Court File Nos. 31892 & 32037

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

BETWEEN:

DONNOHUE GRANT

Appellant / Accused

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent / Prosecutor

-and-

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

Interveners

BETWEEN:

CURTIS SHEPHERD

Appellant / Accused

-and-

ATTORNEY GENERAL OF SASKATCHEWAN

Respondent / Prosecutor

-and-

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

Interveners

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PART I – OVERVIEW AND STATEMENT OF FACTS

[1] The Criminal Lawyers' Association (Ontario) ("CLA") files its joint factum in respect of the appeals *R. v. Grant* (31892) and *R. v. Shepherd* (32037), pursuant to Orders of the Court. The CLA accepts the facts as stated by the Appellant Grant at paragraphs 3 and 4 of his factum, and by the Appellant Shepherd at paragraph 8 of his factum.

PART II – QUESTIONS IN ISSUE

[2] The CLA takes the following positions in respect of the issues raised in these appeals:

(i) **Pedestrian stops and psychological detention:** The CLA submits that when a pedestrian is stopped by police, the test for determining whether a detention arises ought to reflect the fundamental importance of the liberty interests at stake, and must be based on an assessment of the entire police-citizen relationship, predicated upon an acknowledgement of the power imbalance within such exchanges and a recognition of the factors affecting the citizen's reasonable perception of meaningful free choice, including systemic racism.

(ii) **Section 24(2) and conscriptive evidence:** The CLA submits that the conception of conscriptive evidence developed by this Court in *R. v. Stillman*, [1997] 1 S.C.R. 607 represents a considered, principled and coherent approach to trial fairness, appropriately grounded in *Charter* considerations concerning the proper role of the state in prosecuting criminal conduct and the preeminent value of human dignity, autonomy and informed choice. No principled reason has been provided to justify a reversal of *Stillman*'s foundational *Charter* analysis, and such a step cannot be reconciled with *stare decisis*.

PART III – ARGUMENT

(i) Pedestrian stops and the test for psychological detention

[3] **Pedestrians' fundamental liberty interests must be recognized.** Pedestrians on public streets exercise a "fundamental liberty" that is qualitatively different from that of a motorist engaged in the regulated activity of driving.[1] Nevertheless, *Charter* jurisprudence concerning detention does not reflect this difference: unlike pedestrians, vehicle drivers are virtually presumed to be detained when stopped by the police,[2] despite the fact that a motorist's liberty interest is of a more qualified nature than that of a pedestrian. The CLA submits that this counter-intuitive

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[1] *R. v. Dedman*, [1985] 2 S.C.R. 2 at 28-29 (*per* Le Dain J.), 9 (*per* Dickson C.J.); *R. v. Hufsky*, [1988] 1 S.C.R. 621 at 636-637; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 at 1274, 1275; *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 at ¶67, 77 (Ont. C.A.), appeal abandoned [1999] S.C.C.A. No. 87.

[2] *R. v. Mellenthin*, [1992] 3 S.C.R. 615 at 622 ("there can be no question that the appellant was detained"); *Ladouceur*, *supra* at 1277 ("there can be no question that he was detained"); *Hufsky*, *supra* at 631-632; *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 at 489 (Ont. C.A.) ("the detention was a direct result of the stopping of a motor vehicle"). With respect to vehicle passengers, see *R. v. Harris* (2007), 225 C.C.C. (3d) 193 at ¶19 (Ont. C.A.).

result, while perhaps explicable in a strict doctrinal sense,[3] invites consideration by this Court.

[4] The fundamental nature of pedestrians' liberty interests is appropriately recognized if the meaning of detention for *Charter* purposes is acknowledged to vary depending on the context. The degree of coercion or control required to trigger detention will thus depend on the nature of regulation and the individual's reasonable expectation of being left alone.[4] Iacobucci J.'s obiter remark in *Mann*, that "the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no *significant* physical or psychological restraint",[5] ought to be understood in this light. The "significance" of restraint – its constitutional import – depends both on the degree of restraint and the nature of the liberty interest at stake. The coercion or control creating detention of a pedestrian on a public street will be different than that required for a person in her bedroom, a motorist on a highway, or a traveller at a border customs booth.

[5] **The actual or reasonably perceived restraint by police of one's meaningful free choice triggers detention, without any other independent requirement.** The CLA respectfully submits that Le Dain J.'s seminal analysis in *R. v. Therens*, [1985] 1 S.C.R. 613 has been misinterpreted as creating three separate tests for detention, rather than three variants of the same principle. In *Therens*, this Court renounced the formalism that had characterized its pre-*Charter* approach to detention in *Chromiak*,[6] and instead expressly adopted a purposive approach. The purposive analysis of "detention" in *Therens* related to the s. 10 concern of access to counsel, but this analysis is also relevant to s. 9's purpose,[7] which should be understood as the prevention of

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[3] In *R. v. H.(C.R.)* (2003), 174 C.C.C. (3d) 67 (Man. C.A.), the court sought to explain this difference in the analysis of vehicle and pedestrian stops as arising from "the fact that a motorist was *deemed* to be detained as soon as he was stopped in a motor vehicle… [as] at that point… the police assume control over the movements of the motorist under threat of criminal sanction", whereas "[i]n speaking to an individual on the sidewalk, a police officer does not *obviously* assume control over the movements of an individual in the same way as stopping the driver of a motor vehicle" (¶56-57, emphasis added). This passage from *H.(C.R.)* was also quoted with approval in *R. v. L.B.* (2007), 86 O.R. (3d) 730 at ¶54 (Ont. C.A.). The CLA respectfully submits that this tautological reasoning does not provide a principled explanation for the reduced constitutional protection experienced by pedestrians.

[4] This principle has been recognized in several contexts governed by express statutory regulation (in contrast to the pedestrian context), such as: customs processes at borders (*R. v. Simmons*, [1988] 2 S.C.R. 495 at 513, 521-522; *R. v. Jacoy*, [1988] 2 S.C.R. 548 at 557; *R. v. Monney*, [1999] 1 S.C.R. 652 at ¶42-43; *R. v. Hudson* (2005), 77 O.R. (3d) 561 at ¶17, 22, 27 (Ont. C.A.)), refugee screening processes (*Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at 1071-1074), prison visitor screening processes (*R. v. Vandenbosch*, [2007] 11 W.W.R. 639, 2007 MBCA 113 at ¶30-33, 46-47 (Man. C.A.)) and searches of students by teachers in the school setting (*R. v. M.R.M.*, [1998] 3 S.C.R. 393 at ¶33-34, 65-68). See also *H.(C.R.)*, *supra* at ¶49 (Man. C.A.) ("To be stopped randomly in those circumstances [as a pedestrian] without explanation by a figure of authority is contrary to one's expectations and an inference of compulsion maybe easier to establish than in other situations.")

[5] *R. v. Mann*, [2004] 3 S.C.R. 59 at ¶19 (emphasis added). See also *R. v. Orbanski*, [2005] 2 S.C.R. 3 at ¶30.

[6] *R. v. Chromiak*, [1980] 1 S.C.R. 471 at 478 ("the words 'detain' and 'detention' as they are used in s. 2(c) of the *Bill of Rights*… connote some form of compulsory restraint… by due process of law").

[7] Indeed, this Court has recognized that the same approach to detention applies for s. 9 and 10: *Hufsky*, *supra* at 632.

unjustified state interference with individual liberty.[8] Each branch of the *Therens* analysis recognizes a different mechanism by which a state agent might create the conditions of compulsion or coercion constituting interference with freedom of action amounting to detention: first, through physical restraint; second, through a demand carrying criminal liability for failure to comply; and third, through psychological compulsion, when the individual acquiesces in a deprivation of liberty in the reasonable belief that the choice to do otherwise does not exist.[9]

[6] Contrary to the assertion of the Respondent,[10] the CLA submits that the third *Therens* branch – psychological detention – does not require an independent finding of a "coercive demand or direction", in addition to the finding of a reasonable perception of the suspension of freedom of choice. Certainly, psychological detention cannot arise in the absence of a coercive environment; however, the existence of such coercion cannot be separated from the central question of whether the accused reasonably perceived that his freedom of choice was constrained.[11] To suggest that there is no psychological detention because "mere questions" do not qualify as coercive demands, or that questioning undertaken pursuant to a community policing mandate is non-confrontational, is to beg the question: would a person in the circumstances of the accused reasonably perceive the encounter as coercive and confrontational? This determination is made on a modified objective standard, taking into account all of the circumstances, including the nature of the interaction and the defining personal circumstances of the accused.[12] The Respondent's suggested approach – of parsing the facts of the encounter and searching for a factor that might independently constitute a "demand or direction"[13] – reintroduces an inappropriate formalism.

[7] **In establishing detention, the court must consider the police-citizen power imbalance.** While coercion may not be presumed from the bare facts of acquiescence by the accused in a police encounter, there is also no presumption of informed and voluntary compliance.[14] Rather, as

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[8] Stribopoulos, J. "The Forgotten Right: Section 9 of the *Charter*, Its Purpose and Meaning" (2008) 40 S.C.L.R. (2d) 1 at p. 17, 19, 31.

[9] *Therens*, *supra* at 641-644.

[10] *Grant* Respondent's Factum at ¶9, 27, 30.

[11] *R. v. D.M.F.* (1999), 139 C.C.C. (3d) 144 at ¶126-128 (Alta. C.A., *per* Berger J.A.) ("It follows that the extension of 'detention' to instances of 'psychological restraint, compulsion or coercion will, in part, be dependent upon how the Court defines a 'demand or direction' flowing from a police officer… Very few suspects will have either the analytic skills or the presence of mind to distinguish between a formal demand to accompany a police officer and the choice of words said to constitute 'a request'."); *Harris*, *supra* at ¶42 (Ont. C.A.).

[12] *R. v. Moran* (1987), 36 C.C.C. (3d) 225 at 258-259 (Ont. C.A.); *H.(C.R.)*, *supra* at ¶27-31 (Man. C.A.); *R. v. Dolynchuk* (2004), 184 C.C.C. (3d) 214 at ¶32 (Man. C.A.); *R. v. Johns* (1998), 123 C.C.C. (3d) 190 at ¶28 (Ont. C.A.).

[13] See *Grant* Respondent's Factum, ¶27, 43-54.

[14] As the Respondent implicitly suggests: see *Grant* Respondent's Factum, ¶28, 53.

developed in the post-*Charter* common law, the court must recognize that a police encounter is necessarily structured by the exercise of authoritative power, with the following integral features: first, even in the absence of overt physical force, police action is usually intimidating, and second, citizens are generally uncertain as to the extent of police powers and their obligation to comply.[15] This combination of structural power and knowledge imbalances may be relevant in multiple ways in the psychological detention analysis. For example, one must not simply ask if the accused was aware, in an abstract sense, that he had a right to refuse to cooperate, or would reasonably have sensed that the police intended to detain him; one must also consider if he would reasonably have perceived that the police would respect his rights, or would reasonably have feared that any refusal might invite further intrusive, unpredictable or injurious steps.

[8] In determining the s. 9 psychological detention question as posed in *Therens*, concerning the restraint of *meaningful* free choice, it is submitted that due regard for the common law's characterization of the police-citizen relationship is required as a matter of law. In *Grant*, the trial judge's reasons provide no indication that he instructed himself in accordance with this aspect of *Therens* and the common law, and the three "mischaracteriz[ations]" highlighted by the Court of Appeal as justifying appellate intervention all properly relate to this fundamental error.[16]

[9] **Racialized individuals' experiences of systemic racism within the criminal justice system ought to be recognized as a relevant factor.** In determining whether a racialized[17] accused would reasonably have perceived a restraint of meaningful free choice in a police encounter, racialized status ought to be considered as a defining personal characteristic bearing directly upon the accused-police relationship, in a similar manner to such accepted contextual factors as age, size, or gender. The CLA urges this Court to recognize race in the analysis of psychological detention, and thereby articulate s. 9 standards in a purposive manner that reflects the reality of systemic racism within the criminal justice system.[18] The importance of recognizing race within s. 9 is further supported by the oft-noted "low-visibility" of police stop powers.[19] A race-

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15 *Therens*, *supra* at 644; *Dedman*, *supra* at 9-10, 28-29; *R. v. Nolan*, [1987] 1 S.C.R. 1212 at 1227; *Mellenthin*, *supra* at 622; *R. v. Clayton*, 2007 SCC 32 at ¶66 (*per* Binnie J.).

16 *Reasons for Judgment (Ontario Court of Appeal)*, ¶22-26, *Appellant's Record*, Vol. I, p. 51-52.

17 An individual's racialized status refers to the sociological experience of race, rather than the biological characteristic. The term "racialization" has been defined as "the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life" (*Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) at 39).

18 *R. v. Golden*, [2001] 3 S.C.R. 679 at ¶83.

19 *Mann*, *supra* at ¶18; *Ladouceur*, *supra* at 1267 (*per* Sopinka J., dissenting), 1287 (*per* Cory J.).

conscious approach promotes the *Charter*'s underlying equality concerns, by ensuring that the boundaries of the right protected by s. 9 do not indirectly entrench discriminatory stereotypes.[20]

[10] In *Grant*, no challenge has been made to the Court of Appeal's taking judicial notice of the effect of youth on a person's reasonable perception of free choice in the face of adult authority.[21] The CLA respectfully submits that racialized status operates in a similar way, as an integral part of the dynamic of compulsion that structures the citizen's perception of a police encounter. Numerous judgments have recognized the facts of overrepresentation of racialized individuals within the criminal justice system, disproportionate encounters by racialized individuals with law enforcement, and pervasive institutional and individual racism, especially within Toronto.[22] These social facts are now beyond reasonable dispute, and have been recognized as properly subject to judicial notice.[23] This reality can be expected to affect adversely how racialized individuals would reasonably perceive their freedom of choice in an encounter with police:

> Given the history of police violence and racial profiling, it is really reasonable to expect a racialized individual, particularly if they are Aboriginal or African Canadian, to feel free to walk away from the police following a request to stop? JJ Harper, an Aboriginal leader in Manitoba, did precisely that and he was shot and killed. Indeed, we are now hearing about how many African Canadian parents specifically instruct their children on how to act when the police approach to ensure that movements are not misinterpreted which might then lead to serious harm or death.[24]

Given the documented prevalence of such perceptions amongst members of racialized communities and the common-sense reasonableness of such perceptions,[25] it is appropriate to integrate the contextual factor of race into the test for psychological detention.[26]

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[20] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶90; *Law v. Canada (Minister of Employment and Immigration*), [1999] 1 S.C.R. 497 at ¶61.

[21] *Reasons for Judgment (Ontario Court of Appeal)*, ¶25, 29, *Appellant's Record*, Vol. I, p. 51, 55.

[22] *Golden*, *supra* at ¶83; *R. v. Spence*, [2005] 3 S.C.R. 458 at ¶30-44; *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at ¶47 (*per* L'Heureux-Dubé and McLachlin JJ.); *R. v. Gladue*, [1999] 1 S.C.R. 688 at ¶58-65; *R. v. Brown* (2003), 173 C.C.C. (3d) 23 at ¶9 (Ont. C.A.); *R. v. Koh* (1998), 131 C.C.C. (3d) 257 at ¶25-31 (Ont. C.A.); *R. v. Parks* (1993), 84 C.C.C. (3d) 353 at 366-370 (Ont. C.A.). These conclusions are supported by the reports of several commissions and an extensive body of sociological and criminological data: see, for example, *Report of the Commission on Systemic Racism*, *supra* at 337-340; Wortley, S. "Data, Denials and Confusion: The Racial Profiling Debate in Toronto" (2003) 45 *Canadian Journal of Criminology and Criminal Justice* 367 at 371; Closs, W.J. & McKenna P.F. "Profiling a problem in Canadian police leadership: The Kingston Police Data Collection Project" (2006) 49 *Canadian Public Administration* 143 at 150.

[23] *R.D.S.*, *supra* at ¶47 (*per* L'Heureux-Dubé and McLachlin JJ.), 111 (*per* Cory J.); *Spence*, *supra* at ¶5, 52; *R. v. Williams*, [1998] 1 S.C.R. 1128 at ¶54; *Koh*, *supra* at ¶24-31 (Ont. C.A.).

[24] Tanovich, D. "The Further Erasure of Race in Charter Cases," (2006) 38 C.R. (6th) 84 at 95.

[25] Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling – Inquiry Report* (2003) at 37-42. See also *R. v. Pinto* (2003), 113 C.R.R. (2d) 140 at ¶46 (Ont. S.C.J.); *R. v. Savory* (2002), 95 C.R.R. (2d) 261 at ¶14 (Ont. C.J.); *R. v. Griffiths* (2003), 106 C.R.R. (2d) 139 at ¶13-14 (Ont. C.J.).

[26] The law has similarly recognized the relevance of particular gendered experiences in the context of the reasonable person test for self-defence (*R. v. Lavallee*, [1990] 1 S.C.R. 852 at 870-873, 874) and of particular race-, sex-, sexual orientation- and culture-based experiences in the reasonable person test for provocation (*R. v. Hill*, [1986] 1 S.C.R. 313 at 331-332; *R. v. Thibert*, [1996] 1 S.C.R. 37 at ¶14-19; *R. v. Humaid* (2006), 208 C.C.C. (3d) 43 at ¶91-94 (Ont. C.A.), leave denied [2006] S.C.C.A. No. 232; *R. v. Nahar* (2004), 181 C.C.C. (3d) 449 at ¶31-38 (B.C.C.A.)). Contextual factors have

[11] The trial record establishes that Mr. Grant is a young black male.[27] The CLA respectfully submits that this information, supplemented by the significant social fact evidence concerning systemic discrimination of which this Court may take judicial notice, provides an amply sufficient basis for this Court to formulate the principles of psychological detention in a manner that properly recognizes the role of race and systemic racism. Judicial notice of social facts concerning systemic racism is appropriate and justified in this context, given the purpose for which these facts are advanced as well as the numerous prior decisions in which they have been relied upon and acknowledged.[28] In particular, judicially noted facts are not being proffered to assess witness credibility, as recognition of race as a factor within the test for psychological detention does not require this Court to engage directly with the distinct issue of racial profiling, which would relate to whether the decision of the police officers to stop Mr. Grant was improperly motivated by racial considerations. Judicial notice of these social facts would also not be dispositive, but would rather provide another factor to be weighed within the analysis of psychological detention.

[12] **Community-based policing concerns are section 1 issues.** The Respondent seeks to redefine the scope of "detention" for s. 9 purposes, based on the purported "practical reality of modern policing" and the imperatives of "community-based policing", by effectively suggesting that by virtue of this context societal interests in crime prevention and individual liberties should be balanced internally within the concept of psychological detention.[29] Thus, it is suggested that in the context of community-based policing, conduct or instructions relating to officer safety precautions ought somehow to be viewed as not capable of creating detention. The CLA respectfully urges this Court to reject this approach, which would essentially convert large swaths of law enforcement activity to a "*Charter*-light" zone, reducing the protection afforded in a context that is already "low-visibility" and susceptible to abuse.

[13] In *Hufsky* and *Ladouceur*, *supra*, this Court considered how societal interests in preventing drunk driving were to be approached within s. 9, and highlighted the heavy burden that must be met by the Crown. As *Hufsky* and *Ladouceur* instruct, societal interests are not accommodated by distorting the content of s. 9, but rather through the process of demonstrable justification under s. 1. The Respondent has provided no rationale to support a departure from this fundamental

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also been employed in the context of the reasonable person analysis for discrimination claims under s. 15 of the *Charter* (*Law*, *supra* at ¶61; *Canadian Foundation for Children v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at ¶53).

27 Testimony of P. Worrell, *Appellant's Record*, Vol. II, p. 175.

28 *Spence*, *supra* at ¶63-67.

29 *Grant* Respondent's Factum, ¶12-21, 46, 56.

principle, and has failed to satisfy its burden under *Oakes*.[30] First, there is no prescribing law: a mandate for community-based policing in a "high-crime area" does not provide the requisite common law or statutory authority to arbitrarily detain a pedestrian, when there is neither individualized suspicion nor specific information of a particular crime.[31] Second, the Respondent has failed to meet its evidentiary burden with respect to proportionality. In this regard, it should be noted that the meaning and efficacy of "community-based policing" are matters of serious dispute, and certainly cannot be presumed, as the Respondent appears to suggest.

(ii) Section 24(2) and the Stillman approach for conscriptive evidence

[14] **The inclusion of limited types of real evidence within the *Stillman* conscriptive evidence category represents a considered, principled choice.** The gun at issue in *Grant* is real non-discoverable derivative evidence, while the breathalyzer result at issue in *Shepherd* is a non-discoverable bodily emanation.[32] The items of evidence at stake in these appeals thus fall within the "conscriptive evidence" category because of the important choice, confirmed by the *Stillman* majority, to include certain limited types of non-testimonial evidence within a single category subject to the same general treatment under s. 24(2). The CLA submits that this choice by the *Stillman* majority was both carefully considered and principled, and ought to be maintained.

[15] It is critical to locate the *Stillman* majority's discussion of the scope of the conscriptive evidence category within the post-*Charter* jurisprudential debate in which it was rooted. Protections in respect of real derivative evidence and bodily substances were hotly contested, and despite ample discussion, these disputes were left unresolved in several cases prior to *Stillman*. The various differences between these types of evidence and testimonial evidence were fully explored in these earlier cases. The importance of the principle against self-incrimination was highlighted, and the common law's confinement of this principle to communicative evidence was also noted. The competing policy rationales for exclusionary rules were weighed: reliability, preservation of human dignity and individual sovereignty, and maintenance of the integrity of the justice system. Most importantly, however, it was frankly acknowledged that pre-*Charter* common law rules concerning self-incrimination could only be partly explained by reference to principle, and that common law evidentiary distinctions used to evaluate the relevance of state action were in some

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30 *R. v. Oakes*, [1986] 1 S.C.R. 103. See *Grant* Respondent's Factum, ¶57.

31 *Mann*, *supra* at ¶34, 47; *Brown v. Durham Regional*, *supra* at ¶67-79; *Clayton*, *supra*.

32 Of course, the breathalyzer result is only "non-discoverable" for s. 24(2) purposes if there was in fact a breach of Mr. Shepherd's *Charter* rights. The CLA takes no position on this latter issue.

respects inappropriate in the *Charter* era or only partially reflected the relevant values.[33]

[16] There is an important consistency and doctrinal relationship between the *Stillman* conscriptive evidence category and the s. 7 principle against self-incrimination.[34] It must also be recognized, however, that the principles towards which the *Stillman* conception of conscriptive evidence is directed are not limited to that against self-incrimination as developed by common law. The CLA respectfully submits that the main principles underpinning the *Stillman* conscriptive evidence category relate to intertwined considerations concerning the proper role of the state in prosecuting criminal conduct and the preeminent values of human dignity, autonomy and informed choice – principles that are only partially reflected in self-incrimination jurisprudence.

[17] In *Stillman*, the majority of this Court made a principled and considered decision to elevate these considerations in a manner extending beyond the approach developed under the common law. The *Stillman* majority's choice to include a limited class of real evidence within a single category of conscriptive evidence under s. 24(2) reflects a determination that common law-inspired distinctions between communicative conscriptive evidence and real, non-discoverable evidence could not be maintained on a principled basis in the *Charter* era. The purposive foundations of this choice may be discerned in the doctrine of discoverability. As conceived within the *Stillman* framework, discoverability is not a pragmatic or artificial narrowing device, but rather focuses attention directly upon the principle protected by the *Stillman* majority's conception of conscriptive evidence: where the state can demonstrate that it could have obtained the evidence through an alternative, non-conscriptive method, it is not depending upon a necessarily unlawful interference with the accused's mind or body to secure a conviction, so the relevant, protected aspect of the accused's autonomy and human dignity is not engaged.[35]

[18] **The *Stillman* link between conscriptive evidence (both real and testimonial) and trial**

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[33] This debate is reflected in: *Stillman*, *supra* at ¶75-110 (*per* Cory J. for the majority), 184-189 (*per* L'Heureux-Dubé J. dissenting), 198-216 (*per* McLachlin J. dissenting); *R. v. Bartle*, [1994] 3 S.C.R. 173 at 207, 211-212, 213-218 (*per* Lamer C.J. for the majority), 220-221 (*per* La Forest J. concurring), 227-228 (*per* L'Heureux-Dubé dissenting); *R. v. Ross*, [1989] 1 S.C.R. 3 at 16 (*per* Lamer J. for the majority), 19 (*per* L'Heureux-Dubé J. dissenting); *R. v. Hebert*, [1990] 2 S.C.R. 151 at 165-179 (*per* McLachlin J. for the majority), 207-208 (*per* Sopinka J.); *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 477-483 (*per* Wilson J. dissenting), 548-559 (*per* La Forest J.), 580-588 (*per* L'Heureux-Dubé J.), 603-608 (*per* Sopinka J.); *R. v. R.J.S.*, [1995] 1 S.C.R. 451 at ¶83, 90, 173-200 (*per* Iacobucci J. for the majority), 228-239, 260-275 (*per* L'Heureux-Dubé J. concurring but not on this point); *R. v. Clarkson*, [1986] 1 S.C.R. 383 at 392-393.

[34] As the Appellant Grant persuasively details: see *Grant* Appellant's Factum, ¶26-33.

[35] *Stillman*, *supra* at ¶102-110; *R. v. Feeney*, [1997] 2 S.C.R. 13 at ¶65-72. It should be noted that while the availability of alternative means to obtain the evidence may lead to the conclusion that the evidence is not conscriptive, the same factor may well be relevant at the second stage of the s. 24(2) analysis, and may exacerbate the seriousness of the breach.

fairness is coherent and principled. The *Stillman* framework does not suggest that there is anything inherently wrong with the state relying on evidence arising from the accused's body or mind; rather, *Stillman* identifies the relevant "wrong" in these circumstances – labelled "trial unfairness" – as arising when the state is permitted to use such evidence to secure a conviction in a manner that undermines the accused's autonomy, human dignity and informed free choice. Critics of this approach to conscriptive evidence, including the Ontario Court of Appeal in *Grant*, do not dispute the appropriateness of this consideration in some cases. Instead, it is argued that this form of trial unfairness is better understood as a continuum forming merely one factor amongst many to be weighed in assessing whether a trial meets *Charter* standards of fairness.[36]

[19] This aspect of the *Stillman* majority's approach, like the choice concerning real non-discoverable conscriptive evidence, represents a principled position adopted with full awareness of significant debate with respect to this precise issue, both between members of the *Stillman* Court and in a number of previous judgments.[37] In the face of this debate, the *Stillman* majority chose to abandon completely the common law's virtually blind acceptance of reliable evidence,[38] and instead articulated a fundamental constitutional standard with respect to the evidentiary foundations of a fair trial for s. 24(2) purposes: under the *Charter*, the use of unlawfully conscripted evidence to secure a conviction presumptively constitutes a serious breach sufficient to bring the administration of justice into disrepute. In this way, the *Stillman* majority expressed its clear conclusion that reliance by the state on unlawfully conscripted evidence was a special form of unfairness that was not to be condoned under the *Charter*. Given the central importance within the *Charter* of the values embodied by the *Stillman* conception of conscriptive evidence, there is nothing illogical or "fickle"[39] about this conclusion. Nor does it disregard "all of the circumstances", but rather interprets these circumstances through the lens of a principled and coherent understanding of the constitutionally permissible scope of state action in relation to the body and mind of the accused in the course of a criminal prosecution.[40]

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[36] *Reasons for Judgment (Ontario Court of Appeal)*, ¶52, *Appellant's Record*, Vol. I, p. 63-64; *Grant* Respondent's Factum, ¶88-97.

[37] See *R. v. Burlingham*, [1995] 2 S.C.R. 206 at ¶39 (*per* Iacobucci J.), ¶83-110 (*per* L'Heureux-Dubé J., dissenting), ¶147 (*per* Sopinka J.).

[38] *R. v. Wray*, [1971] S.C.R. 272.

[39] *Grant* Respondent's Factum, ¶82.

[40] See *Burlingham*, *supra* at ¶148 (*per* Sopinka J.) ("It is not accurate to characterize the first branch of the *Collins* test as an automatic rule of exclusion with respect to all self-incriminating evidence. While a finding that admission of illegally obtained evidence would render the trial unfair will result in exclusion, *the Court must first conclude that 'in all the circumstances' the admission of the evidence would render the trial unfair*." [emphasis added])

[20] The *Stillman* approach to conscriptive evidence ought not to be approached in these appeals as a straw-man "automatic exclusionary rule". While, "as a general rule", the admission of conscriptive evidence will impermissibly affect trial fairness, in some exceptional circumstances the admission of conscriptive evidence does not affect trial fairness, and hence may be constitutionally permissible. The identifying features of such exceptions have not to date been clearly articulated in the jurisprudence of this Court, but the principles defining such exceptions can be gleaned from prior cases. The CLA submits that such exceptions do not arise because trial unfairness (or some degree thereof) is sometimes constitutionally permissible, but rather because in some exceptional circumstances, the obtaining of the conscriptive evidence is found to be unrelated to and not attributable to the *Charter* breach, so no trial unfairness results from its admission.[41] These exceptional circumstances appear most likely to arise when the conscriptive evidence was obtained on an essentially informed and voluntary basis, and hence does not engage the protected aspects of the *Charter* values of autonomy, human dignity and informed choice.[42]

[21] **Trial unfairness under *Stillman* is not mitigated or diminished by the "reliability" of evidence.** As the Appellant Grant demonstrates,[43] within the context of s. 24(2) two divergent meanings of "trial fairness" competed for recognition in the cases preceding *Stillman*. In *Stillman*, the reliability-focussed approach was rejected by a majority of this Court in favour of a wider conception prioritizing a principled emphasis upon the proper role of the state in securing a conviction through reliance upon evidence compelled from the accused. The CLA supports the Appellant Grant in respectfully urging this Court to reject the invitation of *Stillman*'s critics to create a subcategory for so-called "reliable" conscriptive evidence, and thereby reconsider its earlier rejection of the relevance of a reliability criterion in assessing trial fairness under s. 24(2).

[22] It is arguably not coincidental that calls to reevaluate the *Stillman* approach to conscriptive evidence have arisen in cases involving real conscriptive evidence – such as the appeals at bar.[44]

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[41] *Orbanski*, *supra* at ¶85-104 (*per* LeBel J. concurring); *Bartle*, *supra* at 198, 207 (*per* Lamer J. for the majority), 221 (*per* La Forest J. concurring); *Burlingham*, *supra* at ¶44 (*per* Iacobucci J. for the majority); *R. v. O'Donnell* (2004), 185 C.C.C. (3d) 367 at ¶25-27 (N.B.C.A.); *R. v. Dolynchuk* (2004), 184 C.C.C. (3d) 214 at ¶68-69 (Man. C.A.).

[42] It should be noted that this approach is not equivalent to the "degrees of compulsion" analysis advanced in the *Grant* Respondent's Factum (at ¶91-94), which would effectively permit the admission of conscriptive evidence obtained through a limited degree of compulsion, on the basis that such evidence would not affect trial fairness *too much*. By contrast, the analysis advocated by the CLA focuses in a purposive manner on the values underpinning the conception of conscriptive evidence (voluntariness, informed choice), and would permit admission only if trial fairness were not affected in this way.

[43] *Grant* Appellant's Factum, ¶11-14, 21.

[44] See, for example, *R. v. Richfield* (2003), 178 C.C.C. (3d) 23 at ¶14-18 (Ont. C.A.); *R. v. Petri* (2003), 171 C.C.C. (3d)

Such evidence, especially when viewed in hindsight, appears to promise an unambiguous basis to limit the dangers associated with conscriptive evidence: the evidence, it is pointed out, is clearly reliable proof of guilt. The seductive persuasiveness of the appeal to "reliability" depends heavily upon the suggestion that this criterion will provide a ready means to distinguish between real and testimonial conscriptive evidence, and the implicit promise that its impact will therefore be self-limiting. It should be noted, however, that the distinction between "real" and "communicative" evidence purportedly introduced by reference to "reliability" will ultimate prove illusory: there is no principled reason that conscripted testimonial evidence could not also be subjected to a reliability assessment, by reference to external corroborative evidence.[45] Indeed, in *Grant*, the evidence at issue is not simply the "reliable" gun, but also the self-incriminatory statement without which the gun could not have been discovered; following the reasoning of the Ontario Court of Appeal, the "reliability" of the gun permits admission of the statement, without reference to the *Charter* principles that motivated the *Stillman* majority. The symmetry between this result in *Grant* and the pre-*Charter* treatment of the gun and statement in *Wray* cannot be ignored. The CLA respectfully submits that a "reliability"-based approach will undermine a protection widely-recognized as central to the *Charter*'s purpose and history.

[23] **Breathalyzer evidence is not an exceptional form of conscriptive evidence.** The Respondent in *Shepherd*[46] contends that the *Stillman* majority decision effectively held that, in the case of bodily substances, the trial fairness principles underlying its conception of conscriptive evidence were applicable only if the circumstances surrounding the obtaining of the evidence in question somehow qualified as "self-incriminatory", beyond reference to the inherent nature of the substance itself. The Respondent's approach in this regard would treat bodily substances – in this case, breathalyzer evidence – as an exceptional type of conscriptive evidence, in relation to which trial fairness could be affected only if s. 7 were engaged.

[24] The Respondent's interpretation misconstrues the *Stillman* majority judgment, and reads in limitations in respect of bodily substances that are neither supported by the decision itself nor consistent with its underlying principles. The *Stillman* majority decision evidences no intention to

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553 at ¶36-37 (Man. C.A.); *R. v. Wilding*, 2007 ONCA 853 at ¶8 (Ont. C.A.); *R. v. Janzen* (2006), 285 Sask. R. 296 at ¶7 (Sask. C.A.); *R. v. Lotozky* (2006), 210 C.C.C. (3d) 509 at ¶43-45 (Ont. C.A.).

[45] See *R. v. Nguyen*, 2008 ONCA 49 at ¶29-30, 32 (Ont. C.A.); *Bartle*, *supra* at 227-228 (*per* L'Heureux-Dubé J. dissenting); *Dolynchuk*, *supra* at ¶90 (Man.C.A., *per* Huband J.A. dissenting), leave to appeal refused [2004] S.C.C.A. No. 271.

[46] *Shepherd* Respondent's Factum, ¶71-80, 86-87.

create a bodily substances subcategory subject to different treatment under s. 24(2); in fact, by developing the general conscriptive evidence framework in a case that involved *only* bodily substances, the *Stillman* majority indicated its clear intention to set out an approach applicable *without distinction* to a single category denoted by the term "conscriptive evidence". According to the *Stillman* majority, evidence acquires the relevant conscriptive nature through its inherent relationship with the accused's mind or body *and* the fact that it becomes available to the state "as a result of a breach of the *Charter*".[47] This combination – improper state action yielding evidence and interference with the accused's autonomy and human dignity – forms the principled basis for *Stillman*'s interlinked conceptions of conscriptive evidence and trial fairness. Under *Stillman*, the exceptions arise when the obtaining of the conscriptive evidence is found not to result from the breach – and not, as the Respondent in *Shepherd* suggests, because certain bodily substances are considered inherently non-conscriptive unless self-incrimination is engaged.

[25] Paragraphs 90-94 of the *Stillman* majority decision, which are cited by the Respondent as supporting a lesser degree of *Charter* protection for bodily substance evidence, have been misconstrued. These portions of the decision were not intended to suggest that breathalyzer or fingerprint evidence were somehow exceptional types of conscriptive evidence, but rather sought to explain why the compelled obtaining of breathalyzer evidence (and other minimally intrusive evidence emanating from the accused's body) did not necessarily violate s. 7, *notwithstanding the fact that such evidence, if obtained as a result of a breach of another Charter right, might nevertheless render the trial unfair under s. 24(2)*. The question of how breathalyzer and fingerprint evidence could be *at once* consistent with the principle of self-incrimination and s. 7, and yet also render the trial unfair under s. 24(2), had been raised in several critical minority judgments prior to *Stillman*.[48] These portions of Cory J.'s decision in *Stillman* must be viewed as part of and responsive to the long-standing debate between members of the Court concerning the scope of the principle against self-incrimination and its application to real evidence.

[26] **No principled reason has been provided to justify the reversal of *Stillman*'s foundational *Charter* analysis, and such a step cannot be reconciled with *stare decisis*.** The CLA takes the position that the s. 24(2) approaches advocated by the Respondents in the within appeals constitute a fundamental reversal of the approach and guiding principles clearly articulated in

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47 *Stillman*, *supra* at ¶73, 77, 80.

48 *R.J.S.*, *supra* at ¶177, 201 (*per* Iacobucci J.), 238, 254-256, 269-270 (*per* L'Heureux-Dubé); *Thomson Newspapers*, *supra* at 582 (*per* L'Heureux-Dubé).

Stillman. The CLA respectfully submits that the legal upheaval effected by such a reversal cannot be reconciled with *stare decisis* or its underlying principles and values in the *Charter* era.

[27] *Stare decisis* forms a critical support to the rule of law, and is a part of the organizing constitutional principles underpinning our governmental system.[49] It remains a central principle of contemporary legal methodology, although the traditional emphasis on the distinction between *obiter dictum* and *ratio decidendi*[50] has been attenuated.[51] In *Henry*, this Court rejected a "strict and tidy demarcation" between *ratio* and *obiter* as "an oversimplification of how the common law develops", and recognized that some *obiter* was imbued with significant precedential weight:

> All obiter do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive ratio decidendi to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found persuasive, but are certainly not "binding"…[52]

[28] This Court, unlike the Ontario or Saskatchewan Courts of Appeal, possesses the authority to overrule the *Stillman* precedent. Such a reversal would be unprecedented, in light of *Stillman*'s history – its status as a judgment concluded after a highly unusual rehearing process,[53] from which emerged a majority position that resolved and reconciled many long-standing debates – as well as its subsequent widespread influence. The CLA respectfully submits that if this Court nevertheless intends to contemplate such a step, the principles of judicial/legal methodology and constitutional law informing this decision must be clearly articulated.

[29] The CLA submits that as a matter of principle, the doctrine of *stare decisis* applies in a distinctive manner in the *Charter* context. To date, this Court has not directly considered the special requirements of *stare decisis* in the *Charter* context, beyond observing in passing in *Henry* that *obiter* has become more important since the advent of the *Charter*.[54] In general, this Court has held that "compelling circumstances" are required to justify a departure from precedent, although the nature of these requisite "compelling circumstances" has varied. The contemporary doctrine of *stare decisis* has in application been heavily shaped by the Court's evolving perception of the

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[49] *David Polowin Real Estate v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 at ¶119-120 (Ont. C.A.), leave refused [2005] S.C.C.A. No. 388; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at ¶32, 70-72.

[50] *Prudential Exchange Co. Ltd. v. Edwards*, [1939] S.C.R. 135 at 140-141; *Harvey v. Dominion Textile Co.*, [1919] 59 S.C.R. 508 at 537; *Quinn v. Leathem*, [1901] A.C. 495 at 506 (H.L.); *Myers v. Director of Public Prosecutions*, [1964] 2 All E.R. 881 at 885-886 (H.L.).

[51] *R. v. Salituro*, [1991] 3 S.C.R. 654 at 666-670; *R. v. K.G.B.*, [1993] 1 S.C.R. 740 at 775-778.

[52] *R. v. Henry*, [2005] 3 S.C.R. 609 at ¶52-54, 57. As an example of the type of *obiter* that "should be accepted as authoritative", the Court in *Henry* referred to the s. 1 analysis set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, which "was intended to be, and has been regarded as, binding on other Canadian courts".

[53] *R. v. Stillman*, re-hearing of appeal ordered May 23, 1996, S.C.C. Bulletin, 1996, p. 924.

[54] *Henry*, *supra* at ¶53.

limits and tensions of its law-making and adjudicative roles. Concerns with respect to the proper role of the judiciary have thus properly dominated this Court's analysis in cases involving potential changes to the common law or the interpretation of a statutory provision.[55] By contrast, this Court has also implicitly recognized that *stare decisis* applies differently in respect of written and entrenched constitutional law, and in cases engaging constitutional law in which this Court has reconsidered its own precedent – such as division of powers cases, or *Charter* challenges to common law rules – concerns about not usurping Parliament's role have generally not arisen.[56]

[30] The CLA respectfully submits that in the context of a decision like *Stillman*, in which a general *Charter* framework was developed on the basis of extensive debate both within and before the Court, the doctrine of *stare decisis* must reflect and take into account the *Charter*'s status as the supreme and entrenched law of Canada, and the Court's important role as guardian of this law and the rights it embodies and protects. In this context, the "compelling circumstances" test must require a high burden of a particular nature to justify reconsideration of the precedent in question: this Court should not reconsider a precedent like *Stillman* in the manner urged by the Respondents without first identifying and articulating an error in principle that justifies a rejection of *Stillman*'s considered conclusion. If this Court is to justify a change in the law that will effectively diminish *Charter* protection and retrench the scope of *Charter* rights in practice, the error in principle it identifies in *Stillman* must relate to the purpose of the *Charter* provision in question – in this case s. 24(2). Accordingly, for example, a desire to pursue a different policy balance, or a suggestion that the social context has evolved, is insufficient to satisfy the burden of "compelling reasons". Similarly, it would be insufficient for this Court simply to suggest that it might have decided *Stillman* differently if the case arose today, or that the *Stillman* principles have in practice proven "difficult to apply": *stare decisis* requires a significantly more weighty rationale for such a momentous change to our constitutional law. Rather, if the law concerning the admissibility of conscriptive evidence is to be revisited in a manner that effectively reduces the scope of *Charter* protection, the identified error in principle must relate to the purpose of s.

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[55] *R. v. Bernard*, [1988] 2 S.C.R. 833 at 849-850 (*per* Dickson C.J. in dissent); *Watkins v. Olafson*, [1989] 2 S.C.R. 750 at 760-761; *K.G.B.*, *supra* at 775-778; *R. v. Khan*, [1990] 2 S.C.R. 531 at 540-541; *Ares v. Venner*, [1970] S.C.R. 608 at 622-624; *Salituro, supra* at 666-670; *R. v. Robinson*, [1996] 1 S.C.R. 683; *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at 1352-1353; *Canada (Minister of Indian Affairs and Northern Development) v. Ranville*, [1982] 2 S.C.R. 518 at 528; *Brooks v. Canada Safeway Ltd*., [1989] 1 S.C.R. 1219 at 1243; *R. v. Binus*, [1967] S.C.R. 594 at 601.

[56] *Reference re: Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198 at 212-213; *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680 at 703-704; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 334-335; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at ¶22; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission),* [1990] 2 S.C.R. 489 at 512-513; *Henry*, *supra* at ¶44, 45.

24(2), which was identified in *Collins* as the protection of the repute of the administration of justice and the avoidance of judicial condonation of misconduct by investigatory and prosecutorial agencies.[57] This high burden – the requirement of an error in principle related to the purpose of the *Charter* provision – flows from the special nature of the *Charter* as an entrenched instrument protecting fundamental individual interests, as well as this Court's special constitutional status as the authority of last resort charged with establishing the framework of *Charter* law and maintaining basic uniformity in the application of *Charter* protections.

[31] It is the CLA position that the reasons provided by the critics of *Stillman* are insufficient to satisfy this high burden. No error in principle in the *Stillman* majority decision has been identified: all the criticisms leveled against the *Stillman* approach to conscriptive evidence relate to disagreements that were fully canvassed by the parties and the Court in the *Stillman*, and hence were considered and rejected by the *Stillman* majority. The purported "problems" highlighted by those seeking a reversal of *Stillman* correspond precisely to the principled choices made by the *Stillman* majority; these are not unexpected complexities that bring to light an incoherence in the underlying theory,[58] or new factual scenarios that highlight a previously unacknowledged divergence between a legal rule and its underlying principle.[59] The desire on the part of the Crown to relitigate protective *Charter* principles that have already been fully considered by this Court cannot constitute "compelling circumstances". To decide otherwise would seriously undermine the integrity of the Canadian judicial system and the authority of *Charter* standards.

PART IV & V – ORDERS SOUGHT

[32] The CLA requests permission to present oral argument, does not seek costs, and asks that these appeals be decided in accordance with these submissions.

ALL OF WHICH is respectfully submitted, at Toronto Ontario, this 19th day of March, 2008.

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57 *R. v. Collins*, [1987] 1 S.C.R. 265 at 280-281.

58 As in, for example, *Dunsmuir v. New Brunswick*, 2008 SCC 9.

59 Such as in *Henry*, *supra*.

PART VI – LIST OF AUTHORITIES

	Cited at Para.	Tab #
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