that he intended to "transfer" the gun. In response, the Crown argued that the broad definition of "transfer" in s. 84 did not require any intent for the gun to ever change hands, and that a person "traffics" in firearms merely by unlawfully moving a gun from one place to another, or "dropping it off" somewhere and retrieving it later. The trial judge convicted the Appellant of the s. 100 offence on this latter basis. On appeal, the Appellant argued that the term "transfer" in s. 84 should be interpreted according to the same principles that have been used to construe the similarly-worded definition of "traffic" in s. 2 of the *Controlled Drugs and Substances Act*. It is well-established that:

> [T]he word "transport" in the definition of "traffic" is not meant in the sense of mere conveying or carrying or moving from one place to another, but in the sense of doing so to promote the distribution of the narcotic to another.

(*R. v. Harrington and Scosky, infra,* at p. 195) The Ontario Court of Appeal rejected this argument and concluded that the *Code's* "weapons trafficking" offences require only that a firearm be moved from one place to another, without any intent that it eventually change hands.

> *R. v. Harrington and Scosky* (1963), [1964] 1 C.C.C. 189 at pp. 193-98 (B.C.C.A.)
> Reasons for Judgment (Conviction and Sentence) (Ontario Court of Justice), *Appellant's Record,* Vol. I., pp. 29-32
> Reasons for Judgment (Ontario Court of Appeal) at ¶ 68-80, *Appellant's Record,* Vol. I, pp. 69-73

PART II: QUESTIONS IN ISSUE

8. This appeal raises two principal legal issues:[3]

(i) What rules should govern the admission of unconstitutionally compelled statements and derivative evidence under s. 24(2) of the *Charter*? In particular, should this Court reconsider any of the key principles established by its previous s. 24(2) decisions, including *Stillman, supra*?

(ii) Do the "weapons trafficking" offences in ss. 99 and 100 of the *Criminal Code* capture all unlawful movement of firearms from place to place, or are they engaged only when firearms are moved in furtherance of their intended distribution to other people?

PART III: ARGUMENT

A. "Conscriptive" Evidence and s. 24(2) of the *Charter*

1) Introduction and Overview

9. The Ontario Court of Appeal's judgment in the case at bar reignites a debate over basic *Charter* principles that seemed to have been conclusively settled by this Court more than a decade ago in *R. v. Stillman, supra.* The *Stillman* majority judgment reaffirmed the following key principles emerging from *R. v. Collins, supra* and many subsequent s. 24(2) decisions:

i) Unconstitutionally obtained evidence will be classified as "conscriptive" if it "involved the accused being compelled to incriminate himself either by a statement or the use as evidence of the body or of bodily substances". This category of "conscriptive evidence" includes "derivative real evidence", *i.e.,* real evidence found as a result of the accused's unconstitutional self-conscription;

ii) Admitting unconstitutionally obtained "conscriptive" evidence compromises trial fairness because it effectively forces the accused to be a witness against himself or herself, contrary to the principle against self-incrimination or "case to meet" principle (one of the "principles of fundamental justice" enshrined in s. 7 of the *Charter*). However, if the state could have obtained the same evidence without unconstitutionally conscripting the accused against himself or herself, its admission will not make the trial unfair;

iii) If admitting unconstitutionally obtained evidence would make the trial unfair, the evidence must be excluded "without considering the seriousness of the breach or

[3] The Respondent has indicated that it will seek to uphold the result in the courts below by challenging the Ontario Court of Appeal's conclusion that the Appellant's *Charter* rights were infringed. The Appellant will address this additional issue in a separate factum, pursuant to Rule 29(4) of the *Rules of the Supreme Court*.

> the effect of exclusion on the repute of the administration of justice … since an unfair trial would necessarily bring the administration of justice into disrepute".[4]

This Court has repeatedly reaffirmed these principles in the ten years since *Stillman* was decided,[5] and the *Stillman* majority judgment has never been overruled. However, as discussed in detail below, the new s. 24(2) test established by the Ontario Court of Appeal in the case at bar is directly contrary to the *Stillman* majority judgment in several key respects, and reflects the opposing positions taken by the *Stillman* dissenters on these issues.[6]

R. v. Collins, supra
R. v. Stillman, supra at ¶ 67-119

10 **2) The *Stillman* Majority and Dissenting Judgments**

10. The dispute between the *Stillman* majority and the dissenters centred on two main issues:

i) the meaning of "trial fairness" in the s. 24(2) context;

ii) the consequences of finding that admitting evidence would cause an "unfair" trial.

These two issues are closely intertwined, since the impact on the repute of the administration of justice of allowing an "unfair" trial to proceed cannot be assessed without examining the nature of the "unfairness".

a) The meaning of "trial fairness"

11. Everyone agrees that criminal trials must be "fair". However, there is disagreement over what "fairness" actually requires in this context. In broad terms, there are two competing
20 characterizations. The first approach defines "fairness" solely in terms of the accuracy of outcomes. On this view, a "fair" trial is one capable of correctly distinguishing the factually guilty from the innocent, without regard to any other considerations. This narrow conception of "trial fairness" is exemplified by this Court's 1970 judgment in *R. v. Wray, infra.* Professor Paciocco, a leading academic proponent of this restrictive view of "trial fairness" in the s. 24(2) *Charter* context, frames the issue as follows:

> It has to be asked whether an accused person who is offered every opportunity to present full answer and defence, who is proved guilty beyond a reasonable doubt, can reasonably claim that his trial has been rendered unfair because the court has relied upon relevant and probative evidence? He can certainly assert that the police acted unfairly in breaching his rights, but does
30 this mean that his trial was thereby rendered unfair?

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[4] *Stillman, supra* at para. 119.
[5] See para. 17, *infra*.
[6] See paras. 21ff, *infra*.

R. v. Wray, [1971] S.C.R. 272
D. Paciocco, "*Stillman,* Disproportion and the Fair Trial Dichotomy" (1997), 2 Can Crim. L.R. 163 at p. 169 [hereinafter Paciocco, "Disproportion"]

12. The second, more expansive conception of "trial fairness" emphasizes the importance of enforcing "fair" rules of engagement between the state and the accused. This Court's *Charter* jurisprudence consistently adopts this latter view, strongly linking "trial fairness" to the principle against self-incrimination (see, *e.g., Collins, supra*). For example, writing for the majority in *R. v. Hebert, infra,* McLachlin J. (as she then was) held:

> The *Charter* introduced a marked change in philosophy with respect to the reception of improperly or illegally obtained evidence. Section 24(2) stipulates that evidence obtained in violation of rights may be excluded if it would tend to bring the administration of justice into disrepute, regardless of how probative it may be. No longer is reliability determinative. The *Charter* has made the rights of the individual and the fairness and integrity of the judicial system paramount. The logic upon which *Wray* was based, and which led the majority in *Rothman* to conclude that a confession obtained by a police trick could not be excluded, finds no place in the *Charter*. To say there is no discretion to exclude a statement on grounds of unfairness to the suspect and the integrity of the judicial system, as did the majority in *Rothman*, runs counter to the fundamental philosophy of the *Charter*. [Emphasis added]

Sopinka J., concurring, explained that admitting unconstitutionally compelled statements:

> … is unfair because it is representative of a model of criminal justice fundamentally at odds with that enshrined in the *Charter*. The accused is effectively stripped of the presumption of innocence (because he has damned himself in the eyes of the trier of fact), and he has thus relieved the Crown of the burden of proving the case. Furthermore, the accused is placed in the invidious position of having to take the stand, contrary to the privilege against self-incrimination, in order to disclaim the confession. All of these knock-on effects amply demonstrate the unfairness inherent in the admission of an unconstitutionally acquired confession. [Emphasis added]

This "unfairness" persists even if the evidence is reliable. As Iacobucci J. explained in *R. v. Broyles, infra* (at p. 618):

> Self-incriminatory evidence renders a trial unfair because it "strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination" (*Collins*, *supra*, *per* Lamer J., at p. 284), not because of the effect of its admission on the outcome of the trial. [Emphasis added.]

R. v. Collins, supra at p. 284
R. v. Hebert, [1990] 2 S.C.R. 151 at p. 178 (*per* McLachlin J.); p. 207 (*per* Sopinka J.)
R. v. Broyles, [1991] 3 S.C.R. 595 at p. 618
See also:
R. v. Ross, [1989] 1 S.C.R. 3 at pp. 15-17
Thomson Newspapers Ltd. v. Canada, [1990] 1 S.C.R. 425 at pp. 536-63 (*per* La Forest J.)
R. v. Evans, [1991] 1 S.C.R. 869 at p. 896
R. v. Jones, [1994] 2 S.C.R. 229 at pp. 255-56 (*per* Lamer C.J.C., dissenting in the result)
R. v. Burlingham, [1995] 2 S.C.R. 206 at ¶ 144-45 (*per* Sopinka J.)
R. v. S.(R.J.), supra at ¶ 45-47, 75, 85, 89-90, 95, 160, 176, 187-88, 191-93.
R. v. White, [1999] 2 S.C.R. 417 at ¶ 42
Wigmore on Evidence, vol. 8 (McNaughton rev. 1961), §2251 at pp. 317-18
M. Hor, "The Privilege against Self-Incrimination and Fairness to the Accused", [1993] *Singapore J. Legal Stud.* 35

13. The *Stillman* majority reaffirmed this relationship between the principle against self-incrimination and trial fairness (*per* Cory J., at para. 86):

> It has, for a great many years, been considered unfair and indeed unjust to seek to convict on the basis of a compelled statement or confession. If it was obtained as a result of a breach of the *Charter* its admission would generally tend to render the trial unfair.

McLachlin J. (as she then was) dissented in *Stillman*, but agreed with the majority: (i) that the "trial fairness" branch of *Collins* is principally concerned with protecting the principle against self-incrimination; (ii) that this principle is a component of "fundamental justice" in s. 7 of the *Charter*; and (iii) that the principle applies both to statements and to otherwise undiscoverable "derivative real evidence". This accords with her previous comments in her majority reasons in *Hebert, supra* and *Evans, supra*.

R. v. Stillman, supra at ¶ 86 (*per* Cory J.); ¶ 208, 259 (*per* McLachlin J., dissenting)
R. v. Hebert, supra
R. v. Evans, supra

14. L'Heureux-Dubé J. disagreed with the majority and McLachlin J. on these issues. She reiterated her support for the analytic framework she had previously proposed in her dissenting reasons in *R.J.S., supra,*[7] and *Burlingham, supra,* in which the *Collins* distinction between "conscriptive" and "non-conscriptive" evidence would be replaced with a distinction between "reliable" and "unreliable" evidence, based on a narrow conception of "trial fairness". This alternative conception of trial fairness and self-incrimination has never attracted majority support; indeed, in *Burlingham,* Sopinka J. wrote a separate majority concurrence specifically rejecting L'Heureux-Dubé J.'s emphasis on reliability. He characterized her proposed approach as a "close relative of the rule in *R. v. Wray*", and noted that "[n]owhere in *Collins* is the fairness of the trial equated with the reliability of the evidence".

R. v. Stillman, supra at ¶ 183-91 (*per* L'Heureux-Dubé J., dissenting)
R. v. S.(R.J.), supra at ¶ 246-61 (*per* L'Heureux-Dubé J.).
R. v. Burlingham, supra at ¶ 76-111 (*per* L'Heureux-Dubé J., dissenting); ¶ 138-54 (*per* Sopinka J.)
R. v. Wray, supra

b) The consequences of a finding that evidence would make a trial "unfair"

15. A second major dispute in *Stillman* was over the consequences of a finding that admitting evidence would compromise trial fairness. Several previous majority judgments had suggested

[7] L'Heureux-Dubé J. concurred in the result in *R.J.S.,* but was in dissent on the central legal issue in the case.

that in this situation "there is no need to consider the other factors referred to in *Collins*, *supra*".[8] The *Stillman* majority endorsed this approach, holding (at paras. 118-19) that:

> [A] finding that the admission of the evidence would render the trial unfair means that the administration of justice would necessarily be brought into disrepute if the evidence were not excluded under s. 24(2). … The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute. [Emphasis added.]

The majority emphasized that this did not mean that "conscriptive" evidence would automatically be excluded, noting that this "general rule, like all rules, may be subject to rare exceptions" (at para. 73). Most importantly, the majority confirmed that admitting conscriptive evidence "will generally not render the trial unfair" if the Crown can show "that it would have been discovered by alternative non-conscriptive means".[9] However, once it is determined that admitting a particular piece of evidence would render the trial unfair, that evidence must be excluded. In short, while the *Stillman* majority held that there is no automatic exclusionary rule for conscriptive evidence, it reaffirmed that there is an automatic exclusionary rule for evidence that would cause an unfair trial. This accords with the rules this Court has developed under s. 7 and 24(1) of the *Charter* governing cases of lawful testimonial compulsion.[10]

R. v. Stillman, supra at ¶ 73, 90, 118-19
R. v. Mellenthin, [1992] 3 S.C.R. 615 at p. 629
R. v. Elshaw, [1991] 3 S.C.R. 24 at pp. 45-46
R. v. Bartle, [1994] 3 S.C.R. 173 at p. 219
R. v. Feeney, supra at ¶ 65

16. The *Stillman* dissenters disagreed with the majority on this issue. McLachlin J. distinguished between trials that merely have "aspects of unfairness" and trials that are "fundamentally unfair", in the sense that there is a real "danger that an innocent person may have been convicted". She suggested that when trial fairness was in issue courts should continue to examine the other *Collins* factors (at para. 259):

> Depending on the degree of unfairness and countervailing circumstances, the fairness of the manner in which the evidence was obtained may or may not result in rejection of the evidence under s. 24(2). In an extreme case, where the unfairness casts doubt on the safety of the verdict, it may, as a matter of application of the balancing process, be predicted that the interest in admitting the evidence will never outweigh the harm that would be done by its admission.

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[8] *R. v. Mellenthin, infra,* at p. 629; see also *R. v. Elshaw, infra,* at pp. 45-46; *R. v. Bartle, infra* at p. 219.

[9] At para. 119 (emphasis added). Cory J. also suggested (at para. 90) that some "unintrusive" and "routinely performed" seizures of bodily substances "may come under the rare exception for merely technical or minimal violations" even though they produce "conscriptive" evidence. This potential exception would seem to have no application to testimonial conscriptive evidence.

[10] This issue is discussed in detail at paras. 26ff, *infra*.

L'Heureux-Dubé J. stated that she "[did] not disagree with McLachlin J. and her analysis on this point", and reiterated her view in *Burlingham* that the "trial fairness" branch of *Collins* should be exclusively concerned with the reliability of evidence.[11] In short, both dissents contemplate conscriptive evidence sometimes being admitted even though it would render the trial "unfair".

R. v. Stillman, supra at ¶ 183-91 (*per* L'Heureux-Dubé J., dissenting), 233-60 (*per* McLachlin J, dissenting)
R. v. Burlingham, supra at ¶ 88, 94 (*per* L'Heureux-Dubé J., dissenting)
D. Stuart, *Charter Justice in Canadian Criminal Law,* 4th ed., at pp. 578-82

3) Subsequent s. 24(2) *Charter* Decisions Reaffirming *Stillman*

17. During the ten years since *Stillman* was decided, this Court has repeatedly reaffirmed the majority's s. 24(2) analysis. For example, in *R. v. Cook, supra,* Cory and Iacobucci JJ., writing for seven members of the Court on this point,[12] stated (at para. 72):

> [T]he appellant's statement is conscriptive evidence. This is not a case where the evidence would have been discovered absent the unlawful conscription of the appellant (see *Stillman*, at para. 103). These factors alone would be sufficient to conclude that the evidence must be excluded under s. 24(2). This follows since the general rule is that the admission of conscriptive evidence which would not have been discovered in the absence of the conscription of the accused will render the trial unfair. [Emphasis added.]

In *R. v. Law, supra,* Bastarache J., writing for the unanimous Court, reaffirmed that "[t]he concept of trial fairness is ultimately concerned with the continued effects of unfair self-incrimination on the accused" (at para. 34). Writing for the Court in *R. v. Buhay, supra*, Arbour J. observed that: "[w]here the admission of the evidence would render a trial unfair, it could bring the administration of justice into disrepute to receive it and it must therefore be excluded" (at para. 37, emphasis added). None of these cases have suggested that *Stillman* was wrongly decided on these issues. Further, this Court has never admitted evidence under s. 24(2) after having found that doing so would render the trial unfair.

R. v. Feeney, [1997] 2 S.C.R. 13 at ¶ 61-84
R. v. Cook, [1998] 2 S.C.R. 597 at ¶ 64-78 (*per* Cory and Iacobucci JJ.); 153 (*per* Bastarache J
R. v. M. (M.R.), [1998] 3 S.C.R. 393 at ¶ 85-89 (*per* Major J., dissenting in the result)
R. v. Belnavis, [1997] 3 S.C.R. 341 at ¶ 36-47
R. v. Law, [2002] 1 S.C.R. 227 at ¶ 32-41
R. v. Fliss, [2002] 1 S.C.R. 535 at ¶ 75-89 (*per* Binnie J.)
R. v. Buhay, [2003] 1 S.C.R. 631 at ¶ 41-73
R. v. Mann, supra at ¶ 51-59

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[11] Professor Stuart has interpreted L'Heureux-Dubé J.'s reasons in *Burlingham* and *Stillman* as favouring a more restrictive approach to s. 24(2) than proposed by McLachlin J., in which reliable evidence would be excluded only in "very rare" cases.

[12] Cory and Iacobucci jointly wrote the majority decision, joined by Lamer C.J.C. and Major and Binnie JJ. Bastarache J. (Gonthier J. concurring) wrote separate reasons addressing another point, but "agree[d] with the analysis of Cory and Iacobucci JJ. with regard to … the application of s. 24(2) of the *Charter*" (at para. 153).

4) Justice LeBel's *Orbanski* Concurrence

18. In *R. v. Orbanski, supra,* LeBel J. filed concurring reasons, joined by Fish J., in which he considered the admissibility of evidence of the accused's performance on roadside sobriety tests.[13] LeBel J. expressly reaffirmed the majority holding in *Stillman,* describing it and *Collins* as the two "defining moments" in this Court's s. 24(2) jurisprudence (at para. 88). However, he expressed concern that the majority's judgment had sometimes been misinterpreted as mandating automatic exclusion of all conscriptive evidence (at paras. 91-98). A number of LeBel J.'s subsequent comments suggest that all of the circumstances be considered when assessing whether admitting evidence would render the trial unfair. However, he did not suggest that evidence that would render the trial unfair can, nevertheless, be admitted on the strength of the other *Collins* factors – a position that would be contrary to the majority holding in *Stillman*.

R. v. Orbanski, supra at ¶ 66, 85-104 (*per* LeBel J.)

19. Although the officer who asked Orbanski to perform sobriety tests did not mention the availability of immediate free legal advice from duty counsel, he specifically told Orbanski "that the [roadside sobriety] tests were voluntary".[14] This factor was central to LeBel J.'s conclusion that admitting the sobriety test evidence would not cause an unfair trial (at paras. 103-04):

> Although I have found a *Charter* breach, it is clear from the evidence that Mr. Orbanski did receive some information. In a very broad sense, some of the duties imposed on the police officer were met. Mr. Orbanski appears to have been given incomplete information about his own rights, but he understood what they were and declined to exercise them.
>
> As a result, I do not think that the breach went to the fairness of the trial. It was a minor infringement of an admittedly important *Charter* right. It did not warrant the exclusion of the evidence.

LeBel J. agreed with the "analysis and … conclusion" of the Manitoba Court of Appeal, which had admitted the evidence on the grounds that Orbanski was not compelled to perform the tests but, rather, was specifically told that "[h]e didn't have to … do them if he didn't want to".

R. v. Orbanski, supra at ¶ 66, 102-04
R. v. Orbanski (2003), 173 C.C.C. (3d) 203 at ¶ 111-13 (Man. C.A.)

20. It is submitted that LeBel J.'s conclusion in *Orbanski* can best be understood as an application of the established principle that conscriptive evidence obtained following a *Charter* breach can be admitted without compromising trial fairness if the Crown can show that there was

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[13] LeBel and Fish JJ. found a s. 10(*b*) *Charter* violation arising from an deficient caution. The majority held that there was no s. 10(*b*) duty in the circumstances and thus no breach, and did not address s. 24(2).
[14] *Orbanski, supra* at ¶66 (emphasis added).

no causal link between the breach and the creation of the evidence (see *R. v. Bartle, supra*; *R. v. Harper, infra*). For instance, in *Harper* the accused was not told about the availability of free advice from duty counsel (the same s. 10(*b*) breach identified by LeBel J. in *Orbanski*). However, Harper was specifically told of his right to silence, which he said he understood, before making an unprompted inculpatory admission. Lamer C.J.C. concluded (at pp. 353-54) that the s. 10(*b*) violation "did not affect the appellant's behaviour", and that "his incriminating statement would have been made even if his s. 10(*b*) rights had not been violated":

> Accordingly, I am of the view that admission of the appellant's second inculpatory statement would not significantly affect the fairness of his trial and that the breach of his s. 10(*b*) rights was a minor one. [Emphasis added.]

LeBel J. appears to have taken a similar view of the situation in *Orbanski*. Conversely, he does not suggest that the evidence in *Orbanski* could have been admitted under s. 24(2) if the accused had not known that he could decline to perform the sobriety tests, or that the trial unfairness caused by admitting truly compelled conscriptive evidence could have been outweighed by the other *Collins* factors. Since LeBel J. expressly affirms the *Stillman* majority judgment, his concurrence cannot plausibly be read as endorsing the dissenters' contrary view on these points.

R. v. Orbanski, supra at ¶ 103 (*per* LeBel J.)
R. v. Bartle, supra at pp. 210-13, 218-19
R. v. Harper, [1994] 3 S.C.R. 343

5) The Ontario Court of Appeal's Judgment in *Grant*

21. The Ontario Court of Appeal concluded that admitting the Appellant's inculpatory utterance and the derivative evidence (the seized gun) would render his trial unfair, but held that it was nevertheless admissible under s. 24(2). Laskin J.A. based this conclusion on three "important propositions" he purported to draw from para. 93 of LeBel J.'s *Orbanski* concurrence. It is submitted that each of these three propositions is explicitly contradicted by this Court's majority s. 24(2) decisions:

(i) "the admission of all conscriptive evidence, including derivative evidence, will have some impact on trial fairness";	• this Court has held that admitting conscriptive evidence will not adversely affect the fairness of the trial if it was discoverable by non-conscriptive means (see, *e.g., Stillman, Feeney* and *Harper, supra*);
(ii) "if we do not have an automatic exclusionary rule for conscriptive evidence, then we must recognize that even though the admission of conscriptive evidence compromises trial fairness, its admission will not always bring the administration of justice into disrepute."	• this Court has repeatedly stated that there is no "automatic exclusionary rule for conscriptive evidence" because conscriptive evidence can sometimes be admitted without rendering the trial unfair; • this Court has also repeatedly held that when admitting the evidence would render the trial unfair, "it must therefore be excluded" to protect the repute of the administration of justice: *Buhay, supra*; see also *Stillman, supra, Cook, supra*. This was one of the main points of disagreement between the *Stillman* majority and the dissenters.[15]
(iii) "whether conscriptive evidence should be admitted will depend both on the resulting degree of trial unfairness and on the strength of the other two *Collins* factors."	• this Court has repeatedly and expressly stated that once it is determined that admitting conscriptive evidence would render the trial unfair, the evidence must be excluded without reference to the remaining *Collins* factors (see, e.g., *Stillman, supra*; *Elshaw, supra*). This was also a major point of contention in *Stillman*.

In short, Laskin J.A.'s three "important propositions" amount to a rejection of the *Stillman* majority position, in favour of one similar to that taken by the *Stillman* dissenters. In particular, his suggestion that there are varying degrees of trial unfairness, and that lesser degrees of unfairness not affecting the reliability of the result can be outweighed by other *Collins* factors, was proposed by McLachlin J. in her *Stillman* dissent and specifically rejected by the majority. It is submitted that Laskin J.A.'s three propositions cannot properly be extracted from para. 93 of LeBel J.'s *Orbanski* concurrence, which cannot in any event be taken as overruling this Court's earlier majority pronouncements on s. 24(2), as a matter of *stare decisis*.

Reasons for Judgment (Ontario Court of Appeal) at ¶ 52, *Appellant's Record,* Vol. I, pp. 63-64
10 *R. v. Orbanski, supra* at ¶ 93
R. v. Stillman, supra
R. v. Feeney, supra
R. v. Harper, supra
R. v. Buhay, supra
R. v. Cook, supra
R. v. Elshaw, supra at pp. 43, 45

22. The Court of Appeal's proposed new test for determining the admissibility of conscriptive evidence is similarly inconsistent with this Court's s. 24(2) jurisprudence. Laskin

[15] See paras. 15-16, *supra*.

J.A. held that the evidence in the case at bar could be admitted without seriously compromising trial fairness because the gun was reliable "real" evidence,[16] and because the police had not engaged in "flagrant … abuse", such as making an "overt physical threat". Neither of these factors would be capable of justifying the admission of the evidence under this Court's established approach to s. 24(2). Rather, this Court's ss. 7 and 24(2) decisions on self-incrimination and trial fairness emphasize the inherent unfairness of the state building a case by coercing a suspect to become, in effect, a witness against himself, independent of the reliability of the resulting evidence. Further, "coercion" has always been understood as simply connoting an absence of free choice, and not limited to cases of torture or other extreme state misconduct.

10 As Santoro observes, under the Ontario Court of Appeal's proposed new approach:

> There is no recognition of the general rule that conscriptive evidence generally impacts on trial fairness and that when trial fairness is impacted the administration of justice is necessarily brought into disrepute. … There is no recognition of the holding that the cause of the unfairness is not the reliability of the evidence or the blameworthiness of the police conduct, but the violation of the cornerstone right against self-incrimination: a person cannot be compelled (*i.e.,* conscripted) to produce evidence against himself at his own trial if the trial is to be fair.

On both points, the Ontario Court of Appeal's approach reflects key elements of the *Stillman* dissents and L'Heureux-Dubé J.'s earlier dissent in *Burlingham, supra*.

Reasons for Judgment (Ontario Court of Appeal) at ¶ 54, 58, *Appellant's Record,* Vol. I, pp. 64-65
20 *R. v. Burlingham, supra* at ¶ 145
R. v. Stillman, supra at ¶ 86
R. v. Broyles, supra at p. 618
D.C. Santoro, "The Unprincipled Use of Originalism and Section 24(2) of the *Charter",* (2007) 45 Alta. L.R. 1 at p. 39
R. v. Wray, *supra*
R. v. Elshaw, supra at p. 43

23. Laskin J.A. specifically found that the Appellant's s. 9 *Charter* rights were infringed and that his inculpatory admissions were "compelled" (at para. 29):

> In my view the court can reasonably infer compulsion from [the Appellant's] manner of answering
30 the police's questions and from the answers themselves. …. In the light of his answers, the suggestion that [the Appellant] knew he had the right not to incriminate himself seems unreasonable. I note that at no time during the encounter did the officers tell the appellant that he was free to go or free not to respond to their questions.

He also found that the gun was derivative evidence that the police would not otherwise have located. Under this Court's binding majority s. 24(2) jurisprudence, it follows directly from these findings that admitting the evidence made the Appellant's trial unfair, and that it must

[16] Laskin J.A. did not expressly address the admissibility of the Appellant's utterances, but presumably would have found that the reliability of the Appellant's statement "I have a firearm" was confirmed by the finding of the gun.

therefore be excluded. It is submitted that the Ontario Court of Appeal erred by reaching the opposite conclusion.

Reasons for Judgment (Ontario Court of Appeal) at ¶ 29, *Appellant's Record,* Vol. I, pp. 52-55

6) Should *Stillman* be Overturned?

24. Unlike the Ontario Court of Appeal, this Court has the authority to overrule its own prior decisions. The main issue in this appeal is whether this Court should take the extraordinary step of reversing twenty years of established s. 24(2) *Charter* jurisprudence on the admissibility of "conscriptive" evidence. Since the evidence in the case at bar consists of compelled statements and otherwise undiscoverable derivative evidence – *i.e.,* "testimonial" evidence, rather than non-testimonial "emanations of the body" – the question on this appeal can be framed more narrowly: should this Court reverse course and begin allowing unconstitutionally compelled "testimonial" conscriptive evidence to sometimes be admitted under s. 24(2) even when this makes the trial unfair, contrary to the *Collins/Stillman* approach?

25. The Appellant respectfully submits that such a radical step would be unprecedented and unwise. The *Collins/Stillman* analytic framework is firmly established in Canadian law. The arguments both for and against it were fully canvassed a decade ago in *Stillman*. Most importantly, the "trial fairness" branch of *Collins/Stillman* has become inextricably intertwined with this Court's s. 7 self-incrimination jurisprudence, which would be hopelessly undermined if the Court were to begin allowing unconstitutionally obtained statements and undiscoverable derivative evidence to be admitted under s. 24(2). While the *Collins/Stillman* approach is not immune from appropriate incremental modification, it is submitted that its core holding – the rule that compelled statements and undiscoverable derivative evidence must generally be excluded to preserve trial fairness and uphold the s. 7 principle against self-incrimination – must be preserved. Abandoning this core principle, as the Ontario Court of Appeal has proposed, would render this Court's ss. 7 and 24(2) jurisprudence incoherent and create unacceptable uncertainty and confusion. There is no good reason to embark on such an adventure, and there are strong reasons not to do so.

a) The principle against self-incrimination and section 7

26. Most criticisms of this Court's approach to the exclusion of "conscriptive" evidence under s. 24(2) rest on the express or implied premise that it would be better legal policy to admit unconstitutionally obtained evidence more often than is currently permitted and, in particular, that courts should sometimes admit evidence that fails the "trial fairness" stage of the *Collins/Stillman* analysis. Proponents of this view offer two different justifications. Some critics challenge the basic premise of the *Collins/Stillman* "trial fairness" branch, denying that there is anything "unfair" about using compelled self-incriminatory evidence to convict a person. Other commentators accept that there is some "unfairness" but dispute its significance, arguing that this unfairness should sometimes be outweighed by the societal interest in obtaining a conviction.[17]

27. It is submitted that neither justification is compatible with this Court's well-established vision of the principle against self-incrimination. This Court has repeatedly declared "the right of an accused not to be forced into assisting in his or her own prosecution" to be "the single most important organizing principle in criminal law".[18] The central theme of this Court's self-incrimination decisions is that it is inherently "unfair" to base a prosecution on compelled self-incriminatory "testimonial" evidence. Moreover, by identifying the principle against self-incrimination or "case to meet" principle as a s. 7 "principle of fundamental justice", this Court has recognized its primacy. The "principles of fundamental justice" are, by definition, "fundamental": they cannot routinely be overridden by other considerations, including society's interest in punishing wrongdoers.[19] Under s. 7, witnesses subjected to <u>lawful</u> testimonial compulsion in contexts engaging the principle against self-incrimination are protected against having their statements and any otherwise undiscoverable derivative evidence subsequently used against them. Having regard to the principle that "[t]he *Charter* should be construed as a coherent system" (*R. v. R.J.S.), supra* at p. 561), it would be illogical and incoherent not to continue to give the same protection under s. 24(2) to suspects who are <u>unlawfully</u> compelled to make self-incriminatory statements through a violation of their constitutional rights.

M. Hor, *supra* at p. 35

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[17] The academic commentary on s. 24(2) is discussed in greater detail at paras. 40-51, *infra*.
[18] *R. v. P.(M.B.), infra* at p. 577, *R. v. S.(R.J.), supra* at paras. 46-47, 95; *Smith v. Jones, infra* at para. 26.
[19] This Court has held that violations of s. 7 will only be justifiable under s. 1 in "exceptional circumstances" involving "extraordinary conditions": see, e.g., *Re B.C. Motor Vehicle Act, infra* at p. 518, *R. v. Heywood, infra* at p. 802; *New Brunswick v. G.(J.), infra* at para. 99; *R. v. Ruzic, infra* at para. 92.

R. v. P.(M.B.), [1994] 1 S.C.R. 555 at p. 577
R. v. S.(R.J.), supra at ¶ 46-47, 95, 191-93.
Smith v. Jones, [1999] 1 S.C.R. 455 at ¶ 26 (*per* Major J., dissenting in the result)
Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at p. 518
R. v. Heywood, [1994] 3 S.C.R. 761 at p. 802
New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46 at ¶ 99
R. v. Ruzic, [2001] 1 S.C.R. 687 at ¶ 92

28. This Court's s. 7 self-incrimination decisions emphasize the need to harmonize s. 7's protections with the s. 24(2) exclusionary rule. In his concurring judgment in *Thomson Newspapers, supra,* La Forest J. held that s. 7 required both compelled statements and otherwise undiscoverable derivative evidence to be excluded, since "the subsequent use of this evidence would be indistinguishable from the subsequent use of the pre-trial compelled testimony" and would "violate the principles of fundamental justice", resulting in an unfair trial. He drew heavily on this Court's prior s. 24(2) decisions in arriving at this conclusion. Although La Forest J. described the power to exclude derivative evidence as "discretionary", his reasons indicate that the discretion was limited to the issue of discoverability: he characterized exclusion as the "price [that] must be paid where the use of evidence derived from compelled testimony would undermine the fairness of the trial", adding:

> The one thing the power to compel testimony will never allow anti-combines investigators to use as evidence, however, is information they could not otherwise have uncovered. [Emphasis added.]

Thomson Newspapers, supra at pp. 484 (*per* Wilson J.); pp. 555, 558, 561-62 (*per* La Forest J.)

29. In *R.J.S., supra,* and *BC Securities Comm'n v. Branch, infra*, a majority of this Court adopted much of La Forest J.'s analysis in *Thomson Newspapers*. Writing for the majority in *R.J.S.,* Iacobucci J. noted (at para. 174) that the s. 24(2) jurisprudence:

> … show[ed] that the development of a residual role for s. 7 can enhance the operation of the *Charter* as a system, and result in the coherent recognition of a principle against self-incrimination.

After observing that conscriptive and otherwise undiscoverable evidence was generally excluded under the "trial fairness" branch of *Collins,* Iacobucci J. observed (at para. 191):

> I see no reason not to draw the obvious analogy. Since it is the principle against self-incrimination which is at stake, and since that principle finds recognition under s. 24(2) as I have described, we should avoid the incongruity which would result if a different quality of protection was offered to the witness who is compelled to answer questions. The *Charter* should be construed as a coherent system. Accordingly, I think that evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness, ought generally to be excluded under s. 7 of the *Charter* in the interests of trial fairness. [Emphasis added.]

Although Iacobucci J. continued to describe the exclusion of undiscoverable derivative evidence as "discretionary", he emphasized that evidence affecting trial fairness "is almost always

excluded" under s. 24(2) and that "derivative-type immunity will generally lead to exclusion" under s. 7 (at para. 199). He added:

> I will not try to imagine today the factual circumstances in which derivative-use immunity might not be protected. When, if ever, that might occur, is an issue I leave for another day.

When *R.J.S.* was decided in 1995, there was still some uncertainty in the s. 24(2) case law over whether evidence that would make a trial unfair *necessarily* had to be excluded. This issue was resolved two years later in *Stillman, supra*.[20]

> *R. v. S.(R.J.), supra* at ¶ 160-200.
> *British Columbia Securities Comm'n, v. Branch,* [1995] 2 S.C.R. 3 at ¶ 4-5 (*per* Sopinka and Iacobucci JJ.)
> *Phillips v. Nova Scotia (Westray Mine Inquiry),* [1995] 2 S.C.R. 97 at ¶ 93 (*per* Cory J.)
> *Stillman, supra* at ¶118-19

30. In *Thomson Newspapers,* L'Heureux-Dubé J. argued that s. 7 should provide no protection against the admission of derivative evidence, on the grounds that it was "real evidence" which:

> … cannot be assimilated to self-incriminating evidence and does not go to the fairness of the judicial process which is what, in the end, fundamental justice is all about.

She maintained this position in *R.J.S.* and *Branch*, and was particularly critical of Iacobucci J.'s reliance on the s. 24(2) case law, stating (*R.J.S., supra* at para. 275):

> [I]t appears incongruous to define new and separate *Charter* rights under s. 7 by almost exclusive reliance upon this Court's most recent jurisprudence governing s. 24(2). Such an approach to defining rights can stultify the growth of the *Charter* by freezing it in time or, alternatively, raise serious problems if this Court were to modify its approach to s. 24(2). If the principles of fundamental justice are indeed the bedrock of our legal system then I think it prudent that they, too, must be seen to rest on more solid foundations. [Emphasis added.]

Nevertheless, Iacobucci J.'s approach has carried the day, and has been repeatedly reaffirmed by a majority of this Court.

> *Thomson Newspapers, supra* at p. 585 (per L'Heureux-Dubé J.)
> *R. v. S.(R.J.), supra* at ¶ 271-75 (*per* L'Heureux-Dubé J.).
> *R. v. Fitzpatrick,* [1995] 4 S.C.R. 154
> *R. v. White,* [1999] 2 S.C.R. 417
> *R. v. Jarvis,* [2002] 3 S.C.R. 757
> *Re Application under s. 83.28 of the Criminal Code,* [2004] 2 S.C.R. 248

31. The main issue in this Court's post-*R.J.S.* s. 7 self-incrimination cases has been identifying *when* testimonial compulsion engages the principle against self-incrimination. The Court has developed a "contextual" approach to this issue, which considers factors such as: (i) whether the compulsion to speak arises from a person's voluntary participation in a regulatory regime; (ii) the presence or absence of an adversarial relationship at the time of the compulsion;

[20] See paras. 15-16, *supra*.

and (iii) whether the policy concerns underlying the principle against self-incrimination arise in the particular context at issue. Applying this analytic framework, it has been held that statutorily required fishing reports do not engage s. 7 and thus can be used as evidence against an accused. Conversely, the Court has found s. 7 to be engaged by statutorily compelled motor vehicle accident reports (*R. v. White, supra*), and by testimonial compulsion during an income tax audit when "the predominant purpose of a particular inquiry is the determination of penal liability" (*R. v. Jarvis, supra*). In *Re Application under s. 83.28 of the Criminal Code, supra*, the Court concluded that s. 83.28's statutory "use immunity" and "derivative use immunity" protections would be unconstitutionally under-inclusive unless they were extended to apply in extradition and deportation proceedings. None of these cases suggest that compelled self-incriminatory evidence that would make a trial unfair might nevertheless be admissible in a particular case because of the public interest in securing a conviction.

R. v. Fitzpatrick, supra at ¶ 18-47
R. v. White, supra at ¶ 40-68
R. v. Jarvis, supra at ¶ 67-68, 96-98
Re Application under s. 83.28 of the Criminal Code, supra at ¶ 67-79

32. Although s. 24(2) and this Court's s. 7 self-incrimination jurisprudence both require "balancing" of state and individual interests, the "balancing" process under s. 7 takes place at a higher level of generality than the case-by-case balancing in s. 24(2). Under s. 7, the relevant question is whether the particular power of compulsion at issue generally raises self-incrimination concerns. If it does, the state cannot use the fruits of the compulsion against the target, unless it can establish that the evidence was independently discoverable. Thus, for instance, the central issue in *White, supra* was whether compelled accident reports generally attract s. 7 *Charter* protection. The majority answered this question by considering a number of non-case-specific factors, *i.e.*: (i) whether drivers can generally be viewed as voluntary participants in a regulated activity; (ii) whether accident report demands are generally made in "a context of pronounced psychological and emotional pressure" involving an adversarial relationship with the police; and (iii) whether these demands raise general concerns about reliability and state abuse of power. Having answered these general questions affirmatively, the Court concluded that the statutory power to compel accident reports attracted s. 7 self-incrimination protection. This conclusion was dispositive in *White*. There is no suggestion in the majority's judgment that White's compelled statements might be admissible against her even

though this would violate her s. 7 right against self-incrimination, based on some additional "balancing" of her rights against the state's interest in convicting her. Rather, Iacobucci J. observed (at paras. 71, 89):

> I would emphasize that creating an immunity against the use of an accident report in subsequent criminal proceedings is itself a balancing between society's goal of discovering the truth, on the one hand, and the fundamental importance for the individual of not being compelled to self-incriminate. [Emphasis in original.]
>
> …
>
> In the present case, involving an accused who is entitled under s. 7 to use immunity in relation to certain compelled statements in subsequent criminal proceedings, exclusion of the evidence is required. [Emphasis added.]

Likewise, in *Re Application under s. 83.28 of the Criminal Code, supra,* the majority noted that "testimonial compulsion has been invariably linked with evidentiary immunity", and described the exclusion of compelled statements and undiscoverable derivative evidence as "necessary safeguards" that "provide the parameters within which self-incriminating testimony can be obtained", and which "must necessarily" be granted to s. 83.28 witnesses [at paras. 70, 79; emphasis added]. Further, there is no suggestion in either case that compelled self-incriminatory statements and derivative evidence might become admissible if their reliability is established, or if it is shown that the police did not act exceptionally abusively in obtaining them.

R. v. White, supra at ¶ 71, 89
Re Application under s. 83.28 of the Criminal Code, supra, at ¶70, 79

33. In summary, this Court's s. 7 decisions confirm the link between the principle against self-incrimination and trial fairness previously identified in the s. 24(2) jurisprudence. Section 7 generally allows lawful testimonial compulsion,[21] but the state cannot use the resulting evidence to incriminate that witness, since this would be contrary to the principles of fundamental justice. The Court has consciously crafted the parameters of s. 7's residual protection against self-incrimination to dovetail with the *Collins/Stillman* approach to self-incriminatory evidence under s. 24(2), to ensure that people receive the same protection whether they are compelled to speak lawfully or unlawfully.

34. The importance of maintaining consistency between the parallel rules governing the admissibility of lawfully and unlawfully compelled testimonial evidence has generally been acknowledged by all members of this Court, including those who have disagreed with the

[21] In exceptional cases, a witness can resist testimonial compulsion by showing that the state's predominant purpose is self-incriminatory: *Branch, supra* at ¶6-11

majority's approach to self-incrimination and the exclusion of evidence. In *Thomson Newspapers, supra,* La Forest and L'Heureux-Dubé JJ. differed on many important issues, but both agreed on the need for a coherent approach to interpreting the "principles of fundamental justice" in s. 7 and the s. 24(2) exclusionary remedy. L'Heureux-Dubé J. observed (at p. 582):

> [H]ow could it be said that a breach of fundamental justice does not necessarily bring the administration of justice into disrepute? To state the question is to answer it.

La Forest J. agreed, stating (at p. 551):

> Like my colleague L'Heureux-Dubé J., I find it difficult to imagine how the use of evidence which does not bring the administration of justice into disrepute can at the same time be contrary to the principles of fundamental justice. The consequence of the former finding is, in effect, to declare that the *Charter* breach by which evidence was obtained was non-prejudicial, and in a sense nominal. To argue that the same reasoning cannot be used to determine whether the use of derivative evidence constitutes a breach of the rights guaranteed under s. 7 would be to take an unduly formalistic approach to the interpretation of the *Charter*.

Five years later, in his majority reasons in *R.J.S., supra,* Iacobucci J. adopted this reasoning, explaining (at para. 177):

> If evidence derived from a *Charter* breach can be admitted on the theory that its use will not bring the administration of justice into disrepute, how then can it be said that to admit <u>any</u> evidence derived from compelled testimony would be contrary to the principles of fundamental justice? <u>To make this argument is to suggest, inferentially, that the admission of evidence which offends the principles of fundamental justice does not bring the administration of justice into disrepute. How can this be? As L'Heureux-Dubé J. observed in *Thomson Newspapers*, *supra*, "[t]o state the question is to answer it."</u> [Emphasis added.]

This need for consistency between ss. 7 and 24(2) has implications in both directions. As recognized in *Thomson Newspapers* and *R.J.S.,* it would have been incoherent for this Court to have defined the s. 7 principle against self-incrimination to include evidence that is admissible under s. 24(2). It would be equally incoherent for the Court, now that the parameters of s. 7 have been established, to suddenly change its approach to s. 24(2) and begin admitting evidence that would trigger a s. 7 violation. If the principles of fundamental justice require <u>lawfully</u> compelled statements and undiscoverable derivative evidence to be excluded to preserve trial fairness, it would stand the rule of law on its head to allow the same evidence to be <u>admitted</u> under s. 24(2) when it is obtained in violation of "the supreme law of Canada".[22] Since s. 7's protections against self-incrimination have been deliberately crafted to accord with the existing s. 24(2) analytic framework, it would, as L'Heureux-Dubé J. recognized in her dissent in *R.J.S., supra*, "raise serious problems if this Court were to modify its approach to s. 24(2)" (at para. 275).

Thomson Newspapers, supra at p. 551 (*per* La Forest J.); p. 582 (*per* L'Heureux-Dubé J.)
R. v. S.(R.J.), supra at ¶ 177 (*per* Iacobucci J.); at ¶ 275 (*per* L'Heureux-Dubé J.).

[22] *Constitution Act,* 1982, s. 52.

Constitution Act, 1982, s. 52

35. The circumstances in the case at bar squarely raise the concerns recognized in this Court's s. 7 self-incrimination jurisprudence. The police stopped and questioned the Appellant while he was exercising his basic unregulated liberty of movement. The questions they asked him were specifically directed at obtaining self-incriminating responses to be used against him. The Ontario Court of Appeal expressly found that the Appellant was "detained", that his self-incriminatory responses to the police questions were "compelled", and the gun found as a direct result of his statements would not otherwise have been discovered. If the Appellant had been lawfully compelled to provide this self-incriminatory evidence, he would be protected against its subsequent use against him, on the grounds that this would offend the s. 7 principles of fundamental justice. It would be illogical and incoherent not to extend the same protection to him when the compulsion that produced the evidence was unlawful and violated the *Charter*.

R. v. White, supra

36. The Ontario Court of Appeal admitted the evidence in the case at bar by applying a new test that gives primacy to two factors – the reliability of the evidence, and the seriousness of the police misconduct – that have no bearing on either the self-incriminatory character of the evidence or the "unfairness" resulting from its admission, as these concepts are understood in this Court's previous *Charter* decisions. The principle against self-incrimination and the "case to meet" principle enshrined in s. 7 do not contain any exception for "reliable" evidence – there is no *Charter* analogue of the common law *St. Lawrence/Wray* rule. Likewise, the "compulsion" required to trigger these principles has never been limited to egregiously wrongful forms of state coercion; rather, they can be fully engaged by entirely *lawful* compulsion. What matters for the purposes of this principle, and the associated "trial fairness" concerns, is the effect of compulsion on the suspect's free will, not the wrongfulness of the police conduct. In essence, the Court of Appeal's proposed test reflects a narrow view of "trial fairness" that is fundamentally inconsistent with this Court's majority self-incrimination jurisprudence, and which strongly resembles L'Heureux-Dubé J.'s proposed approach in her *Burlingham* and *R.J.S.* dissents.

R. v. St. Lawrence (1949), 93 C.C.C. 376 at p. 391 (Ont. C.A.)
R. v. Wray, supra
R. v. Sweeney (2000), 148 C.C.C. (3d) 247 at ¶ 41-62 (Ont. C.A.)
R. v. Sang, [1979] 2 All E.R. 1222 at 1245, *per* Lord Scarman (H.L.)
Lam Chi-ming v. R., [1991] 3 All E.R. 172 (P.C.)
R. v. Burlingham, supra
R. v. S.(R.J.), supra.

b) *Stare decisis* and the criticisms of *Stillman*

(1) The Need for "Compelling Circumstances" to Reverse Established Precedent

37. As discussed above, it is submitted that this Court cannot substantially change its current approach to the exclusion of "testimonial" self-incriminatory evidence under s. 24(2) without fatally undermining the internal logic of its s. 7 self-incrimination decisions. The recognition of the principle against self-incrimination as a s. 7 principle of fundamental justice was a landmark development in the evolution of the *Charter*. Reversing this holding, or substantially eroding its foundations, would be an extraordinary step with profound and potentially unforeseeable consequences. Moreover, even apart from these broader s. 7 implications, it would be an extraordinary departure from the principle of *stare decisis* for this Court to substantially alter the existing s. 24(2) exclusionary rule. The core of the *Collins/ Stillman* framework has been firmly established as the law for two decades, and has been applied to decide tens of thousands of criminal cases. Ten years ago, in *Stillman,* this Court took the unusual step of ordering a re-hearing and calling for interventions in order to ensure that the arguments for and against its established approach were fully canvassed. It would be a virtually unprecedented step for this Court now to reverse *Stillman*, based on what are essentially the same arguments. Such a drastic step cannot be taken lightly, having regard to the principle that "[t]here must be compelling circumstances to justify departure from a prior decision" (*R. v. Robinson, infra* at para. 16), and that "[t]he Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection" (*R. v. Henry, infra* at para. 44).

Order dated May 23, 2006, *Supreme Court of Canada Bulletin of Proceedings,* May 24, 2006
R. v. Stillman, supra
R. v. Robinson, [1996] 1 S.C.R. 683 at ¶ 16
R. v. Henry, [2005] 3 S.C.R. 609 at ¶ 44

38. The exclusionary remedy is inherently controversial. As Sopinka J. noted in *Burlingham, supra,* "[n]ot surprisingly, commentators no less than the public differ as to the appropriate approach". Through an incremental and evolutionary process over the past two decades, this Court has identified foundational principles, from which it has derived concrete rules for deciding cases. Inevitably, these principles and rules are, in some sense, contingent: a different Court, differently constituted, might have identified a different set of principles and rules. Reasonable people can debate whether a different set of principles and rules would have been

better or worse than the ones selected by this Court. However, under the principles of *stare decisis*, the burden borne by those advocating reversing settled decisions and principles cannot be met simply by showing that a different decision at first instance was possible, or that arguments can be made in support of a different approach. As Professor Stribopoulos notes:

> [F]or reasons going to its institutional integrity, the Court must proceed with great caution before substantially revamping established precedent or taking the drastic step of overruling an earlier judgment. If the Court appears too eager to revisit established principles then the authority of its judgments will be undermined and its institutional integrity will needlessly suffer.

It is submitted that proponents of radically re-writing the law of s. 24(2), at this late date in the development of the *Charter*, must bear a heavy burden of establishing that the current approach to the exclusion of "testimonial" conscriptive evidence – *i.e.,* compelled statements and undiscoverable derivative evidence – is based on flawed principles or is internally incoherent. It is further submitted that neither of these claims are sustainable.

> J. Stribopoulos, "Has Everything Been Decided? Certainty, the *Charter* and Criminal Justice", (2006) 34 S.C.L.R. (2d) 381 at p. 385

39. This Court has occasionally overturned a particular *Charter* rule after deciding, on considered reflection, that it is inconsistent with the underlying *Charter* principle. For example, in *R. v. Henry, supra,* the Court reversed its earlier decision in *R. v. Mannion, infra,* on the grounds that the case "did not adopt an interpretation in line with the purpose of s. 13 [of the *Charter*]", and "led to an unfair dilution of the s. 13 protection" in some situations (at ¶ 45-46). The Court reversed the specific rule established by *Mannion*,[23] but reaffirmed the key principles established by its previous s. 13 *Charter* cases. In contrast, opponents of the *Collins/Stillman* approach to s. 24(2) generally seek to repudiate the key underlying principles on which it is founded, namely, this Court's identification of the principle against self-incrimination as fundamentally important *Charter* precept that is an essential element of "trial fairness". It is unsurprising that academic commentators who disagree with this Court's choice of principles – *i.e.,* who dismiss concerns about self-incrimination as not particularly important, or who define "trial fairness" differently and deny that there is anything "unfair" about a trial based on compelled self-incriminatory evidence – also disagree with this Court's reliance on these factors as grounds for excluding evidence under s. 24(2). However, the existence of this disagreement does not, it is submitted, constitute a compelling basis for this Court, as currently constituted, to

[23] Namely, the rule that defendants who voluntarily testify at a re-trial cannot be cross-examined for an incriminatory purpose on their prior voluntary testimony at their previous trial.

reject the principles identified in the carefully considered decisions of previous majorities over the past two decades.

R. v. Henry, supra at ¶ 45-46,
Dubois v. The Queen, [1985] 2 S.C.R. 350
R. v. Mannion, [1986] 2 S.C.R. 272
R. v. Kuldip, [1990] 3 S.C.R. 618

(2) Academic Criticism of the *Collins/Stillman* approach

(a) Textual and Originalist Arguments

40. Some critics of this Court's s. 24(2) jurisprudence object that the *Collins/Stillman* approach to "conscriptive" evidence conflicts with the original intent of the *Charter*'s drafters and ratifiers who, it is argued, were opposed to a US-style "automatic exclusionary" rule. It is argued that the Court has thwarted the "framers'" wishes by "automatically" excluding evidence on trial fairness grounds. A closely related textual argument focuses on s. 24(2)'s requirement that decisions about admission or exclusion be made "having regard to all the circumstances". Some commentators suggest that it is inconsistent with this language to exclude evidence on trial fairness grounds without first considering and weighing the second and third sets of *Collins* factors. These arguments were referred to in the dissenting judgments in *Stillman* and by the Ontario Court of Appeal in the case at bar.

Reasons for Judgment (Ontario Court of Appeal) at ¶ 50, *Appellant's Record,* Vol., I, pp. 62-63
R. v. Stillman, supra at ¶ 236-59 (*per* McLachlin J., dissenting); at ¶ 190 (*per* L'Heureux-Dubé J., dissenting)
R. Burlingham, supra at ¶ 84, 92 (*per* L'Heureux-Dubé J.)
D. Paciocco, "The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule" (1990), 32 *Crim. L.Q.* 326 [hereinafter Paciocco, "Judicial Repeal"]
A. Parachin, "Compromising on the Compromise: The Supreme Court and Section 24(2) of the *Charter*", (2000) 10 Windsor Rev. Legal. Soc. Issues 7
D. Stratas, "The Law of Evidence and the *Charter*", in *Law Society of Upper Canada Special Lectures 2003: The Law of Evidence,* at p. 281

41. Neither of these arguments can withstand close scrutiny. This Court has generally rejected "originalist" interpretive arguments, in part because it is impossible to attribute authorship of the *Charter* to a discrete group of "framers" possessing a unified "intent" (see, *e.g., B.C. Motor Vehicles Reference, supra,* at pp. 507-09).[24] Identifying the "framers' intention" is particularly difficult in the case of s. 24(2), which emerged out of a vigorous debate between

[24] "Originalism" as a doctrine of constitutional interpretation can also be criticized on other, more fundamental bases: see, e.g., L. Tribe, *infra,* at §1-14.

legislators and stakeholders with diametrically opposed views. As Santoro persuasively argues in a recent article (at p. 26):

> [I]t is evident from the historical record … that the current s. 24(2) was the product of a great amount of tension, the expression of numerous voices. It is clear that the government was reluctant, to say the least, to accept anything other than the *Wray* regime for exclusion, and had to be virtually bullied into proposing s. 24(2). Section 24(2) is best described as an acknowledgment that the *Charter* should contain a remedy when evidence is obtained in violation of guaranteed rights. The courts are given the power to exclude evidence when its admission would bring the administration of justice into disrepute. The meaning of this vague phrase was deliberately left to the courts to develop in the jurisprudence.
>
> It cannot be legitimately argued that s. 24(2) was the expression of any single intention. No discernible legal doctrine can be derived from the controversy leading up to the proposal and enactment of the section.

At most, the historical record suggests that the *Charter*'s drafters and ratifiers expected s. 24(2) to be interpreted more liberally than the common-law rule in *Wray* and more restrictively than the American "automatic exclusion" rule. Since there is a great deal of room between these two extremes, this provides very limited interpretive assistance. In particular, there is no clear indication that the "framers" of s. 24(2) ever turned their mind specifically to the issue of how unconstitutionally compelled *self-incriminatory* evidence should be treated.

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at pp. 507-09
Santoro, *supra* at pp. 17-26
L. Tribe, *American Constitutional Law,* 3rd ed. at §1-14

42. Claims that the *Collins/Stillman* approach to "conscriptive" evidence is tantamount to the US rule of "automatic exclusion" are inaccurate. As discussed above,[25] the *Collins/Stillman* framework does not automatically exclude all "conscriptive" evidence. Rather, "conscriptive" evidence is excluded only after a careful analysis of the circumstances leads to the conclusion that its admission would cause an unfair trial. There is no indication in the historical record that the "framers" ever turned their minds to the relationship between the principle against self-incrimination, trial fairness, and the repute of the administration of justice, let alone arrived at any consensus on these matters. Rather than deferring to some purely fictional "original intent", this Court has properly brought its own expertise and experience to bear on these difficult issues.

43. The presence of the phrase "having regard to all the circumstances" in the text of s. 24(2) is similarly unrevealing. As Professor Penney has observed, "the phraseology of s. 24(2) is largely devoid of intrinsic meaning, and … inevitably some effort must be made to ground the

[25] See para. 15, *supra*.

provision in theory and policy". There are strong policy reasons for rejecting a completely unstructured, *ad hoc* approach. Professor Roach notes that courts in the United States experimented for a time with a discretionary "balancing" approach to exclusion, only to reject it as "subjective", "accordion-like", "*ad hoc*" and unpredictable. Most commentators agree that there must be *some* kind of analytic framework for identifying which circumstances are important, and for systematically weighing different factors against each other. The task of devising such a framework inevitably falls to this Court, which can take very little guidance from the vague language of s. 24(2). Once the need for some structure is acknowledged, no particular choice of framework can properly be criticized or praised as being more or any less true to the text of s. 24(2). As Professor Roach persuasively argues, the debate over the merits of the various different analytic frameworks that have been proposed is "important … but not one … that is advanced by claims that the text of s. 24(2) favours one side".

> S. Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the *Charter*", (2003) 49 McGill L.J. 105 at pp. 108, footnote 9, pp. 141-42 [hereinafter Penney, "Deterrence"]
> K. Roach, *Constitutional Remedies in Canada* (loose-leaf ed.), at §10.130, 10.424

44. Under <u>any</u> workable s. 24(2) analytic framework, a court must eventually reach a point where it has considered enough "circumstances" to make a decision about admissibility. One of the main functions of an analytic framework is to identify this cut-off point. The *Collins/Stillman* approach holds that in the special case of "conscriptive" evidence, this point is reached once it is determined, having regard to all the facts, that the evidence was not otherwise discoverable. This reflects this Court's conclusion that in this situation admission will necessarily taint the fairness of the trial to such a degree that the damage to the repute of the administration of justice cannot be offset by any other "circumstances". As Professor Pottow acknowledges, this "is certainly an internally consistent position and cannot be faulted on that basis." It is submitted that there is similarly no real basis to fault it on textual grounds.

> J. Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24 (Part II)", (2000) 44 C.L.Q. 34 at pp. 45-46
> Santoro, *supra* at pp. 31-32

(b) "Hierarchy of Rights" Arguments

45. A second line of academic criticism of the *Collins/Stillman* approach claims that treating "conscriptive" and "non-conscriptive" evidence differently is either unprincipled or creates an unjustifiable "hierarchy of rights". Several commentators have argued that the right against self-

incrimination and s. 8's protection against unreasonable searches are both "rooted in the concept of privacy", and that compelled self-incriminatory evidence should thus not receive special scrutiny (see, e.g., Delisle, *infra*; Penney, *infra*). As Professor Penney states:

> If fairness and privacy are simply variations of the same general theme, it makes little sense to assert that evidence affecting fairness should be automatically or even presumptively excluded, whereas evidence affecting privacy should be *prima facie* admissible.

R. Delisle, "Collins: An Unjustified Distinction" (1987), 56 C.R. (3d) 216 at pp. 217-18
S. Penney, "Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence Under S. 24(2) of the *Charter*", (1994) 32 Alta. L.R. 782 at pp. 808-09; "The Continuing Evolution of the s. 7 Self-Incrimination Principle: *R. v. White*" (1999), 24 C.R. (5th) 247 [hereinafter Penney, "Evolution"]; "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era" (2004) 48 C.L.Q. 249 (Part I), 280 (Part II) & 474 (Part III) [hereinafter Penney, "Self-Incrimination"]
D. Stratas, "The Law of Evidence and the *Charter*", *supra* at pp. 281-82

46. It is submitted that a distinction between physical searches and compelled "testimonial" self-incrimination is fully supportable as a matter of policy and principle. First, a strong argument can be made that invasions of the mind are a uniquely serious and qualitatively distinct form of incursion on "privacy", warranting special protection.[26] Second, the principle against self-incrimination this Court has recognized under s. 7 is not fundamentally concerned with the invasion of privacy caused by compelled speech but, rather, with the impact of allowing it to be used *as evidence against the speaker*. Within limits,[27] the *Charter* allows the state to coercively "overbear the will" and invade "the privacy of the mind" by compelling people to become witnesses against another. However, s. 7 forbids the state from using the fruits of this legitimate compulsion as evidence against the speaker. This restriction has nothing to do with protecting the witness's "privacy", which is irretrievably lost at the point of compulsion; rather, it is based on a conception of justice and fairness that views it as fundamentally wrong to force a person "to assist in his own prosecution". For this reason, this Court has generally used the terms "principle against self-incrimination" and "case to meet principle" interchangeably. It is this principle that has been identified as a s. 7 "principle of fundamental justice", not a general right to the privacy of one's mind.

D. Paciocco, "Self-Incrimination: Removing the Coffin Nails", (1989) 35 *McGill L.J.* 73 at p. 88
R. v. Jones, supra at pp. 248-57 (*per* Lamer C.J.C., dissenting in the result)
P.(M.B.), supra at pp. 577-78
R. v. S.(R.J.), supra at ¶ 3 (*per* Lamer C.J.C.); at ¶ 81, 86-90, 93, 141-59.

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[26] See, e.g., D. Paciocco, "Self-Incrimination: Removing the Coffin Nails", *infra* at p. 88.
[27] The state can coerce testimony with threats of imprisonment, but it highly doubtful that a law authorizing the police to compel speech through torture or an injection of sodium pentothal, etc., would survive *Charter* scrutiny.

47. The distinction between "mere" invasions of privacy and the more serious wrong associated with compelled "testimonial" self-incrimination has deep roots in Anglo-Canadian legal tradition, and is reflected throughout the *Charter* and the *Criminal Code*. Section 8 of the *Charter* provides only a qualified right against "unreasonable" state incursions on privacy. The *Charter* and the *Code* allow the police to invade people's privacy in a variety of ways – some extremely intrusive – specifically to gather evidence against them, as long as the police have sufficient grounds to make the invasion "reasonable". Conversely, the *Charter's* various protections against "testimonial" self-incrimination (*i.e.,* ss. 7, 11(*c*) and 13) are not internally qualified. Even people who the police have very strong grounds to suspect of wrongdoing cannot be forced to help build a case against themselves. Indeed, under this Court's "contextual" approach to s. 7, the presence of individualized suspicion can trigger the principle against self-incrimination and *prevent* testimonial compulsion (see, *e.g., Fitzpatrick, supra*; *Jarvis, supra*). In short, individualized suspicion increases the state's power to invade privacy, but decreases its ability to compel self-incriminatory "testimonial" evidence. Moreover, people who are compelled to speak for a permissible, non-self-incriminatory purpose (*e.g.,* as a witness in proceedings against another) become entitled to evidentiary protections calibrated to put them in the same position *vis-à-vis* the adversarial state they would have occupied if they had been allowed to remain silent. Witnesses cannot be denied these protections on the grounds that their constitutional right against self-conscription is outweighed in the particular circumstances by the public importance in convicting them. Indeed, it is doubtful that a legislated exception to the "case to meet" principle could be upheld under s. 1.[28]

R. v. Fitzpatrick, supra
R. v. Jarvis, supra

48. Since the principle against self-incrimination and "case to meet" principle are not primarily concerned with protecting privacy, there is nothing anomalous about s. 24(2) giving special treatment to self-incriminatory "testimonial" evidence. In contrast, it would be anomalous if the *Charter* provided less protection against the self-incriminatory use of "testimonial evidence" when it is compelled unconstitutionally rather than lawfully.

[28] See footnote 19, *supra*.

(c) Internal Inconsistency Arguments

49. Some critics attack the *Collins/Stillman* "trial fairness" doctrine by arguing that it treats unconstitutionally obtained "conscriptive" evidence inconsistently with how it is handled in other *Charter* contexts. A number of commentators point to the fact that "bodily substances" can lawfully be seized for use as evidence against a person without violating the *Charter,* and admitted into evidence without rendering the trial unfair, (see, e.g., *R. v. S.A.B., infra*). They argue that it is anomalous to treat this same type of evidence as affecting trial fairness when it is obtained unconstitutionally.[29] This argument has some validity, but its impact is limited. In essence, it challenges the majority's decision in *Stillman* and a number of earlier cases to extend the concept of "conscriptive" evidence to include "non-testimonial" emanations of the body. However, there is no similar anomaly in the *Charter*'s treatment of <u>testimonial</u> conscriptive evidence. Rather, as discussed above,[30] this Court has deliberately crafted its s. 7 self-incrimination and s. 24(2) exclusion jurisprudence to ensure that suspects receive *the same* protection against having their compelled statements and derivative evidence used against them, regardless of whether this evidence is obtained lawfully or unlawfully. Accordingly, critics of the *Collins/Stillman* "trial fairness" analysis cannot fairly (and do not) allege there is any inconsistency in this Court's treatment of "testimonial" conscriptive evidence. Since the evidence at issue in the case at bar consists entirely of statements and derivative evidence, the broader question of whether this Court should revisit the extension of the *Collins/Stillman* trial fairness doctrine to include bodily substances and other "emanations of the body" does not arise in this appeal. While arguments can be made against this aspect of the "trial fairness" doctrine, these arguments cannot logically be extrapolated into an attack on the "trial fairness" doctrine <u>as it relates to testimonial self-incriminatory evidence</u> (including derivative evidence).

D. Paciocco, "Disproportion", *supra* at p. 169
Penney, "Self-Incrimination" (Part II), *supra* at p. 335; "Deterrence", *supra* at p. 132
A. Mewett & P. Sankoff, *Witnesses,* loose-leaf ed., Vol. 2, §21.3(f)(vii)
R. Mahoney, "Problems with the Current Approach to s 24(2) of the Charter: An Inevitable Discovery", (1999), 42 C.L.Q. 443 at pp. 456-58
R. v. B.(S.A.), [2003] 2 S.C.R. 678
Stillman, supra at ¶ 73, 76. 80, 82-98 (*per* Cory J.); ¶ 195-216 (*per* McLachlin J., dissenting)
R. v. Ross, supra
R. v. Bartle, supra

[29] This was one of the main issues on which McLachlin J. dissented in *Stillman*.
[30] See paras. 26ff, *supra.*,

(d) Rejections of this Court's Underlying Theory of Self-Incrimination and "Trial Fairness"

50. As discussed above, academic critics of this Court's s. 24(2) jurisprudence cannot identify any significant internal problems with this Court's treatment of "testimonial" conscriptive evidence (*i.e.,* compelled statements and derivative evidence). The *Collins/Stillman* treatment of testimonial conscriptive evidence fully accords with this Court's conception of the principle against self-incrimination and the idea of "trial fairness". As a result, academic criticisms of this Court's approach to the exclusion of testimonial conscriptive evidence under s. 24(2) are fundamentally *external:* commentators do not argue that the *Collins/Stillman* "trial fairness" branch is inconsistent with the Court's own theoretical premises but, rather, criticize the Court for not adopting a different set of premises. Thus, for instance, most of Professor Paciocco's criticisms of the *Collins/Stillman* approach can be traced to his disagreement with this Court's vision of the principle against self-incrimination and "trial fairness". On his conception, the principle against self-incrimination would have no application to derivative evidence, and "trial fairness" would be understood as solely a function of the accuracy of verdicts.[31] Professor Penney, for his part, objects on utilitarian grounds to there being *any* general principle against self-incrimination, arguing that "there is nothing wrong with denying criminal suspects the right to choose whether to respond to criminal accusations", because the harm caused by compelled self-incrimination is "easily outweighed by the state's interest in punishing criminals". It is no surprise, therefore, that he disagrees with the *Collins/Stillman* approach, which expressly rests on the contrary view that compelled self-incrimination is fundamentally unjust. These commentators, and many others, have articulated their own internally consistent theories of the *Charter* that are to varying degrees inconsistent with this Court's chosen approach. It is submitted that the ability of legal academics to devise coherent alternate theories does not, in and of itself, present a compelling reason for this Court to abandon its own carefully considered and equally internally coherent interpretations of ss. 7 and 24(2) of the *Charter,* particularly since these alternative theories were generally well known to the Court at the time of *Stillman*.

D. Paciocco, *Charter Principles and Proof in Criminal Cases* (1987), at pp. 540, 597; "Disproportion", *supra* at pp. 168-69

Penney, "Self-Incrimination" (Part I), *supra* at pp. 250, 261; "Evolution", *supra* at pp. 249-58; "Deterrence", *supra* at pp. 130-31

[31] See para. 12, *supra.*

51. Professor Paciocco concedes that this Court's s. 24(2) "fair trial" jurisprudence is fundamentally true to its own stated principles, but objects that:

> While [a] theoretical basis for a fair trial theory is available, it has to be recognized that accepting it is entirely a matter of choice, not legal imperative. It requires the choice to equate the use of evidence obtained from the accused during pre-trial investigation, with calling the accused as a witness against himself.
>
> …
>
> The fact that there can be such radically different conceptions about whether, or when, a trial will become unfair through the admission of evidence must cast a long shadow over the legitimacy of claiming that courts have no choice other than to exclude what is currently being defined as conscriptive evidence. … The powerfully seductive rhetoric that the admission of evidence will render a trial unfair, thereby requiring its exclusion, masks the fact that we are not entirely sure if or when that horrible result will occur through the admission of relevant, probative evidence. The *Stillman* Court no doubt thinks that it is sure now, but so too did the *Collins* Court and the *Wray* Court before it …

As Professor Pottow notes, this argument "begrudges the court its institutional imperative to make the tough value choices that Parliament and the drafters of the *Charter* saw fit to leave to it". In order to give meaning and content to the *Charter*, this Court must inevitably choose between competing interpretations and foundational legal theories. A range of reasonable interpretations almost always exists, each with its proponents, and it is exceedingly rare for any particular choice to be dictated by "legal imperative". This Court's decision to adopt the principle against self-incrimination as a cornerstone *Charter* precept was not made hastily or unreflectively, but resulted from a careful consideration of the purpose and structure of the *Charter* and Canada's legal traditions. The fact that it was a "choice" does not make it illegitimate, since the need to make <u>some</u> choice was unavoidable: it would have been just as much of a "choice" for this Court to have declined to recognize any principle against self-incrimination in the *Charter,* or to have refused to give effect to its implications for the admissibility of compelled testimonial evidence. This Court does not have the option of simply throwing up its hands and refusing to make the difficult decisions that have been entrusted to it under the *Charter*.

Paciocco, "Disproportion", *supra* at p. 169, 181
Pottow, *supra* at p. 48

52. Academic criticism of the *Collins/Stillman* approach is not, in any event, uniform. For instance, Professor Roach, a leading expert on *Charter* remedies, "prefer[s] the [*Stillman*] majority's position" over that of the dissenters, arguing that the majority's approach to the exclusion of "conscriptive" evidence "is tied closely to the violation of the right against self-incrimination and resembles a form of corrective justice that nullifies the effect of the original

violation". Further, the academic critics of the *Collins/Stillman* approach cannot agree among themselves on an alternative. For instance, while Paciocco and Penney both criticize this Court's approach for paying insufficient attention to the reliability of some conscriptive evidence, their views on how s. 24(2) cases should be decided are diametrically opposed: Paciocco gives primacy to "truth-finding" and would presumptively admit most reliable evidence, while Penney emphasizes the deterrence of police misconduct and favours "a bright-line rule mandating exclusion for all but reasonable, inadvertent infringements". Professors Mahoney and Mewett & Sankoff generally agree with Professor Paciocco's position, but Professor Stuart – also a vigorous critic of the *Collins/Stillman* framework – considers it "fortunate" that the *Stillman* majority "clearly rejected" Paciocco's alternative approach to s. 24(2). Accordingly, even if this Court wanted to attempt to appease its academic critics by abandoning the *Collins/Stillman* framework, it would be impossible to devise a new analytic framework they would all support.

Paciocco, "Disproportion", *supra* at pp. 168-69
Penney, "Deterrence", *supra* at pp. 143-44
D. Stuart, *Charter Justice in Canadian Criminal Law,* 4th ed., at p. 580
K. Roach, *Constitutional Remedies in Canada,* loose-leaf ed., at ¶10-925, ¶10-1970

c) Conclusions re the continued validity of *Stillman*

53. For the reasons discussed above, it is submitted that the *Collins/Stillman* approach to the exclusion under s. 24(2) of "testimonial" conscriptive evidence – compelled statements and otherwise undiscoverable derivative evidence – must be preserved in order to maintain logical consistency and coherence with this Court's s. 7 self-incrimination jurisprudence. Reversing the core holding of *Stillman* – and, by necessary implication, every self-incrimination case decided since *Thomson Newspapers* – would be an extraordinarily radical and disruptive step that cannot be justified under the principles of *stare decisis*. The new test articulated and applied by the Ontario Court of Appeal in the case at bar is plainly inconsistent with both *Stillman* and, more fundamentally, this Court's conception of the principle against self incrimination and trial fairness. The Ontario Court of Appeal agreed that the evidence at issue in the case at bar was conscriptive and otherwise non-discoverable, and that its admission would compromise trial fairness. Under the *Collins/Stillman* approach, these conclusions required it to be excluded. The Appellant was "compelled to participate in the discovery" of the gun, which was not available "independently of the *Charter* breach in a form useable by the state": *Stillman, supra* at para. 75. Using this evidence to convict him blatantly offends the "case to meet" principle.

Stillman, supra at ¶75

54. It is submitted that any future modifications to *Stillman* should be incremental and consistent with the fundamental principles this Court has previously identified in its ss. 7 and 24(2) jurisprudence. In particular, it is submitted that:

- "Trial fairness" should continue to be understood as encompassing concerns about compelled self-incrimination. The narrower view of "trial fairness" as being solely concerned with the reliability of evidence should continue to be rejected as incompatible with this Court's recognition of the principle against self-incrimination and "case to meet" principles as s. 7 "principles of fundamental justice";

- This Court should continue to reject the argument that testimonial conscriptive evidence failing the "trial fairness" branch of the s. 24(2) analysis should sometimes still be admissible. This would be contrary to this Court's approach in cases of lawful testimonial compulsion under s. 7, and is based on the inconsistent premise that the "case to meet" principle is not fundamentally important and can thus be overridden by the state's interest in securing a conviction in a particular case;

In summary, the Appellant submits that in order to maintain the internal coherence of ss. 7 and 24(2) of the *Charter,* otherwise undiscoverable compelled statements and derivative evidence should continue to be excluded under the *Collins/ Stillman* "trial fairness" branch without regard to the remaining *Collins* factors.

55. Since the evidence in the case at bar consists solely of statements and otherwise undiscoverable derivative evidence, it is unnecessary in this appeal to reconsider any other aspects of this Court's s. 24(2) jurisprudence, such as the *Stillman* majority's extension of the term "conscriptive evidence" to include the compelled "use of the body" and provision of bodily substances. In the future, it may be open to this Court to reconsider whether the admission of these latter types of non-testimonial evidence should continue to be seen as necessarily making trials unfair. Unlike "testimonial" conscriptive evidence, the *Charter* generally permits the state to lawfully seize bodily substances for use as evidence against the target. While seized bodily substances may engage s. 7 to some degree, the *R.J.S.* "use immunity" and "derivative use immunity" protections are restricted to testimonial self-incriminatory evidence (statements and derivative evidence): see *R.J.S., supra, R. v. S.A.B., supra*. Accordingly, the extension of "conscriptive evidence" to include bodily substances is not dictated by the need to maintain coherence between ss. 7 and 24(2). Revisiting this aspect of *Stillman* would address a major academic criticism of the *Collins/Stillman* approach. It may also be open Court to reassess the

circumstances in which "trial fairness" will be compromised by admitting self-incriminatory evidence when a defendant has been specifically advised of his or her right to refuse to provide it (*e.g., Orbanski, supra*). However, this latter issue also does not arise in the case at bar.

R. v. S.(R.J.), supra at ¶ 201.
R. v. B.(A.S.), supra
R. v. Orbanski, supra

7) Admissibility of the Evidence in the Case at Bar Under the Second and Third Branches of the *Collins* Analysis

56. The Appellant's primary position is that admitting the evidence in the case at bar compromised the fairness of his trial, and that it should therefore have been excluded without regard to the other sets of *Collins* factors, pursuant the majority judgment in *Stillman.* However, if this Court decides to reverse this aspect of *Stillman* and allow evidence to sometimes be admitted even though this makes a trial unfair, it is submitted in the alternative that the evidence against the Appellant should have been excluded on an assessment of all of the *Collins* factors.

57. The Ontario Court of Appeal based its decision to admit the evidence on the seriousness of the offences, the reliability of the evidence and its importance to the Crown's case, and the apparent "good faith" of the police. It is submitted that the Court's analysis failed to give appropriate weight to the seriousness of the *Charter* violation, the unfairness to the Appellant caused by the admission of compelled self-incriminatory evidence at his trial, and the deleterious long-term consequences to the administration of justice that would result from admitting unconstitutionally obtained evidence in these circumstances. This was not a case where the police had grounds to suspect the Appellant of wrongdoing falling just short of what they needed to detain him lawfully. Rather, they acted purely on the strength of an objectively unsupportable "hunch". The seriousness of the interference with the Appellant's rights "must be weighed against the absence of any reasonable basis for justification" (*R. v. Mann, supra* at para. 56, emphasis in original). The Appellant was not participating in a licensed, regulated activity like driving, but was simply exercising his basic right to walk down the street unmolested. The police took advantage of his ignorance of his rights by not informing him that he did not have to remain and answer their questions. His detention thus engaged the core values that s. 9 of the *Charter* is meant to protect. It was a serious breach of his constitutional rights.

R. v. Mann, supra at ¶ 56
R. v. Mellenthin, supra at pp. 629-30

R. v. Feeney, supra at ¶ 73-75
R. v. Buhay, supra at ¶ 65

58. The test applied by the Ontario Court of Appeal also failed to properly weigh the impact on trial fairness caused by admitting evidence that engages the s. 7 principle against self-incrimination. Even if this unfairness no longer always requires exclusion, contrary to the majority judgment in *Stillman,* it must remain an extremely significant factor in the "balancing" analysis, since a prosecution based on this evidence offends the principles of fundamental justice. There is no indication that the Ontario Court of Appeal gave any weight to this consideration when assessing the third stage of the *Collins* test. Rather, to the extent that Laskin J.A. considers the issue, he repeatedly minimized the impact of the evidence in this case on trial fairness by emphasizing its reliability and the fact that the police did not obtain it through violence. He acknowledged that the Appellant "believed he had no choice but to answer [the police] questions", and was never advised otherwise by the police. In these circumstances, the Appellant's decision to respond to the police questions and incriminate himself was plainly neither "informed" nor "voluntary", and the violation of his *Charter* rights therefore struck at the heart of the principle against self-incrimination. It is submitted that Laskin J.A. erred by not properly factoring this into his analysis, and erred further by treating the seriousness of the charged offences as a factor exclusively militating in favour of admission, without considering how it interacted with the issue of trial fairness. As Lamer J. stated in *Collins*, *supra* (at p. 286):

> If any relevance is to be given to the seriousness of the offence in the context of the fairness of the trial, it operates in the opposite sense: the more serious the offence, the more damaging to the system's repute would be an unfair trial.

Reasons for Judgment (Ontario Court of Appeal) at ¶ 29, *Appellant's Record,* Vol. I., pp. 52-55
R. v. Collins, supra at p. 286
R. v. Broyles, supra at p. 618

59. Finally, it is submitted that the Ontario Court of Appeal erred by failing to consider the negative long-term consequences that would result from routinely admitting the fruits of unconstitutional random street detentions. As Iacobucci J. observed in *R. v. Mann, supra,* "low-visibility exercises of [police] discretionary power" have a high inherent "potential for abuse". The success of the particular police tactic at issue here – namely, approaching people on the street, for no good reason, and asking them explicitly self-incriminatory questions about what they have in their possession – is entirely dependant for its success on targets' ignorance of their rights. The case law suggests that this police tactic is predominantly directed at poor and urban

youth, and while "racial profiling" is not directly at issue in this case, statistics suggest that members of visible minorities are more likely to be stopped and questioned by the police.[32] The thrust of the Ontario Court of Appeal's holding in the case at bar is that the public interest in finding illegal guns and punishing gun offenders outweighs both the breach of the Appellant's s. 9 rights and the s. 7 trial fairness concerns that arise from his being convicted entirely on the strength of unconstitutionally compelled self-incriminatory evidence. The logical implication of this analysis is that violations of the *Charter* that lead to the seizure of guns are always in the public interest. It would be entirely understandable for the police to interpret the Ontario Court of Appeal's decision as not merely condoning, but encouraging, their unconstitutional conduct in this case. If Canadian courts routinely allow unconstitutionally obtained evidence to be admitted on the basis that punishing "gun crimes" is more important than enforcing *Charter* rights, the inevitable practical consequence will be an erosion of *Charter* protections. This is an extremely significant negative consequence that must be factored into any "balancing" calculus that purports to be consistent with *Charter* values.

R. v. Mann, supra at ¶ 18
D. Tanovich, "The Further Erasure of Race in *Charter* Cases" (2006), 38 C.R. (6th) 84 at p. 99
D. Stuart, "Threats to *Charter* Rights of Accused in Making the Test for Exclusion of Evidence under Section 24(2) More Flexible" (2007), 45 C.R. (6th) 262 at pp. 265-66

B. The Meaning of "Transfer" in ss. 84, 99 and 100 of the *Criminal Code*

60. Sections 99 and 100 are two of most serious firearms offences in Part III of the *Criminal Code,* carrying substantial maximum and mandatory minimum sentences.[33] Section 99 prohibits the "transfer" of a gun without lawful authority, while s. 100 prohibits possession of a gun "for the purpose of transferring it" without lawful authority. The term "transfer" is broadly defined in s. 84 to mean "sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver". On the literal interpretation of s. 84 adopted by the Ontario Court of Appeal, in which "transport" is equated with "movement", any person who moves or intends to move a gun from place to place in an unlawful manner commits a "weapons trafficking" offence, even if there is no intent that the gun ever change hands. Since the movement of even licensed firearms is highly regulated, this broad interpretation produces absurd results. For example, the licensed holder of a restricted weapon who violates the terms of her *Firearms Act* licence by moving a gun from

[32] See Tanovich, *infra* at p. 99.
[33] Bill C-2, currently before Parliament, would raise the mandatory minimum sentence from one year to three years for first offenders and five years for repeat offenders.

place to place in an unauthorized manner could, at the Crown's discretion, be charged and convicted of "weapons trafficking" rather than being prosecuted for the directly applicable and seemingly more appropriate *Firearms Act* regulatory offence, or the *Criminal Code* offence of "transporting a firearm in contravention of the regulations" (s. 86(2)). Similarly, an otherwise law-abiding hunter who violates the Regulations by not locking his rifle in his car trunk when returning from a hunting trip could, in theory, be charged and convicted of "weapons trafficking" and subjected to the mandatory minimum one-year sentence (soon to be raised to three years). Indeed, since almost everyone who possesses a firearm intends to move it from place to place at some point, the Court of Appeal's broad interpretation would convert virtually every case of unlawful firearms possession into the more serious s. 100 "trafficking" offence.

Criminal Code, ss. 84, 86, 99, 100
Firearms Act, ss. 17, 19-21
Storage, Display, Transportation and Handling of Firearms by Individuals Regulations, s. 11,

61. The words in a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Re Rizzo and Rizzo Shoes, infra*). These latter considerations often militate against a "plain meaning" interpretation. As Gonthier J. observed in *Ontario v. Canadian Pacific Ltd., infra* (at para. 65):

> [A] statute should be interpreted to avoid absurd results. …[C]onsideration of the consequences of competing interpretations will assist the courts in determining the actual meaning intended by the legislature. Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results.

The interpretive problem posed by ss. 84, 99 and 100 of the *Criminal Code* is very similar to that presented by the "drug trafficking" offences in the *Controlled Drugs and Substances Act* and its predecessors, which employ a structurally indistinguishable definition. On a literal interpretation of the *CDSA* definition, a person who walked down the street with a joint of marihuana in their pocket could be convicted as a "drug trafficker". Canadian courts have consistently avoided this absurd result by applying established principles of statutory construction to narrow the statutory definition of "traffic" to exclude the mere "transportation" of drugs from place to place. When ss. 99 and 100 of the *Code* were enacted in 1995, they were explicitly labelled as "weapons trafficking" offences in both the heading and the marginal notes, suggesting that legislators intended and expected them to be construed similarly. Indeed, during the Parliamentary debates over Bill C-68, none of the legislators who mentioned the Bill's new "gun trafficking" offences

suggested that these new crimes would (or should) capture the mere unlawful movement of guns from place to place.

Re Rizzo and Rizzo Shoes Ltd., [1998] 1 S.C.R. 27 at ¶ 21, 23
Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031 at ¶ 65
Controlled Drugs and Substances Act, s. 2(1)
R. v. Harrington and Scosky, supra
R. v. Gardiner (1987), 35 C.C.C. (3d) 461 at pp. 463-65 (Ont. C.A.)
R. v. Binkley (1982), 69 C.C.C. (2d) 169 at pp. 170-71 (Sask. C.A.)
R. v. Pappin (1970), 12 C.R.N.S. 287 at p. 288 (Ont. C.A.)
R. v. Kelly, [1992] 2 S.C.R. 170 at p. 189
R. v. Wigglesworth, [1987] 2 S.C.R. 541 at pp. 556-58
Hansard, February 16, 1995 at 1210, 1255, 1445, 1530, 1625, 1630; February 27, 1995 at 1525, 1555, 1620; March 13, 1995 at 1250, 1350, 1555, 1620, 1730, 1750, 1810; March 28, 1995 at 1045, 1120, 1155, 1215, 1335, 1520-25, 1595; April 5, 1995 at 1600; June 12, 1995 at 1345; June 13, 1995 at 1130

62. The Ontario Court of Appeal gave two reasons for rejecting the analogy between weapons and drug "trafficking", neither of which withstand close scrutiny. First, Laskin J.A. argued that interpreting "transport" in s. 84 non-literally would "destroy the cohesion between the *Criminal Code* provisions on firearms and the *Firearms Act*", and that "transport" in s. 84 "should be given its ordinary meaning: carrying or moving from one place or person to another." The flaw in this argument is there is simply no "cohesion" between the language of these two different statutes.[34] The *Firearms Act* provisions dealing with the "transport" of firearms, read in context, clearly *are* intended to govern mere movement. It does not follow that Parliament necessarily intended the *Code*'s "weapons trafficking" provisions to have the same ambit.

Reasons for Judgment (Ontario Court of Appeal) at ¶ 77, *Appellant's Record,* Vol. I, p. 72
Firearms Act, ss. 17, 19
Storage, Display, Transportation and Handling of Firearms by Individuals Regulations, ss. 10-12

63. Second, Laskin J.A. rejected the analogy between firearms and drug trafficking on the grounds that "[t]he *Firearms Act* severely restricts the movement of prohibited firearms in ways not found in drug trafficking legislation" (at para. 79). However, he overlooked the fact that the *Code* and the *Firearms Act* contain numerous other provisions that are expressly designed to enforce these movement restrictions.[35] While Parliament undoubtedly wanted to regulate the movement of firearms, it cannot reasonably be inferred from this that Parliament did not simultaneously want to distinguish mere unauthorized movement from the much more serious problem of illicit firearms distribution. The history of ss. 99 and 100 strongly suggests that

[34] For instance, the two statutes define "transfer" differently: compare *Criminal Code,* s. 84 with *Firearms Act,* s. 21.
[35] See, *e.g., Criminal Code,* s. 86; *Firearms Act,* s. *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations,* ss. 10-12.

Parliament saw the distribution of firearms as a distinct and especially serious social evil, much in the same way that the distribution of illegal drugs has traditionally been seen as a more serious crime than mere possession. It is submitted that the "weapons trafficking" provisions in the *Code* are structurally indistinguishable from the "drug trafficking" provisions in the *CDSA,* and that the interpretive principles Canadian courts have relied on over the past forty years to construe the true meaning of "drug trafficking" apply with equal force to the *Code*'s "weapons trafficking" offences. There is every reason to believe this is exactly what Parliament intended.

Reasons for Judgment (Ontario Court of Appeal) at ¶ 79, *Appellant's Record,* Vol. I, p. 73

64. The trial judge did not find that the Appellant intended to transfer possession of the gun to another person. Indeed, in his subsequent reasons for sentence he stated that "[t]here was no evidence to suggest just exactly what [the Appellant] was going to do with [the gun]".[36] He convicted the Appellant on the s. 100 offence (Count 4) on the basis of the Crown's argument that the offence required only proof of an intent to move a gun from place to place. It is submitted that this interpretation was incorrect, and led the trial judge to convict the Appellant on this count based on factual findings that should have resulted in an acquittal.

Reasons for Sentence (Ontario Court of Justice), p. 28, *Appellant's Record,* Vol. I p. 32

PART IV: SUBMISSIONS RE COSTS

65. The Appellant does not seek costs.

PART V: ORDERS SOUGHT

66. It is respectfully requested that the appeal be allowed, that the seized gun and the evidence of the Appellant's utterances be excluded under s. 24(2) of the *Charter*, and that his convictions be set aside and acquittals entered on all counts. In the alternative, it is requested that the Appellant's conviction on Count 4 be set aside and an acquittal entered on that count.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF NOVEMBER, 2007

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COUNSEL FOR THE APPELLANT

[36] The Court of Appeal also did not address the admissibility under s. 24(2) of the Appellant's utterance that he was "dropping off" the gun "up the road". There was no evidence corroborating the reliability of this statement, and it is not apparent how it would be admissible even under the Court of Appeal's proposed new s. 24(2) test.

PART VI: AUTHORITIES TO BE CITED

Cases

Articles and Texts

Statutes

Regulations

Parliamentary Debates

PART VII: STATUTORY PROVISIONS

A. *Canadian Charter of Rights and Freedoms*

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society.

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par un règle de droit, dans des limités qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

8. Everyone has the right to be secure against unreasonable search or seizure.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

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

…

(*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:

…

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.

(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.

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.

B. *Criminal Code of Canada*, R.S.C. 1985, c. C-46

PART III
FIREARMS AND OTHER WEAPONS

INTERPRETATION

Definitions

84.(1) In this Part and subsections 491(1), 515(4.1) and (4.11) and 810(3.1) and (3.11),

…

"transfer" means sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver.

R.S., 1985, c. C-46, s. 84; R.S., 1985, c. 27 (1st Supp.), ss. 185(F), 186; 1991, c. 40, s. 2; 1995, c. 39, s. 139; 1998, c. 30, s. 16; 2003, c. 8, s. 2.

USE OFFENCES

…

Careless use of firearm, etc.

86. (1) Every person commits an offence who, without lawful excuse, uses, carries, handles, ships, transports or stores a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any ammunition or prohibited ammunition in a careless manner or without reasonable precautions for the safety of other persons.

Contravention of storage regulations, etc.

(2) Every person commits an offence who contravenes a regulation made under paragraph 117(*h*) of the *Firearms Act* respecting the storage, handling, transportation, shipping, display, advertising and mail-order sales of firearms and restricted weapons.

PARTIE III
ARMES À FEU ET AUTRES ARMES

DÉFINITIONS ET INTERPRÉTATION

Définitions

84.(1) Les définitions qui suivent s'appliquent à la présente partie et aux paragraphes 491(1), 515(4.1) et (4.11) et 810(3.1) et (3.11).

…

«cession » Vente, fourniture, échange, don, prêt, envoi, location, transport, expédition, distribution ou livraison.

L.R. (1985), ch. C-46, art. 84; L.R. (1985), ch. 27 (1er suppl.), art. 185(F) et 186; 1991, ch. 40, art. 2; 1995, ch. 39, art. 139; 1998, ch. 30, art. 16; 2003, ch. 8, art. 2.

INFRACTIONS RELATIVES À L'USAGE

…

Usage négligent

86. (1) Commet une infraction quiconque, sans excuse légitime, utilise, porte, manipule, expédie, transporte ou entrepose une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées d'une manière négligente ou sans prendre suffisamment de précautions pour la sécurité d'autrui.

Contravention des règlements

(2) Commet une infraction quiconque contrevient à un règlement pris en application de l'alinéa 117*h*) de la *Loi sur les armes à feu* régissant l'entreposage, la manipulation, le transport, l'expédition, l'exposition, la publicité et la vente postale d'armes à feu et d'armes à autorisation restreinte.

Punishment

(3) Every person who commits an offence under subsection (1) or (2)

(*a*) is guilty of an indictable offence and liable to imprisonment

(i) in the case of a first offence, for a term not exceeding two years, and

(ii) in the case of a second or subsequent offence, for a term not exceeding five years; or

(*b*) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 86; 1991, c. 40, s. 3; 1995, c. 39, s. 139.

Peine

(3) Quiconque commet l'infraction prévue au paragraphe (1) ou (2) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal :

(i) de deux ans, dans le cas d'une première infraction,

(ii) de cinq ans, en cas de récidive;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

L.R. (1985), ch. C-46, art. 86; 1991, ch. 40, art. 3; 1995, ch. 39, art. 139.

TRAFFICKING OFFENCES

INFRACTIONS RELATIVES AU TRAFIC

Weapons Trafficking

99.(1) Every person commits an offence who

(*a*) manufactures or transfers, whether or not for consideration, or

(*b*) offers to do anything referred to in paragraph (*a*) in respect of

a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition knowing that the person is not authorized to do so under the *Firearms Act* or any other Act of Parliament or any regulations made under any Act of Parliament.

Trafic d'armes

99.(1) Commet une infraction quiconque fabrique ou cède, même sans contrepartie, ou offre de fabriquer ou de céder une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées sachant qu'il n'y est pas autorisé en vertu de la *Loi sur les armes à feu*, de toute autre loi fédérale ou de leurs règlements.

Punishment

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year.

R.S., 1985, c. C-46, s. 99; 1995, c. 39, s. 139.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an.

L.R. (1985), ch. C-46, art. 99; 1995, ch. 39, art. 139.

Possession for Purposes of Weapons Trafficking

100.(1) Every person commits an offence who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition for the purpose of

(*a*) transferring it, whether or not for consideration, or

(*b*) offering to transfer it,

knowing that the person is not authorized to transfer it under the *Firearms Act* or any other Act of Parliament or any regulations made under any Act of Parliament.

Possession en vue de faire le trafic d'armes

100.(1) Commet une infraction quiconque a en sa possession une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées en vue de les céder, même sans contrepartie, ou d'offrir de les céder, sachant qu'il n'y est pas autorisé en vertu de la *Loi sur les armes à feu*, de toute autre loi fédérale ou de leurs règlements.

Punishment

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an.

R.S., 1985, c. C-46, s. 100; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), ss. 14, 203, c. 27 (2nd Supp.), s. 10, c. 1 (4th Supp.), s. 18(F); 1990, c. 16, s. 2, c. 17, s. 8; 1991, c. 40, s. 12; 1992, c. 51, s. 33; 1995, c. 22, ss. 10, 18(F), c. 39, s. 139; 1996, c. 19, s. 65.

L.R. (1985), ch. C-46, art. 100; L.R. (1985), ch. 11 (1er suppl.), art. 2, ch. 27 (1er suppl.), art. 14 et 203, ch. 27 (2^{e} suppl.), art. 10, ch. 1 (4^{e} suppl.), art. 18(F); 1990, ch. 16, art. 2, ch. 17, art. 8; 1991, ch. 40, art. 12; 1992, ch. 51, art. 33; 1995, ch. 22, art. 10 et 18(F), ch. 39, art. 139; 1996, ch. 19, art. 65.