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

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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Interveners

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FACTUM OF THE RESPONDENT

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PART I:
STATEMENT OF FACTS

Overview

1. While carrying a loaded handgun, Mr. Grant was walking down the street in the area of a number of high schools in the middle of the school day. He caught the attention of plain clothes Toronto Police Service officers who were specifically assigned to patrol the area of these high schools because students had become targets for violent criminal behaviour during their lunch breaks. Mr. Grant was approached by the police and asked a few questions. His honest answers to those questions resulted in his arrest and the seizure of his loaded firearm. Contrary to the trial judge, the Court of Appeal for Ontario found that Mr. Grant had been arbitrarily detained within the meaning of s.9 of the *Charter*. Nonetheless, the court concluded that the firearm was admissible pursuant to s.24(2) of the *Charter*.

2. This case raises two critical constitutional issues. The first pertains to identifying the point in time when a police-citizen interaction, that is not informed by reasonable grounds, crystalizes into a s.9 detention. It is the position of the respondent that the Court of Appeal for Ontario, with the greatest of respect, failed to identify that time correctly. There must be some scope for the police to engage a citizen in conversation without cloaking that individual in s.9 protection. Invoking s.9 too early will undermine community-based policing by inhibiting police-citizen dialogue that is crucial to cooperative crime prevention. Community-based policing serves an important purpose in promoting and ensuring the safety of the community and depends on fluid interaction between the police and the public. In this appeal, it is important that the Court approach the issue in a sufficiently flexible manner so as to strike a balance between the competing, but equally important, interests of the citizen and the community at large. The correct balancing of these interests leads to the conclusion that Mr. Grant was not detained.

3. The second critical constitutional issue raised in this appeal has taken a decade to come before the Court. While in recent years this Court seems to have moved away from the suggestion that *Stillman* set up an automatic exclusionary rule as it relates to non-discoverable conscriptive and derivative conscriptive evidence under s.24(2) of the *Charter*, there is insufficient clarity on this point. This case will provide the Court with an opportunity to provide that much needed clarity. It is the position of the respondent that the flexible approach adopted by Mr. Justice Laskin in the court

below is entirely correct. Section 24(2) of the *Charter* and, specifically, the fair trial prong of *Collins,* was never intended to act as an automatic rule of exclusion strictly on the basis of labelling evidence. Such an approach does a disservice to the language of s.24(2), the concept of a fair trial and, ultimately, to the repute of the administration of justice. This Court is asked to reinforce its rich jurisprudence that underscores the balancing that must take place within any s.24(2) analysis, regardless of the type of evidence in issue.

The Facts

4. Although the facts set out in paragraphs 3 to 7 of the *Appellant's Factum* are fair, they fail to provide the whole context in which the interaction between the appellant and the police officers took place. That context is crucial to the analysis of the issues raised in this appeal and will, therefore, be examined in conjunction with the relevant *Charter* principles in Part III. Before addressing the legal issues, however, a brief summary of the trial evidence is warranted.

i. The trial evidence

5. On Monday, November 17, 2003 while armed with a loaded handgun, Donnohue Grant walked down a Toronto sidewalk and into the heart of a fundamental constitutional debate. It was noon and the appellant's "fidgeting" and "staring" caught the attention of police officers on patrol in a "high risk" area surrounded by high schools. He was approached by Cst. Gomes, who politely engaged him in conversation. The officer had no reason to suspect that Mr. Grant had committed any offence until, in response to some general questions, the appellant stated that he was in possession of marijuana and a firearm. He was quickly arrested and his trial focussed on *Charter* issues involving detention, search and seizure, rights to counsel and the exclusion of evidence.[1]

6. The area of Toronto in which this incident arose is populated by a mix of residential and commercial buildings and five high schools, four of which had been the subject of swarmings, assaults, robberies and drug dealing since school started in September. These acts of violence often occurred over the lunch period – which spanned from 11:00 a.m. to 1:30 p.m. – and prompted the police to regard the area as a "hot spot". Accordingly, both plainclothes and uniformed officers were assigned to provide a visible presence to instill a sense of safety in the minds of students, and to

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[1] *Cst. Worrell*, *Appellant's Record*, v. II, p.110, l. 30 - p. 113, l. 4; p. 131, l. 25 - p. 141, l. 8; *Cst. Forde*, *Appellant's Record*, v. II, p. 256, l. 19 - p. 258, l. 1

respond to incidents that occurred. It was in the course of one such "directed patrol" that the police came in contact with Mr. Grant on a public sidewalk at 12:30 p.m. on a school day.[2]

7. The entire interaction from the moment the first officer approached the appellant until the arrest and recovery of the handgun lasted no longer than seven minutes. A chronology of the events can be found at paragraph 19 of the Court of Appeal's judgment and will not be reproduced here.[3]

ii. Court of Appeal for Ontario

8. The Court of Appeal declined to show deference to the trial ruling that the appellant was not detained because it concluded that the trial judge "mischaracterized what occurred in at least three important ways". That is, Justice Harris is said to have:

a) erred in describing the conversation as a "chit chat";

b) erred in characterizing Cst. Gomes' advice that the appellant keep his hands in front him as a "request" rather than a "demand or direction"; and

c) misunderstood the "dynamics of the encounter" in concluding that the appellant could have politely walked away from the officers.

Although Laskin J.A. found that the appellant was arbitrarily detained, he nonetheless concluded that the handgun was admissible as it would not bring the administration of justice into disrepute.[4]

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[2] *Cst. Worrell*, *Appellant's Record*, v. II, p. 108, l.1 - p. 110, l. 28; p. 126, l. 1 - p. 128, l. 24; p. 164, l. 31 - p. 167, l. 2; *Cst. Gomes*, *Appellant's Record*, v. II, p. 201, l. 6 - p. 202, l. 25; p. 220, l. 30 - p. 222, l. 8; *Cst. Forde*, *Appellant's Record*, v. II, p. 255, l. 1 - p. 256, l. 22; p. 277, l. 26 - p. 279, l. 5

[3] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record*, v. I, pp. 47-50, 52, 66-67

[4] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record*, v. I, pp. 51-52, 68

PART II:
POINTS IN ISSUE

Issue 1: Whether in the context of community-based policing, a pedestrian is detained for *Charter* purposes when he or she is stopped by the police for the purpose of identification and interview?

9. It is the respondent's position that s.9 *Charter* concerns are not engaged unless the questioning is accompanied by a coercive demand and direction.[5]

Issue 2: Whether the admission of non-discoverable conscriptive and derivative conscriptive evidence results in an unfair trial, eclipsing the need to engage in a full and balanced s.24(2) inquiry?

10. It is the respondent's position that, while the nature of evidence may impact on the question of trial fairness, it cannot be dispositive of the outcome of a s.24(2) inquiry. A full and balanced approach, true to the language of s.24(2), must take into account "all the circumstances" when determining whether the admission of evidence will bring the administration of justice into disrepute.

Issue 3: Whether the offence of weapons trafficking includes the movement of firearms from place to place?

11. The Court of Appeal for Ontario was correct in giving the word "transport" its ordinary meaning and, therefore, holding that "weapons trafficking" is committed when a prohibited firearm is moved from one location to another without authorization.

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[5]Although this issue is not raised by the appellant, Rule 29(3)of the *Rules of the Surpreme Court of Canada,* SOR/202-156, states that a respondent may seek to uphold the judgment appealed from "on a ground not relied on in the reasons for that judgment" without applying for leave to cross-appeal. The respondent raised its intention to challenge the Court of Appeal's ruling that the appellant was psychologically detained, should leave to appeal be granted, in paras. 2-3 of the *Respondent's Memorandum of Argument (leave application)*. See also, *R. v. Keegstra*, [1995] 2 S.C.R. 381 at paras. 21, 28, 33-34.

PART III:
BRIEF OF ARGUMENT

Issue 1: Was the Appellant Detained?

i. Overview

12. Community-based policing depends on a cooperative relationship and dynamic interaction between the police and the citizens they serve. When a police officer acting in this role stops and speaks to a citizen he or she does not automatically create a detention of constitutional proportions. *Mann* endorsed this practical reality of modern policing by recognizing that s. 9 of the *Charter* is "not engaged by delays that involve no significant physical or psychological restraint".[6] How much psychological restraint will be tolerated before it becomes "significant" and attracts *Charter* protection was left unanswered.

13. The resolution of this question requires an examination of how the concept of psychological detention is to be reconciled with the moral and social duty on civilians to assist the police, both of which are to be balanced against the duty of the police to investigate crime and maintain peace.[7] The delicate weighing of these competing interests will define the extent to which our democracy will accept and encourage its police officers to engage in cordial, albeit probing, conversation with pedestrians in the pursuit of community safety. It will also signal an acceptance of the vision of the police and the public as being united in crime prevention, or entrench a perception that the police and citizens are two solitudes divided by a *Charter* through which any interaction must progress.

14. Also at issue is whether the Court of Appeal erred in the application of the standard of review that governs questions of fact, inferences of fact, and questions of mixed fact and law. Before exploring those factual issues, however, it is necessary to first demonstrate how the officers were promoting the goals of community-based policing when they approached the appellant. This factum will then examine why the concept of psychological detention was never meant to encompass the facts of this case, and how the Court of Appeal erred in finding otherwise.

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[6] *R. v. Mann,* [2004] 3 S.C.R. 59 at para. 19 *per* Iacobucci J.

[7] *R. v. Singh,* [2007] S.C.J. No. 48 at paras. 27-28 *per* Charron J.; *R. v. Grafe* (1987), 36 C.C.C. (3d) 267 at 271 (Ont.C.A.)

ii. Community-based policing

a) What is "community-based policing"?

15. Police are part of the community and are expected to prevent crime through cooperation with the citizens they protect. From the time of Sir Robert Peel, it has been recognized that "the police are the public and the public are the police", and public safety is the responsibility of every member of the community. Rooted in this philosophy, modern community-based policing is a broad concept premised on the belief that crime prevention can be achieved through "pro-active problem-solving and police-community partnerships".[8] Sometimes referred to as "proactive" policing, it can be contrasted with "reactive" policing which, although also important, is responsive to crimes that have already been committed.

16. This distinction is significant because one generally accepted component of community-based policing is increased interaction between police officers and the public in an effort to prevent offences from occurring. This is particularly so during directed patrols in high-crime areas, often referred to as "hot spots", where the officers become familiar with the immediate community they serve, thereby helping to reduce the incidence of crime and alleviate fear in the neighbourhood.[9] It is this type of non-adversarial community-based policing that the officers were engaged in and for which they were commended by the trial judge.[10]

17. The officers testified that, due to the high incidence of swarmings, assaults, robberies and drug dealings, the neighbourhood was considered a "hot spot". Both plainclothes and uniformed officers were assigned to patrol the area to prevent further incidents. As Cst. Forde explained, the officers were not "going out and looking for people to arrest. That is not what we do." Instead, they were liaising with the community, in particular the local high schools, to preserve peace in the area. In this context, the officers approached the appellant in an effort to familiarize themselves with him

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[8] A. Normandeau and B. Leighton, "A Growing Canadian Consensus: Community Policing", *Community Policing in Canada,* (Canadian Scholars Press: Toronto, 1993) at p. 30; P. McKenna, *Foundations of Community Policing in Canada*, (Prentice-Hall Canada: Scarborough, 2000) chapter 1, p. 5; B. Whitelaw, R. Parent and C. Griffiths, *Community-Based Strategic Policing in Canada,* Second Edition (Thomson: Toronto, 2006), chapter 2, pp. 40, 44-46

[9] B. Whitelaw, R. Parent and C. Griffiths, *Community-Based Strategic Policing in Canada,* Second Edition, *supra*, at pp. 73-75; A. Normandeau and B. Leighton, "A Growing Canadian Consensus: Community Policing", *Community Policing in Canada, supra*, at pp. 31-32

[10] *Reasons on Charter Application (Ontario Court of Justice)*, *Appellant's Record*, v. I, pp. 15-18

and ascertain why he appeared so nervous.[11] This is the type of proactive policing that is legislatively demanded of the police and the officers' conduct must be assessed in this light.

b) *Police Services Act*: Codification of community-based policing

18. Community-based policing is the dominant policing philosophy in Canada and is codified in Ontario in the *Police Services Act*, which requires provincial and municipal police services to provide "community-based crime prevention initiatives".[12] As well, regulations require all police services to dedicate officers to "provide community patrol" consisting of general and "directed patrol in the areas and at the times where it is considered necessary and appropriate".[13]

19. The statutory powers of individual police officers in Ontario also include a community-based component by vesting them with responsibility for "preserving the peace" and "preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention".[14] This supplements an officer's general duties at common law to prevent crime and keep the peace.[15]

c) Crime prevention is a collective responsibility

20. An officer's crime prevention role is complemented by the moral and social duty resting on citizens to assist the police.[16] This is not a legal obligation but one which is grounded in the collective responsibility all citizens have to ensure the safety of their communities. Without the

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[11] *Cst. Worrell*, *Appellant's Record*, v. II, p. 108, l.1 - p. 110, l. 28; p. 126, l. 1 - p. 128, l. 24; p. 164, l. 31 - p. 167, l. 2; *Cst. Gomes*, *Appellant's Record*, v. II, p. 201, l. 6 - p. 202, l. 25; p.220, l. 30 - p. 222, l. 8; *Cst. Forde*, *Appellant's Record*, v. II, p. 255, l. 1 - p. 256, l. 22; p. 277, l. 26 - p. 279, l. 5

[12] *Police Services Act*, R.S.O. 1990, c. P.15, ss. 3(2)(g), (i), 5.1(4)-(9), 42; B. Leighton, "Community Policing in Canada: An Overview of Experience and Evaluations", *The Challenge of Community Policing: Testing the Promises* (California: Sage Publications, Inc., 1994) at pp. 209, 214-216

[13] *Adequacy and Effectiveness of Police Officers*, O.Reg. 3/99, ss. 1-4, 30

[14] *Police Services Act, supra*, s. 42(1)(a) and (b)

[15] *R. v. Mann, supra*, at para. 26; *R. v. Dedman*, [1985] 2 S.C.R. 2 at para. 65; *Brown v. Durham Regional Police Service* (1998), 131 C.C.C. (3d) 1 (Ont.C.A) at paras. 63-67, appeal to S.C.C. abandoned [1999] S.C.C.A. No. 87

[16] *R. v. Grafe*, *supra*, at 271; *Rice v. Connolly*, [1966] 2 All E.R. 649 at 652; *Thomson Newspapers Ltd. v. Canada (Director of Investigations & Research, Restrictive Practices Commission,* [1990] 1 S.C.R. 425 at 576 *per* L'Heureux-Dubé J. (dissenting on other grounds); *R. v. Dedman, supra,* at para. 34 *per* Dickson C.J.C (dissenting on other grounds); and D.A. MacIntosh, *Fundamentals of the Criminal Justice System,* 2nd ed. (Carswell: Scarborough, 1995) at 21; *R. v. Singh, supra,* at para. 86 *per* Fish J. (dissenting, but not on this point)

cooperation of the public, police cannot familiarize themselves with the neighbourhood, which is fundamental to community-based policing. Therefore, where this model is employed, it is normal and necessary for citizens to speak with officers on directed patrols. These interactions are non-adversarial, constructive dialogue between the public and police.

d) Dialogue is not detention

21. The authority to speak to citizens, of course, does not include the power to detain them for that purpose unless such detention is also permitted by law.[17] The question, though, is not whether the police have the power to detain a pedestrian for community-based crime prevention purposes, but whether the appellant was detained at all prior to his arrest.

22. Appellate courts have long recognized that the police may stop and question a pedestrian without giving rise to a detention. This may occur even though the police have no reasonable grounds to believe that an offence has been committed, much less that the individual may have been involved in wrongdoing. Thus, in circumstances that were similar to the present case, the Court of Appeal for Ontario held in *Grafe* that the *Charter* does not "insulate all members of society from all contact with constituted authority, no matter how trivial that contact may be". The court explained that implicit in the moral and social duty to assist the police,

> ... is the right of a police officer to ask questions even, in my opinion, when he or she has no belief that an offence has been committed. To be asked questions, in these circumstances, cannot be said to be a deprivation of liberty or security.[18]

23. This approach to police-citizen interaction is consistent with Justice Iacobucci's observation in *Mann* that,

> ... the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed" or "kept waiting". But the

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[17] *R. v. Mann, supra*, at paras. 33-35; *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 at 493-4 (Ont.C.A.); *R. v. Esposito* (1985), 24 C.C.C. (3d) 88 at 94 (Ont.C.A.)

[18] *R. v Grafe, supra*, at 271; *See also: R. v. B.(L.)* (2007), 86 O.R. (3d) 730 at paras. 51-52; *R. v. Hall* (1995), 22 O.R. (3d) 289 at 295-6 (C.A.); *R. v. H.(C.R.)* (2003), 174 C.C.C. (3d) 67, at paras. 15-18; and *R. v. Rajaratnam*, [2006] A.J. No. 1373 at para. 13 (C.A.); and *R. v. Dedman* (1981), 59 C.C.C. (2d) 97 at 108-9 (Ont.C.A.); aff'd [1985] 2 S.C.R. 2; *R. v. Esposito, supra*, at 94

> constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.[19]

It is also consistent with American jurisprudence, which holds that the Fourth Amendment protection against "seizure of the person" does not prohibit the police from approaching citizens and asking probing questions, even in the absence of reasonable grounds to suspect wrongdoing.[20]

24. It can be seen, therefore, that the police were entitled to approach Mr. Grant to ask him questions, and could do so without engaging his s. 9 *Charter* rights. Whether the appellant was in fact detained involves the application of the "psychological detention" principles.

iii. Detention

a) General position of the respondent

25. The Court of Appeal's approach to psychological detention does not give due weight to the societal interest in crime prevention, particularly in the context of community policing. By over-emphasizing individual liberty interests, the court applied a legal analysis that would turn most, if not all, inquiries by police officers into detentions.

b) Court of Appeal's judgment

26. To be sure, Justice Laskin correctly identified the competing interests at stake, namely: the police duty and authority "to investigate and prevent crime in order to keep our community safe", and a citizen's right to move freely about in the community. As well, Laskin J.A. accepted that "[n]ot every encounter between the police and a citizen amounts to a 'detention'", and declined to draw "bright-line rules" as to what types of questions should be deemed to create a psychological detention.[21] The respondent takes no issue with these portions of Justice Laskin's judgment and, indeed, advances them as accurate statements the law. Justice Laskin's balancing of these interests, however, proceeds on an erroneous approach to psychological detention.

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[19] *R. v. Mann, supra*, at para. 19

[20] *U.S. v. Mendenhall*, 446 U.S. 544 at 554-555 (1980). See also *Terry v. Ohio*, 392 U.S. 1 at 19 (1968). This concurring opinion in *Mendenhall* was eventually adopted by a majority of the Court in *Florida v. Royer* 460 U.S. 491 (1983). See also *I.N.S. v. Delgado*, 466 U.S. 210 at 227-228 (1984); *Florida v. Rodriguez*, 469 U.S. 1 at 5-6 (1984); *Florida v. Bostick*, 501 U.S. 429 at 433-434,439 (1991).

[21] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record,* v. I, pp. 45-46

27. Psychological detention is premised on a coercive demand that deprives the citizen of his or her freedom of choice. Because the appellant did not testify as to what, if anything, had this effect on him,[22] the Court of Appeal was left to infer coercion from three main factors: 1) Cst. Gomes' initial request that Mr. Grant keep his hands in sight; 2) the presence and positioning of three police officers, and 3) the questions posed by Cst. Gomes. The first two factors will be considered later. With respect to the third, the Court of Appeal's judgment wrongly implies that because citizens may not be aware of the limits of police authority they can be presumed to feel compelled to answer a police officer's questions when approached on the street. In particular, Justice Laskin stated:

> And whether questioning gives rise to a detention must be assessed in the light of the concern expressed by Le Dain J. in Therens: that most citizens are unaware of the limits of the police authority...."[23]

28. Equating police questioning with a coercive demand (and thus a "detention") renders most, if not all, police interviews "psychological detentions" and is not what was intended by *Therens.* Indeed, the common law is built on the "right of the individual to refuse to answer questions put to him by persons in authority" and the public might, therefore, be expected to know that they are not obliged to speak to the police, but, if they do speak, they must tell the truth.[24] Thus, compulsion cannot be inferred from the mere fact that the police ask questions – even potentially incriminating questions. Instead, "something more" is required; namely, "a deprivation of liberty".[25] This approach is supported by the jurisprudence surrounding "psychological detention".

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[22]Although not a prerequisite to a finding of psychological detention, an accused's testimony "is often crucial to the question of whether there was a reasonable belief that a compulsion to reply was present": see *R. v. H.(C.R.), supra*, at para. 45; *R. v. B.(L.), supra*, at para. 64; *R. v. Burke,* [2006] O.J. No. 2185 at paras. 9-10 (C.A.).

[23]*Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record,* v. I, p. 46. Laskin J.A. also noted Iacobucci J.'s concern in *Mann* about "the potential for abuse inherent in such low visibility exercises of discretionary power". The question of abuse (*e.g.*, racial profiling), however, does not arise on the facts of this case and was never raised by the appellant in the courts below: *Cst. Worrell, Appellant's Record*, v. II, p. 146, l. 24 - p. 148, l. 17; p. 175, l. 14 - p. 176, l. 13.

[24]*Rice v. Connolly, supra*, at 652

[25]*R. v. H.(C.R.*), *supra,* at paras. 15-18, 36, 57 (Man.C.A.); *R. v. B.(L.), supra*, at paras. 51-56; *R. v. Rajaratnam*, *supra*, at para. 13; and *R. v. Grafe*, supra, at 271, 274

c) *Therens & Thomsen*: "Psychological detention"

29. The concept of psychological detention was developed in the s. 10 cases of *Therens* and *Thomsen*,[26] which departed from the narrow, pre-*Charter* approach to detention articulated in *Chromiak*. In *Chromiak*, this Court held that a person subjected to a demand to provide a breath sample was not detained as contemplated by the *Canadian Bill of Rights*[27] unless there was a physical restraint pursuant to due process of law.[28] Although *Therens* accepted this as a type of detention protected by the *Charter*, Le Dain J. (dissenting in the result) added that coercive restraint could also be of a psychological or mental nature.[29] Thus, a demand for a breath sample could be assumed to produce a psychological detention because the consequent criminal liability for failure to comply effectively made cooperation involuntary. In addition, the Court recognized that directions or demands that are not accompanied by criminal liability for non-compliance may also amount to psychological detention because citizens may not be aware of the "precise legal limits of police authority". This may lead to a "reasonable belief that one does not have a choice as to whether or not to comply".

30. Those cases established a flexible, context-driven approach to psychological detention that ensures *Charter* protection is not denied to those whose free choice is constrained by non-physical means. The concern that citizens may not be aware of the legal limit of police authority, however, was not directed toward mere questioning that is unaccompanied by a coercive demand or direction. By suggesting otherwise, the Court of Appeal's judgment in *Grant* has broadened this category of psychological detention beyond what was contemplated in *Therens* and *Thomsen*.

31. *Mann* recognized that the mere fact the police stop and question a pedestrian does not necessarily engage s. 9 concerns. However, this Court was not called upon to resolve the vexing issue of when the delay inherent in such encounters becomes significant enough to constitute a

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[26] *R. v. Therens*, [1988] 1 S.C.R. 613 dealt with the right to counsel during a detention for the purpose of providing a sample into a breathalyzer machine, while *R. v. Thomsen*, [1988] 1 S.C.R. 640 addressed the same issue in the context of a roadside screening device.

[27] R.S.C. 1970, App. III, s. 2(c)

[28] *Chromiak v. The Queen*, [1980] 1 S.C.R. 471

[29] *R. v. Therens*, *supra*, at paras. 48-53 *per* Le Dain J. (dissenting in the result). *See also: R. v. Hufsky*, [1988] 1 S.C.R. 621 at para. 12 ["detention" analysis applies equally to ss. 9, 10, re: stationary spot checks]; and *R. v. Ladouceur,*[1990] 1 S.C.R. 1257 at para. 36 [roving spot checks]

detention. The case at bar calls for an answer to that question and, to do so, it is necessary to look at the origin of the concept of coercive demands and directions.[30]

d) Meaning of coercive "demand or direction"

32. This case is concerned with the type of "demand or direction" that does not have criminal liability for non-compliance but which, nevertheless, is made in circumstances that compel the individual to believe that he or she must comply. The mere fact that a police officer approaches a person and poses questions seeking incriminating answers does not meet this standard.[31] Instead, the questions must be accompanied by circumstances that create a perception that the individual must remain with, or accompany, the officer to be interviewed.

33. The ambit of psychological detention can be gleaned from the cases from which it originated. The concept may be traced to *Conn v. Spencer*,[32] a civil action for false imprisonment which arose when a store security officer falsely accused Mr. Conn of shoplifting. Rather than argue with the security officer in the crowded store, and risk being subjected to physical force, the plaintiff complied with the security officer's request that he accompany her to a room upstairs. In its defence, the store claimed that the plaintiff had accompanied the security officer voluntarily and was not detained. In rejecting this argument, the trial judge felt that the accusation of theft by a person in authority was sufficient to compel Mr. Conn to believe that he must accompany the security officer.

34. This principle, which has its roots in earlier English case law, was applied in a number of later false imprisonment cases, including *Chaytor v. London*, in which the court observed that a person accused of shoplifting may feel a "psychological type of imprisonment" in the absence of

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[30] *R. v. Mann*, *supra,* at paras. 15, 19

[31] *R. v. H.(C.R.), supra*, at para. 36; *R. v. B.(L.), supra*, at paras. 51-52 ; *R. v. Rajaratnam, supra,* at paras. 12-13. In *Mendenhall*, the U.S. Supreme Court stated that a "person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained". Absent such a seizure, the questioning of citizens on the street does not offend the Fourth Amendment: *Mendenhall, supra*, at 553-555. See also *I.N.S. v. Delgado, supra,* at 215-216; *Florida v. Royer, supra,* at 497-498; *Florida v. Bostick, supra*, at 434-435.

[32] *Conn v. David Spencer Ltd.*, [1930] 1 D.L.R. 805 (B.C.S.C.) - this case was cited in a passage from the Court of Appeal's judgment in *Therens* that was subsequently quoted with approval by Le Dain J. in this Court: see *Therens, supra*, at paras. 39, 50-53.

actual physical restraint.[33] These cases demonstrate how a person may form a reasonable belief that he or she has no real choice but to submit to the authority of another even in the absence of criminal liability for non-compliance. This is not invariably true, however, and a different person may not feel detained in similar circumstances.[34]

e) Coercive "demands and directions" in the criminal law context

35. When looking at detention in the criminal context, it is important to immediately distinguish vehicle stop cases that fall within the first branch of psychological detentions identified in *Therens*; *i.e.,* those for which coercion stems from legal consequences for non-compliance.[35] Next, it is equally important to distinguish those cases in which there is an adversarial relationship between the police and the pedestrian from those that are non-confrontational.[36] Finally, it must be recognized that even non-adversarial encounters between the police and citizens involve a power imbalance inherent in the authority of the officer.[37] Nevertheless, appellate courts have consistently held that police interviews are not, for that reason alone, conducted in an atmosphere of coercion, regardless of whether the purpose of the interview is to prevent or investigate crime.

36. Thus, a suspect who complied with a request to attend the police station to be interviewed regarding allegations of sexual assault was found not to be detained.[38] Similarly, no detention occurred when the police attended at a suspect's residence to ask him questions concerning credit

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[33] *Chaytor et al. v. London et al.* (1961), 30 D.L.R. (2d) 527 (Nfld.S.C.); *Whiffin v. David Spencer Ltd.*, [1941] 2 D.L.R. 727 (B.C.S.C.); *Sinclair v. Woodward's Store Ltd.*, [1942] 2 D.L.R. 395 (B.C.S.C.); and *Lebrun v. High-Low Foods Ltd.* (1968), 69 D.L.R. (2d) 433 (B.C.S.C.)

[34] *Cannon v. Hudson's Bay Co.; Stephens v. Hudson's Bay Co.,* [1939] 4 D.L.R. 465 (B.C.S.C.)

[35] *R. v. B.(L.), supra*, at para. 54; *R. v. H.(C.R.), supra*, at pars. 56-59. Notable examples of such vehicle stop cases are *Therens, Thomsen, Hufsky, Ladouceur, Mellenthin*, and *Simpson*.

[36] *R. v. Simpson*, *supra*, at p. 500. *Simpson* was also a "crime prevention" case but one in which there was an adversarial relationship from the outset because the police were investigating suspected drug activity at the residence from which the accused exited. It was conceded that Simpson was detained when he was later stopped as a passenger in a motor vehicle and the issue was whether the police had "articulable cause" to do so for investigative purposes. *Florida v. Royer, supra*, also provides an example of a confrontational approach of a citizen in that, like the false imprisonment shoplifting cases, the individual was accused of wrongdoing and was asked to accompany the drug enforcement officers to a private room for questioning.

[37] *R. v. B.(L.), supra*, at para. 64; *R. v. H.(C.R.), supra,* at para. 36

[38] *R. v. Hawkins*, [1993] 2 S.C.R. 157; rev'g (1992), 72 C.C.C. (3d) 524 (Nfld.C.A.)

card fraud.[39] Nor was there a detention when a murder suspect voluntarily attended at a police station to answer incriminating questions.[40] Similarly, a person found at the scene of a suspicious death was not detained when he acceded to a "request" to sit in the back of a police cruiser for over an hour to provide a "needed" statement.[41] Finally, appellate courts have held that police may stop and ask questions of pedestrians who are not suspected of any criminal activity without contravening s. 9.[42]

37. The circumstances that transcend mere questioning to become a detention have been scrutinized in various pedestrian stop cases. Some courts have concluded that the police may approach citizens and ask potentially incriminating questions without infringing s. 9,[43] while others have found detentions arising from the manner in which the pedestrian was stopped.[44]

38. The courts have looked to precedents to glean the circumstances that might give rise to a psychological detention. However, appellate courts have been unable to provide exhaustive criteria that can be applied in all cases with predictable results. The Court of Appeal for Ontario attempted to do so in *Moran*, but the factors identified by Justice Martin are specifically designed to address

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[39] *R. v. Esposito*, *supra*. Indeed, in *Esposito* the Court of Appeal for Ontario specifically rejected the notion that all questioning of suspects amounts to a detention, a concept endorsed by the Newfoundland Court of Appeal in *Hawkins* but not directly addressed by this Court when overturning that judgment.

[40] *R. v. Bazinet* (1986), 25 C.C.C. (3d) 273 at 282-6 (Ont.C.A.): The court stated that a "coercive environment" is not sufficient to constitute a detention in the absence of a "demand or direction" (as opposed to a "request") to attend for an interview. *See also: R. v. Moran* (1987), 36 C.C.C. (3d) 225 (C.A.) and *R. v. Smith* (1986), 25 C.C.C. (3d) 361 (Man.C.A.) in which the initial interviews were conducted before the accused became suspects. See also *Hicks v. U.S.*, 382 F. 2d 158 (D.C. Cir. 1967) and *U.S. v. Mendenhall, supra*, at 559.

[41] *R. v. Anthony*, [2007] O.J. No. 3345 (C.A.)

[42] *R. v. Grafe, supra; R. v. Lawrence* (1990), 59 C.C.C. (3d) 55 at 60-61 (Ont.C.A.); *R. v. Hall*, *supra*; *R. v. B.(L.), supra; R. v. H.(C.R.), supra*; *R. v. Rajaratnam, supra*; *R. v. G.(C.M.)* (1996), 113 Man.R. (2d) 76 (C.A.)

[43] *R. v. Orellana*, [1999] O.J. No. 5746 (C.J.); *R. v. Oldfield*, [2007] O.J. No. 5105 (C.J.); *R. v. Wint*, [2004] O.J. No. 3279 at para. 17 (C.J.)

[44] *R. v. Peck*, [2001] O.J. No. 4581 at paras. 18-20 (S.C.J.); *R. v. Lam & Dinh* (2003), 178 C.C.C. (3d) 59 at paras. 74-75 (Alta.C.A.); *R. v. Daley* (2001), 156 C.C.C. (3d) 225 at paras. 4-9, 22 (Alta.C.A.); *R. v. Carty*, [1995] O.J. No. 2322 at paras. 38, 47, 50 (O.C.J.); *R. v. Dolynchuk* (2004), 184 C.C.C. (3d) 214 at paras.22-32 (Man.C.A.); *R. v. B.(K.)* (2004), 186 C.C.C. (3d) 491 at paras. 19-33 (Man.C.A.); *R. v. Hopkins*, [2004] O.J. No. 3273 at paras. 14-16 (O.C.J.); *R. v. Ferdinand*, [2004] O.J. No. 3209 at paras. 25-26, 40-45, 51-54, 56-57 (S.C.J.); *R. v. Ngo*, [2005] O.J. No. 2678 (O.C.J.); *R. v. V.(S.)* (unreported, September 22, 2005, Cole J., O.C.J.); *R. v. Powell* (2000), 35 C.R. (5th) 89 (S.C.J.), overruled, *R. v. B.(L.), supra*, at para. 47.

interviews that occur at police stations, although courts have attempted to adapt them to other venues as well.[45]

39. This *ex post facto* approach to detention analysis has been criticized by Prof. Penney as being too imprecise and not providing "sufficient guidance to police, who must often make quick decisions in pressure-filled environments".[46] Like the appellant in the court below, Prof. Penney advocates "bright-line" rules that can be applied by police with certainty in advance. However, while it is true that *Moran*-type lists are notoriously imprecise and incomplete,[47] "bright-line" rules are equally problematic.[48] The certainty they provide is more than offset by the inherent inflexibility and unfairness they generate, and have thus been rejected not only in the present case but in other *Charter* decisions as well.[49]

40. Justice Laskin rejected the appellant's suggestion that the line should be drawn between questions regarding identification (permissible) and those of an incriminatory nature (impermissible).[50] On this model, a pedestrian who would otherwise be considered psychologically detained would not have the benefit of s. 9 if he or she was only required to provide identification to the police. The unfairness of this approach is evident when it is realized that it was the request for Grafe's name that led to the incriminating answer resulting in his conviction for personation.[51] Conversely, this Court has already recognized that incriminating questions may be asked of suspects

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[45]Indeed, Harris J. attempted to follow the *Moran* analysis in the case at bar: *Reasons on Charter Application (Ontario Court of Justice)*, *Appellant's Record*, v. I, pp. 18-21.

[46]S. Penney, "Triggering the Right to Counsel: 'Detention' and s. 10 of the *Charter*" (2008), 38 *S.C.L.R.* [forthcoming]

[47]One cannot prepare exhaustive lists for all the types of detentions that might occur (*eg.* at a police station, in a police cruiser, at the accused's residence, on a public street, at an airport, etc.). Who, for instance, could predict the possibility of police officers on horseback cornering a young male against a building (*Carty*). As well, the factors that are identified will exist in different combinations and degrees in every case (*eg.* time of day, nature of questions, number of officers, age of accused, reason for the approach, *etc.*).

[48]As Prof. Young observes in "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991), 29 *Osgoode Hall L.J.* 329 at 351, the "line dividing constitutionally-protected interactions and those deemed inconsequential by the courts is not clear-cut".

[49]*Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record*, v. I, pp. 46-47; *Brown v. Durham Regional Police Force*, *supra*, at para. 62; *R. v. Singh, supra,* at para. 42 *per* Charron J.

[50]*Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record*, v. I, p. 46

[51]*R. v. Grafe, supra*

without automatically amounting to a detention.[52] Prof. Penney's proposed dividing line is equally unworkable in that it would prohibit the police from asking incriminating questions of "suspects", but allow them to be asked of those only "remotely suspect[ed] of wrongdoing".[53] Apart from the imprecision of such a test, it would unfairly apply to situations in which no "demand or direction" is issued to the accused. Thus, it would unfairly deprive the police of access to the very person most likely to have useful information about the incident.[54]

41. As neither "bright-lines" nor *Moran*-type lists are entirely suitable to govern inherently dynamic and unpredictable police-citizen interactions, the proper approach to s. 9 is to identify governing principles that will guide the police and reviewing courts. Those principles include the recognition that crime prevention is a collective responsibility, that the police are entitled to approach any citizen to ask (even incriminating) questions, that citizens have the right to move about freely in the community and may refuse to answer an officer's questions, and that the police must have reasonable grounds to detain an individual for questioning. Lists of relevant factors from previous cases may assist the police and courts in identifying circumstances that merit consideration, but they will be of limited use in predicting the outcome of future cases that are highly fact-specific.[55]

42. No doubt this principles-based approach to detention will attract the criticism that it does not provide predictable guidance to police officers in advance. The answer to this concern, however, is not to create "bright-line" rules that will unfairly constrain legitimate police work, but to avoid overly-critical second-guessing of the decisions made by police officers on the street.[56]

43. For present purposes, though, whether one applies these principles or the *Moran* factors the conclusion is the same – the appellant was not psychologically detained. The three main circumstances that led the Court of Appeal to decide otherwise do not withstand closer scrutiny.

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[52] *R. v. Hawkins, supra*

[53] S. Penney, "Triggering the Right to Counsel: 'Detention' and s. 10 of the *Charter*", *supra*

[54] *R. v. Singh*, *supra*, at paras. 27-28, 45

[55] See *R. v. Ingle*, [2007] B.C.J. No. 2024 at paras. 40-41 (C.A.)

[56] See *R. v. Golub* (1997), 117 C.C.C. (3d) 193 at paras. 18, 44-45 (Ont.C.A), leave to appeal to S.C.C. dismissed [1997] S.C.C.A. No. 571

iv. The appellant was not psychologically detained

44. Justice Laskin found it significant that Cst. Gomes blocked Mr. Grant's path and told him to keep his hands in sight.[57] It cannot be said, however, that merely interfering with someone's path on a public sidewalk gives rise to a psychological detention as this would have the farcical effect of requiring the police to approach individuals from behind or the side. Moreover, approaching a person on foot is much less coercive than positioning a police cruiser across the sidewalk, which was held in *Lawrence* to give rise to "physical inconvenience" but not detention.[58]

45. In any event, it is apparent that the Court of Appeal was more troubled by Cst. Gomes' instruction to the appellant to keep his hands visible. Justice Laskin disagreed with the trial judge's characterization of this as a mere "request"[59] and viewed it, instead, as a "command that must be obeyed", by which the officer "effectively took control of the appellant's physical movements".[60] In substituting its view of the evidence for that of the trial judge, the Court of Appeal failed to accord proper deference to factual findings made at trial.[61] There was no palpable and overriding error in Justice Harris' characterization of this as a "justifiable instruction" designed to ensure officer safety. Indeed, that conclusion was supported by the testimony of Cst. Gomes and there was no evidence from the appellant that he felt under the control of the officer at any time.[62]

46. Moreover, whether this is viewed as a "request" or a "command" a reasonable person, fully apprised of the dangerous nature of police work, would appreciate the precautionary purpose of such an instruction without feeling that he or she was thereafter under the officer's control.[63] This is a common instruction whose purpose can be readily understood to be limited to ensuring officer and public safety.[64] Police officers should not be asked to compromise their safety by foregoing this

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[57] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record*, v. I, p. 53

[58] *R. v. Lawrence, supra*, at 61

[59] *Reasons on Charter Application (Ontario Court of Justice)*, *Appellant's Record*, v. I, pp. 13, 17, 20-21, 26

[60] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record*, v. I, pp. 51, 53

[61] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paras. 8-9; *R. v. Mann*, *supra,* at para. 49; *R. v. Clark*, [2005] 1 S.C.R. 6 at para. 9*; R. v. Beaudry*, [2007] S.C.J. No. 5 at paras. 4, 27-28, 33, 61-63 *per* Charron J.and para. 98 *per* Fish J.A. (dissenting)

[62] *Cst. Gomes*, *Appellant's Record*, v. II, p. 207, l. 20 - p. 208, l. 6; p. 234, l. 12 - p. 235, l. 10

[63] *R. v. Mann, supra*, at para. 43

[64] See, for example, *R. v. Clayton and Farmer*, [2007] S.C.J. No. 32 at para. 10; *R. v. H.(C.R.), supra*, at paras. 4, 50; and *R. v. Harris, supra*, at para. 101 *per* O'Connor A.C.J.O. (dissenting).

minimally intrusive instruction out of fear that a reviewing court will later deem that it created a detention.[65]

47. The Court of Appeal also found the positioning of the officers to be a significant factor in deciding that the appellant was detained.[66] On Justice Laskin's view of the evidence, although the police did not take physical control of the appellant they positioned themselves so as to block his progress and, indeed, moved in unison with him to prevent passage up the street. With Cst. Worrell and Cst. Forde standing behind Cst. Gomes, the police were said to have "effectively formed a small phalanx blocking the path in which the appellant was walking". In this manner, "the officers exerted control over the appellant's movement throughout the encounter".[67]

48. Unlike the Court of Appeal, the trial judge did not find that the officers took control over the appellant's movements. Justice Harris noted, instead, that the police did not surround or detain Mr. Grant and that the appellant was free to walk around the officers at any time. These findings are consistent with the evidence of the officers.[68] Cst. Forde, for example, testified that Mr. Grant was not surrounded or boxed in. Moreover, each testified that the appellant was at liberty to leave at any time before he admitted to being in possession of marijuana and that there was room on the sidewalk to do so.[69]

49. Again, the Court of Appeal improperly substituted its view of the evidence for that of the trial judge. This is particularly troubling given the fact that the trial judge had the advantage of watching Cst. Gomes demonstrate how he and the appellant moved during the conversation. Contrary to the

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[65] *R. v. White*, [2007] O.J. No. 1605 at para. 54 (C.A.); *R. v. Ferris* (1998), 126 C.C.C. (3d) 298 at paras. 42-44, 54 (B.C.C.A.), leave to appeal to S.c.C. refused [1998] S.C.C.A. No. 424 ["If the police have the duty to determine whether a person is engaged in crime or is about to engage in crime they should not be obliged to risk bodily harm to do so."] See also *Terry v. Ohio, supra*, at 23-24, 32-33.

[66] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record*, v. I, pp. 51, 53-54

[67] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record*, v. I, pp. 53-54

[68] *Cst. Worrell*, *Appellant's Record*, v. II, p. 114, ll. 20-30; p. 154, l. 10 - p. 156, l. 14; p. 196, l. 28 - p. 199, l. 31; *Cst. Gomes*, *Appellant's Record*, v. II, p. 207, ll. 1-10; p. 208, l. 26 - p. 209, l. 2; p. 248, l. 2 - p. 250, l. 30; *Cst. Forde*, *Appellant's Record*, v. II, p. 261, ll. 16-30; p. 286, l. 22 - p. 292, l. 5; p. 300, ll. 8-20; *Diagram drawn by Cst. Worrell*, *Appellant's Record*, v. II, p. 303

[69] *Cst. Worrell*, *Appellant's Record*, v. II, p. 196, l. 28 - p. 199, l. 31; *Cst. Gomes*, *Appellant's Record*, v. II, p. 208, l. 26 - p. 210, l. 1; p. 248, l. 2 - p. 250, l. 30; *Cst. Forde*, *Appellant's Record*, v. II, p. 286, l. 22 - p. 292, l. 5; p. 300, ll. 8-20; *Reasons on Charter Application (Ontario Court of Justice)*, *Appellant's Record*, v. I, pp. 20-21

Court of Appeal's findings, that demonstration reveals that, rather than mirror the appellant's movement and act as a human barricade, the officer rotated in a circular motion to maintain his relative position to Mr. Grant.[70]

50. Nevertheless, even on the Court of Appeal's version of the events, a psychological detention was not made out. In particular, the Court of Appeal failed to appreciate that the appellant had commenced speaking to Cst. Gomes *before* Cst. Worrell and Cst. Forde decided to join them.[71] It cannot be said, therefore, that the appellant felt compelled to answer the officer's questions because of the presence and positioning of three officers and, indeed, Mr. Grant led no evidence to that effect.

51. The third critical factor that led Laskin J.A. to infer detention was the nature of the questions and answers. In particular, he was critical of the trial judge's characterization of questions that invite incriminating answers as "chit chat".[72] As discussed above, though, appellate courts have repeatedly recognized that the police are entitled to ask such questions and, in the absence of an accompanying "direction or demand", do not thereby create a psychological detention.

52. Moreover, the Court of Appeal's reliance on its characterization of the conversation is another example of the reviewing court's failure to accord proper deference to the findings of fact and factual inferences made by the trial judge. Regardless of how he labelled the discussion, Justice Harris accurately summarized the nature and content of the conversation and appreciated that its purpose was to find out more about the appellant.[73] This included learning whether he might be involved in the swarmings, robberies and drug dealing that was occurring in the neighbourhood. The trial judge was also aware that the tone of the discussion was conversational and non-aggressive.[74]

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[70] *Cst. Gomes*, *Appellant's Record*, v. II, p. 247, l. 20 - p. 250, l. 30

[71] *Cst. Worrell, Appellant's Record,* v. II, p. 113, l. 20 - p. 114, l. 30

[72] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record,* v. I, pp. 51, 54

[73] *Reasons on Charter Application (Ontario Court of Justice)*, *Appellant's Record*, v. I, pp. 7-8, 11-18, 21

[74] *Cst. Worrell*, *Appellant's Record*, v. II, p. 108, l. 7 - p. 113, l. 15; p. 131, l. 25 - p. 142, l. 8; p. 146, l. 12 - p. 149, l. 25; p. 167, l. 3 - p. 169, l. 19; *Cst. Forde*, *Appellant's Record*, v. II, p. 255, l. 24 - p. 257, l. 31; p. 263, l. 24 - p. 264, l. 16; p. 273, l. 7 - p. 282, l. 24; *Cst. Gomes*, *Appellant's Record*, v. II, p. 203, l. 9 - p. 209, l. 7; p. 221, l. 21 - p. 222, l. 16; p. 229, l. 16 - p. 240, l. 27

53. As well, Justice Laskin improperly inferred from the appellant's truthful, incriminating answers that he must have felt compelled to submit to the police.[75] The trial judge, on the other hand, found that the answers were the product of the appellant's own desire to cooperate with the officers.[76] Justice Harris' findings are supported by the evidence and properly recognize that one's conscience (or other personal factors), rather than police coercion, can often be the impetus behind a confession.[77]

54. Accordingly, there was no palpable and overriding error in the trial judge's appreciation of the evidence that would justify interfering with his findings of facts. Moreover, the Court of Appeal incorrectly inferred compulsion from the questions and answers themselves, which led the Court to find a psychological detention in the absence of a "demand or direction".

v) Effect of Court of Appeal's errors

55. The Court of Appeal expressly declined to show deference to the trial judge's ruling on the detention issue because it felt that the factual basis for that ruling was tainted by "mischaracterizations" of the evidence. Unfortunately, the process by which the appellate court identified and acted on those mischaracterizations failed to respect the deference owed to the trial judge on questions of fact or inferences of fact and, in some respects, was itself the product of palpable and overriding error. Had the Court of Appeal not so erred, it would necessarily have paid deference to the trial judge's conclusion that Mr. Grant was not detained and, indeed, may well have agreed with it.[78]

56. In the context of community-based policing, the police have the right and duty to approach any citizen and ask potentially incriminating questions provided those questions are not accompanied by a "direction or demand" to remain or accompany the officer for the purpose of answering. In such

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[75] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record,* v. I, pp. 54-55

[76] *Reasons on Charter Application (Ontario Court of Justice)*, *Appellant's Record*, v. I, pp. 21, 26

[77] *R. v. Singh, supra*, at para. 95 *per* Fish J. (dissenting, but not on this point); *R. v. Sawchyn* (1981), 60 C.C.C. (2d) 200 (Alta.C.A.); *R. v. McKinnon*, [2007] A.J. No. 1347 at paras.143-149 (C.A.); *R. v. Turcotte*, [2005] 2 S.C.R. 519 at paras. 51-52. See also *U.S. v. Mendenhall, supra*, at 555-556, 559.

[78] *R. v. Chaisson*, [2006] 1 S.C.R. 415 at para. 7; *R. v. B.(L.)*, *supra,* at para. 9; *R. v. Vandenbosch,* [2007] M.J. No. 346 at para. 14 (C.A.); *R. v. H.(C.R.)*, *supra*;*R. v. Kang-Brown* (2006), 210 C.C.C. (3d) 317 (B.C.C.A) at paras. 7-13 *per* Côtë J.A and para. 94 *per* Papernay (dissenting); appeal to S.C.C. heard May 22, 2007 and judgment reserved (#31598); *Housen v. Nikolaisen*, *supra*, at paras. 26-36

an encounter, the citizen has the well-established right to refuse to answer but may, out of a sense or moral or social duty, or for other reasons wholly internal to himself or herself, choose to respond. In the absence of a "demand or direction", however, a psychological detention cannot be inferred simply from the questions asked or the answers given.

vi. Section 1: Reasonable limit

57. In the event that this Court finds that the questioning of citizens, in the absence of reasonable grounds to suspect wrongdoing, by a police officer discharging his or her duties pursuant to Ontario's community-based policing model violates s. 9 of the *Charter*, it is submitted that, for the reasons discussed above, this practice is a reasonable limit prescribed by law that is demonstrably justifiably in a free and democratic society.[79] It is only should this Court find that the appellant was arbitrarily detained in a manner not justified under s. 1 that it is strictly necessary to decide the s. 24(2) issue. The importance of that issue, and the need for clarification of this Court's jurisprudence, however, render it desirable that s. 24(2) be addressed regardless of the outcome under s. 9.

Issue 2: Section 24(2)

i. Overview

58. Section 24(2) of the *Charter* has received a remarkable amount of judicial and academic attention. Since 1982 we have struggled to find the parameters for this deceptively simple, yet critically important, remedial provision. Section 24(2) jurisprudence has been intermittently punctuated by this Court's efforts to provide the provision with principles of application consistent with the meaning and purpose of the unique remedial approach adopted. Names like *Collins, Burlingham,* and *Stillman,* to mention but a few, are inextricably linked to its maturing process. In the instant case, we have arrived at another important juncture in the development of this provision. The time has come to assess and, to some extent, reassess the meaning and application of the trial fairness prong of *Collins* and how it relates to the other factors for consideration. In the end, it is the position of the respondent that the flexible approach advocated by Laskin J.A. in the court below is not only right, it is the only tenable position that remains true to the words of the provision, avoids inexplicable ritualistic exclusion of clearly reliable evidence engaging only minor and technical

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[79] *Canadian Charter of Rights and Freedoms*, s. 1; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Orbanski*; *R. v. Elias*, [2005] 2 S.C.R. 3

Charter breaches, and ensures consistency in the approach to the meaning of "trial fairness" throughout the *Charter.*

59. The appellant urges this Court to ignore the obvious deficiencies in the current approach to trial fairness within s.24(2) and, instead, to freeze the provision in time. He attacks the judgment of the Court of Appeal for Ontario, saying that the rejection by Laskin J.A. of a strict, formulaic approach to trial fairness and admissibility under s.24(2) is out of sync with s.7 jurisprudence as it relates to self-incrimination as a principle of fundamental justice. He says that to overtake the automatic exclusionary rule will be to turn s.7 self-incrimination jurisprudence on its head. The appellant's *in terrorem* argument should be rejected as it overstates the principle against self-incrimination within the body of jurisprudence where Mr. Grant seeks to take refuge. Whether the majority *Stillman* judgment set up an automatic exclusionary rule in relation to conscriptive non-discoverable evidence, or whether such a rule has developed through a misunderstanding of the majority judgment, or whether such a rule exists at all, the undeniable fact remains that the post-*Stillman* decade has witnessed the automatic exclusion of a tremendous amount of evidence, which has resulted in a breathtaking number of cases not being decided on their merits. The toll on the public interest has been great indeed, a public interest that is connected to the meaning of a fair trial. It is time to reinforce and, to some extent, resurrect this Court's jurisprudence on s.24(2) that embraces a "delicate and nuanced"[80] approach, taking into account "all of the circumstances" in determining whether the administration of justice will be brought into disrepute by the admission of evidence.

ii. No deference is required

60. While appellate courts should generally show a considerable degree of deference to the trial courts' findings under s.24(2), Laskin J.A. was correct when he noted that he need not defer to the trial judge's admissibility conclusion in this case.[81] After all, the s. 24(2) comments were, strictly speaking, *obiter,* and were based on unarticulated, hypothetical *Charter* breaches which, in all likelihood, did not mirror the s.9 breach ultimately found by the Court of Appeal. The trial judge's

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[80] *R. v. Orbanski,supra, per* LeBel J. at para. 94

[81] *R. v. Buhay*, [2003] 1 S.C.R. 631 *per* Arbour J. at paras. 42-48; *R. v. Mann*, *supra, per* Iacobucci J. at para. 59; *R. v. Belnavis,* [1997] 3 S.C.R. 341 *per* Cory J. at para. 35; *R. v. Duguay,* [1989] 1 S.C.R. 93 *per* Dickson C.J.C. at p. 98; *R. v. Chaisson*, [2006] 1 S.C.R. 415 *per* Fish J. at para. 7

seriously truncated s.24(2) analysis cannot have taken into account the exact nature and seriousness of the breach eventually found by the Court of Appeal.[82]

iii. Did *Stillman* create an automatic exclusionary rule?

61. This is a difficult question to answer. There can be no doubt that prior to *Stillman,*[83] this Court's s.24(2) jurisprudence was already concerned with the link between self-incriminating evidence and the fair trial prong of *Collins*.[84] No one disputes this link: not the court below and not the respondent on appeal. What is in dispute in this appeal is whether the admission of conscriptive or derivative conscriptive evidence will necessarily result in an unfair trial requiring exclusion without regard to "all the circumstances" surrounding the *Charter* breach and the effect of admission on the repute of the administration of justice.[85]

62. The *pre-Stillman* jurisprudence from this Court was faithful to all of the *Collins* factors, even where evidence was of a self-incriminating quality. While the intersection of that evidence with the trial fairness prong of *Collins* often weighed heavily in the balance, this Court, for the most part,[86] did not lose sight of the need to balance. This is perhaps best captured by McLachlin J. (as she then was) in *Hebert,* where she held: "I should not be taken as suggesting that violation of an accused's

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[82]*Reasons for Judgment on Section 24(2),* Ontario Court of Justice, *Appellant's Record*, Vol. I, pp. 27-28. *Reasons for Judgment of the Court of Appeal for Ontario*, *Appellant's Record*, Vol. I, p. 59, paras. 40-42.

[83]*R. v. Stillman*, [1997] 1 S.C.R. 607

[84]*R. v. Bartle*, [1994] 3 S.C.R. 173 *per* Lamer C.J. at pp. 218-19; *R. v. Burlingham*, [1995] 2 S.C.R. 206 *per* Iacobucci J. at pp. 233-34, 239-40; *R. v. Collins, supra, per* Lamer J. (as he then was) at pp. 284-85; *R. v. Broyles,* [1991] 3 S.C.R. 595 *per* Iacobucci J. at pp. 617-18; *R. v. Hebert*, [1990] 2 S.C.R. 151 *per* McLachlin J. (as she then was) at pp. 182-83, 188-89; *R. v. Elshaw*, [1991] 3 S.C.R. 24 *per* Iacobucci J. at pp. 45-46; *R. v. Ross,* [1989] 1 S.C.R. 3 *per* Lamer J. (as he then was) at pp. 16-17; *R. v. Black,* [1989] 2 S.C.R. 138 *per* Wilson J. at pp. 159 -60; *R. v. Manninen*, [1987] 1 S.C.R. 1233 *per* Lamer J. (as he then was) at p. 1246; *R. v. Evans*, [1991] 1 S.C.R. 869 *per* McLachlin J. (as she then was) at pp. 896-98; *R. v. Smith,* [1991] 1 S.C.R. 714 *per* McLachlin J. (as she then was) at pp. 731-32; *R. v. Colarusso*, [1994] 1 S.C.R. 20 *per* LaForest J. at paras. 112-15; *R. v. Dersch*, [1993] 3 S.C.R. 768 *per* Major J. at paras. 28-29; *R. v. Pohoretsky,* [1987] 1 S.C.R. 945 *per* Lamer J. (as he then was) at paras 4-5; *R. v. Borden*, [1994] 3 S.C.R. 145 *per* Iacobucci J. at paras. 46-53

[85]At times in this factum the respondent refers to "concriptive evidence". It is done for ease of reference and should be read as a reference to non-discoverable conscriptive and derivative conscriptive evidence.

[86]It is acknowledged that the following cases, while adverting to all of the *Collins* factors, contain *dicta* that foreshadowed the result in *Stillman: R. v. Hebert, supra, per* Sopinka J. in his concurring judgment and *obiter dicta* at p. 207; *R. v. Elshaw, supra, per* Iacobucci J. at p. 45*; R. v. Broyles, supra, per* Iacobucci J. at p. 619*; R. v. Mellenthin,* [1992] 3 S.C.R. 615, *per* Cory J. at p. 629; *R. v. Burlingham, supra, per* Iacobucci J. at para. 29

right to silence under s.7 automatically means that the evidence must be excluded under s.24(2)."[87] Prior to *Stillman* there were examples of cases where clearly non-discoverable conscriptive evidence gathered in the context of a *Charter* breach was admitted under s.24(2).[88]

63. In the eyes of many, the jurisprudence took a significant turn in *Stillman.* The majority developed a pigeon-hole approach to conscriptive and non-conscriptive evidence to determine whether a trial would be rendered unfair by its admission. Conscriptive evidence was defined by Cory J. as arising out of situations where the police "compelled the accused to participate in providing self-incriminating evidence",[89] "by means of a statement, the use of the body or the production of bodily samples".[90] The following three passages in *Stillman* have caused considerable and understandable angst about an automatic or near automatic exclusionary rule for conscriptive evidence:

- "... in situations where the evidence would not have been discovered in the absence of the conscription of the accused in violation of the *Charter,* its admission would render the trial unfair. In those circumstances it is not necessary to consider the seriousness of the violation or the repute of the administration of justice since a finding that the admission of the evidence would render the trial unfair indicates that the administration of justice would necessarily be brought into disrepute if the evidence were not excluded under s.24(2)". [para. 110]

- "... where the conscriptive evidence would not have been discovered in the absence of the unlawful conscription of the accused, its admission would generally tend to render the trial unfair. In those circumstances it is not necessary to consider the seriousness of the violation, or the repute of the administration of justice, as 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 ...". [para. 118]

- "If the evidence is conscriptive evidence [and not discoverable] then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence

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[87] *R. v. Hebert, supra,* at p. 188. Despite finding that the admission of Mr. Hebert's statement would render his trial unfair, McLachlin J. still went on to consider the seriousness of the breach and whether the effect of the admission of the evidence would bring the administration of justice into disrepute. Similarly, in *R. v. Strachan,* [1988] 2 S.C.R. 980 at p. 1008, Dickson C.J. concluded: "Not every breach of the right to counsel will result in the exclusion of evidence." See, as well, all of the cases cited in footnote 84, *supra,* involving conscriptive evidence, but engaging a full *Collins* analysis.

[88] *R. v. Dewald,* [1996] 1 S.C.R 68; *R. v. Mohl*, [1989] 1 S.C.R. 1389; *R. v. Tremblay*, [1987] 2 S.C.R 435

[89] *R. v. Stillman, supra, per* Cory J. at para. 70. See the repeated reference to "compelled" evidence throughout the majority judgment, including paras. 73, 75, 77, 78, 80, 81, 82, 84, 86, 88, 89, 93, 98, 103, 113, 114, 118, 119, 120.

[90] *R. v. Stillman, supra, per* Cory J. at para. 80.

> without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice." [para. 119]

These passages reveal a rigid exclusionary approach that can be distilled as follows: admission of non-discoverable conscriptive and derivative conscriptive evidence equals unfair trial equals exclusion.[91] There can be no doubt that the majority judgment has been interpreted by many as a virtually automatic exclusionary rule. In support of this observation, one need look no further than the strong dissenting judgments of McLachlin J. (as she then was) and L'Heureux-Dubé J. in *Stillman.* In fact, McLachlin J. referred to the majority position as setting up an "automatic exclusionary rule for evidence affecting trial fairness".[92] (As will be discussed below, McLachlin J.'s central criticism of the majority judgment was that it never came to grips with the critical distinction between the admission of conscriptive evidence that may cause some unfairness within a trial and the admission of conscriptive evidence that would result in an unfair trial.)[93] Many subsequent judgments, including those of this Court, have interpreted the rule as one of automatic exclusion.[94]

64. The year following the release of *Stillman*, Cory J., writing extra-judicially, added to the view that *Stillman* was intended as a virtually automatic rule of exclusion for conscriptive evidence: "If the conscriptive evidence was not discoverable, its admission will render the trial unfair. It fails the first branch of the *Collins* test and must be excluded without reference to the other *Collins* factors."[95] Without a doubt, the academic community was and remains of the view that *Stillman* set up an automatic exclusionary rule for conscriptive evidence and has directed repeated and trenchant

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[91]Despite this seemingly rigid approach, Cory J. does make reference to the "general" rule of exclusion in other parts of the majority judgment, potentially admitting of a more flexible approach. See, for instance, paras. 73, 80, 90, 92, 93, 98. While it is not clear what this "general" exclusion language was intended to accommodate, taken in context, it likely referred to the admissibility of otherwise discoverable conscriptive evidence or evidence constituting a "rare exception" for a "merely technical or minimal violation". [see para. 90] Importantly, this is how the appellant reads the "general exclusion" language. (See para. 15 appellant's factum.)

[92]*R. v. Stillman, supra, per* McLachlin J. at para. 234

[93]*R. v. Stillman, supra, per* McLachlin J. at para. 250

[94]See for instance: *R. v. M.R.M.,* [1998] 3 S.C.R. 393 *per* Major J. in dissent at paras. 86-90; *R. v. Cook,* [1998] 2 S.C.R. 597 *per* Cory and Iacobucci JJ. at paras. 67-72; *R. v. Feeney,* [1997] 2 S.C.R. 13*, per* Sopinka J. at paras. 71-72; *D.P. v. Wagg* (2004), 184 C.C.C. (3d) 321 (Ont. C.A.) *per* Rosenberg J.A. at p. 346; *R. v. Dolynchuk* (2004), 184 C.C.C. (3d) 214 (Man. C.A.), leave dismissed [2004] S.C.C.A. No. 271; *R. v. Roy* (1997), 117 C.C.C. (3d) 243 (Que. C.A.) *R. v. Witts* (1998), 124 C.C.C. (3d) 410 (Man. C.A.); *R. v. Schaeffer* (2005), 194 C.C.C. (3d) 517 (Sask. C.A.)

[95]Peter Cory, "*General Principles of Charter Exclusion (Exclusion of Conscriptive and Non-Conscriptive Evidence*", (1998) 47 U.N.B.L.J. 229 at pp. 234-39

criticism its way.[96] As noted by Professor David Paciocco, the exclusionary rule has had a tremendous impact in the "impaired driving area where it has upended thousands of cases that once would have been routine convictions".[97] Professor Don Stuart has referred to the "mountain of case law" excluding entirely reliable and voluntary confessions for s.10(b) violations.[98]

65. In recent years, though, this Court has made reference to the fact that there exists no automatic exclusionary rule and that all *Collins* factors must be considered in each case. Of particular note are *Buhay* and *Mann,* where this observation has been made in the context of non-conscriptive evidence.[99] In the wake of these judgments, one was left to ponder their application to cases involving conscriptive evidence. Then along came the concurring judgment of LeBel J., joined by Fish J., in *Orbanski,*[100] which confirmed there is no automatic exclusionary rule in the context of a case involving clearly non-discoverable conscriptive evidence. LeBel J. observed that while this Court has remained cognizant of the importance of the "nature of the evidence" in issue and the impact of the admission of that evidence on the fairness of the trial, it "has not suggested that the presence of conscriptive evidence that has been obtained illegally is always the end of the matter and that the other stages and factors of the process become irrelevant". According to LeBel J., the same balancing process applies to both conscriptive and non-conscriptive evidence:

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[96]See for instance: David M. Paciocco, *"Stillman, Disproportion and the Fair Trial Dichotomy under Section 24(2)"* (1997), 2 Can. Crim. L. Rev. 163; Carol A. Brewer, *"Stillman and Section 24(2): Much To-Do about Nothing"* (1997), 2 Can. Crim. L.R. 240; Peter Sankoff, *"Rewriting the Charter of Rights and Freedoms: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process*", Jamie Cameron and James Stribopoulos eds., The Charter and Criminal Justice: Twenty-Five Years Later (LexisNexis: Toronto, 2008) forthcoming; also forthcoming in 40 or 41 S.C.L.R.; Don Stuart, *"Eight Plus Twenty-Four Two Equals Zero"* (1998), 13 C.R. (5th) 50 at pp. 50-51; Steven Penney, *"What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination law in the Post-Charter Era, Part II: Self-Incrimination in Police Investigations"*, [2004] 48 C.L.Q. 281

[97]David Paciocco, *"Charter Tracks: twenty-five years of constitutional influence on the criminal trial process and rules of evidence",* Jamie Cameron and James Stribopoulos eds., The Charter and Criminal Justice: Twenty-Five Years Later (LexisNexis: Toronto, 2008) forthcoming; also forthcoming in 40 or 41 S.C.L.R. (p. 1 of unpublished article)

[98]Don Stuart, "*Charter Standards for Investigative Powers: Have the Courts Got the Balance Right?",* Jamie Cameron and James Stribopoulos eds., The Charter and Criminal Justice: Twenty-Five Years Later (LexisNexis: Toronto, 2008) forthcoming; also forthcoming in 40 or 41 S.C.L.R. (p. 50 of unpublished article)

[99]*R. v. Buhay*, [2003] 1 S.C.R. 631 *per* Arbour J. at para. 71; *R. v. Mann, supra, per* Iacobucci J. at para. 57. See also: *R. v. Law,* [2002] 1 S.C.R. 227 *per* Bastarache J. at para. 33*; R. v. Fliss,*[2002] 1 S.C.R. 535 *per* Binnie J. at paras. 73-76.

[100]*R. v. Orbanski*, *supra*. The majority of this Court did not address the s.24(2) issue as the common law rule in question was saved by the application of s.1 of the *Charter.*

> ... the process amounts to finding a proper balance between competing interests and values at stake in the criminal trial, between the search for truth and the integrity of the trial .... All of the *Collins* factors remain relevant throughout this delicate and nuanced inquiry.[101]

The Attorney General for Ontario agrees.

66. In the end, whether the *Stillman* majority set up a broad automatic exclusionary rule or not, the time has most certainly come for clarification.[102] In seeking that clarification, the Attorney General for Ontario says that if *Stillman* stands for an automatic exclusionary rule for non-discoverable conscriptive and derivative conscriptive evidence, this Court should, with the greatest of respect, overturn that jurisprudence. Not only is the rule out of step with the meaning and intent of s.24(2) of the *Charter,* but it is out of step with the principle against self-incrimination and the meaning of a fair trial. While the respondent acknowledges that this Court should not depart from precedent unless there are compelling reasons to do so, if an automatic exclusionary rule exists, there are exceptionally compelling reasons to depart from the rule, so that s.24(2) may be permitted to operate in the manner it was intended.[103] Bearing in mind that *Charter* jurisprudence is intended to grow and evolve over time, like a "living tree", this Court should not take up the appellant's invitation to shy away from the important task at hand.[104]

iv. Using self-incriminating evidence

a) Overview

67. The appellant argues that the automatic exclusionary rule under s.24(2) is consistent with this Court's approach to the principle against self-incrimination under s.7 of the *Charter* as it relates to lawfully compelled conscriptive evidence. He says that to breathe discretion into the trial fairness prong of *Collins*, as it relates to the admissibility of conscriptive evidence, will "hopelessly" undermine s.7 self-incrimination law.[105] The appellant's argument overstates this body of

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[101] *R. v. Orbanski, supra, per* LeBel J. at paras. 93-94.

[102] For ease of reference, when the respondent refers to the automatic rule of exclusion, it does so with the foregoing discussion in mind.

[103] *R. v. Henry,* [2005] 3 S.C.R. 609 *per* Binnie J. at para. 44; *R. v. Salituro,* [1991] 3 S.C.R. 654 *per* Iacobucci J. at paras. 26-37

[104] *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 S.C.R. 486 *per* Lamer J. (as he then was) at p. 509; *Hislop v. Canada (A.G.)*, 1 S.C.R. 429 *per* Bastarache J. at para. 144; *Gosselin v. Quebec (A.G.),* [2002] 4 S.C.R. 429 *per* McLachlin C.J. at para. 82; *Hunter v. Southam,* [1984] 2 S.C.R. 145 *per* Dickson J. (as he then was) at p. 155

[105] Appellant's factum, paras. 25, 27, 34

jurisprudence by ignoring the fundamentally different context in which it operates. The principle against self-incrimination is contextually sensitive and informed by rationales that, interestingly, dovetail with Laskin J.A.'s reasons in the court below. When the genealogy of the rule is explored, it actually supports the flexible approach advocated by the Court of Appeal for Ontario, an approach that nicely co-exists with the meaning and purpose of s.24(2) of the *Charter.*

b) Rejecting the appellant's plea to stay focussed on testimonial evidence

68. The appellant says that because the handgun at issue in this case is derivative to a statement – what he calls "testimonial" evidence – this court should only assess the s.24(2) trial fairness issue against this type of evidence and leave non-testimonial conscriptive evidence (emanations from the body and the use of the body) to another day. Leaving aside the incorrect characterization of a statement as "testimonial" evidence, this bifurcated approach to this critical s.24(2) issue should be rejected. The very case that set up the exclusionary rule under scrutiny in this appeal, *Stillman,* was a case about the admission of bodily substances, yet extended its reach to statements. In the circumstances, it would not be without some irony if this Court felt constrained in this case to limit its reach to statements.

69. In order to understand the principle against self-incrimination, it is necessary to assess the entire principle, in all its permutations. It is only by gaining insight into the scope and meaning of the principle as a whole that we can begin to understand its full relationship to trial fairness. The appellant's invitation to assess only one aspect of self-incrimination would result in a distorted analysis and cause further confusion about the application of s.24(2) in trial courts throughout the country. Guidance is needed on all forms of conscriptive evidence and there is no reason that this case cannot offer that guidance.

c) Context is everything

70. To state the obvious, there is nothing inherently wrong with the state using self-incriminating evidence. It happens all the time, from voluntary statements[106] to voluntary sworn evidence[107] to abandoned DNA.[108] This type of evidence constitutes a mainstay of many criminal prosecutions.

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[106] *R. v. Rothman,* [1981] 1 S.C.R. 640 at p. 644; *Ibrahim v. The King,* [1914] A.C. 599 (P.C.); *R. v. Oickle,* [2000] 2 S.C.R. 3

[107] *R. v. Henry*, [2005] 3 S.C.R. 609.

[108] *R. v. Stillman, supra, per* Cory J. at para. 62

Moreover, there is nothing wrong with the state collecting and using compelled self-incriminating evidence in some circumstances. DNA, blood and breath samples, and fingerprints[109] are but a few examples. To be clear, then, using an accused as a non-compelled source of evidence will not offend the principle against self-incrimination and using the accused as a compelled source of evidence will be, in some circumstances, permitted.[110]

71. There is no magical point at which the admission of conscriptive evidence in a criminal proceeding will suddenly create an unfair trial. The appellant's treatment of the principle against self-incrimination like a monolithic, impenetrable right that applies equally across *Charter* provisions, substantive and remedial alike, ignores the underlying contextual premise and rationales for the rule.

72. In determining what state conduct will offend the protection provided by the principle against self-incrimination, a "contextually sensitive"[111] analysis must be engaged. This Court has recognized that the principle against self-incrimination is of "limited scope"[112] and demands "different things at different times and in different contexts".[113] In finding the scope of the right in any given context, the court must always begin "on the ground" to determine whether the principle against self-incrimination is engaged in a particular case.[114] To be sure, it is not an "absolute"[115] rule and there exists no "free-standing right against self-incrimination".[116]

73. Importantly, in *White,* Iacobucci J. made the following observation that has direct application to this case:

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[109]*Criminal Code*, ss. 487.05, 256, 254, and s. 2 *Identification of Criminals Act,* R.S.C. 1985, c. I-1

[110]This observation is made by David Paciocco in *"Stillman, Disproportion and the Fair Trial Dichotomy", supra,* at p. 169

[111]*R. v. White*, [1999] 2 S.C.R. 417 *per* Iacobucci J. at para. 45; *R. v. S.(R.J.),* [1995] 1 S.C.R. 451 *per* Iacobucci J. at paras. 96-100

[112]*R. v. B.(S.A.),* [2003] 2 S.C.R. 678 *per* Arbour J. at para. 57

[113]*R. v. S.(R.J.), supra, per* Iacobucci J. at paras. 107-8; *R. v. B.(S.A.), supra, per* Arbour J. at para. 34

[114]*R. v. Fitzpatrick,* [1995] 4 S.C.R. 154 *per* La Forest J. at paras. 21-25; *R. v. White, supra, per* Iacobucci J. at para. 46

[115]*R. v. Jarvis,* [2002] 3 S.C.R. 757 *per* Iacobucci and Major JJ. at paras. 67-68; *R. v. Fitzpatrick, supra, per* LaForest J. at paras. 21-22; *R. v. White*, *supra, per* Iacobucci J. at para. 45

[116]*R. v. Fitzpatrick, supra, per* LaForest J. at para. 21-25; *R. v. S.(R.J.), supra, per* Iacobucci J. at paras. 96-100; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),* [1990] 1 S.C.R. 425 *per* La Forest J. at p. 538

> It is the balancing of principles that occurs under s.7 of the *Charter* that lends significance to a given factual context in determining whether the principle against self-incrimination has been violated. In some contexts, the factors that favour the importance of the search for truth will outweigh the factors that favour protecting the individual against undue compulsion by the state. This was the case, for example, in *Fitzpatrick, supra,* where the Court emphasized the relative absence of true state coercion, and the necessity of acquiring statements in order to maintain the integrity of an entire regulatory regime. In other contexts, a reverse situation will arise, as was the case, for example, in *Thomson Newspapers, supra, S.(R.J.), supra,* and *Branch, supra.* In every case, the facts must be closely examined to determine whether the principle against self-incrimination has truly been brought into play by the production or use of the declarant's statement.[117]

74. The appellant's argument ignores the need for a contextual analysis designed to identify when the principle against self-incrimination will be offended by the admission of evidence in any given case. He attempts to analogize the myriad circumstances giving rise to *Charter* breaches at issue in the s.24(2) context, with cases that involve rigid and clear statutory and common law rules permitting specific and, oftentimes, extreme forms of prior approved compulsion. In the end, the cases the appellant cites in support of his position – that lawful conscription translates into automatic exclusion and, therefore, unlawful conscription should translate into automatic exclusion – represent policy driven decisions that do not apply to the s.24(2) environment.[118] They do not support the proposition that all self-incriminating evidence is so dirty, so tainted, so bad, that it holds a unique position that sets it apart from other forms of unlawfully obtained evidence and eclipses the meaning and purpose of s.24(2). Rather, these cases represent this Court's best efforts to balance competing and important principles of fundamental justice and provide a *quid pro quo* in return for a court approved breach of the principle against self-incrimination.[119]

75. There is a world of difference between this body of jurisprudence and the type of conscriptive evidence that may arise in the context of a *Charter* breach. In the case of *S.(R.J.),* for instance, this Court authorized the Crown to subpoena a separately indicted co-accused to testify at his accomplice's trial about the very events he was facing criminal charges on in another proceeding. Of course, a failure to comply with a subpoena comes at substantial risk to the witness, not to

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[117] *R. v. White, supra, per* Iacobucci J. at para. 48

[118] It is noted that this, in and of itself, is an overstatement. As this Court concluded at para. 198 of *R. v. S. (R.J.), supra*, there is no rule of automatic exclusion in relation to derivative conscriptive evidence.

[119] *R. v. S.(R.J.), supra, per* Iacobucci J. at para. 165-66; *Thomson Newspapers Ltd. v. Canada,* [1990] 1 S.C.R. 425; *British Columbia Securities Comm'n v. Branch,* [1995] 2 S.C.R. 3; *Phillips v. Nova Scotia (Westray Mine Inquiry),* [1995] 2 S.C.R. 97; *Re Application under s.83.28 of the Criminal Code,* [2004] 2 S.C.R. 248; *R. v White, supra*.

mention that a failure to tell the truth exposes the witness to a prosecution for perjury.[120] The s.7 issues in this context are writ large. One can understand how a majority of this Court arrived at the conclusion that if it was going to pre-approve this form of extreme state compulsion, and force an accused to testify about the crime he was about to be tried for, trial fairness demanded that there had to be a meaningful *quid pro quo* in return: general exclusion of his testimony and evidence derivative to his testimony.

76. Contrast that situation with the case at hand. The appellant was approached on the street by officers and asked whether he had anything on him he shouldn't. To juxtapose the two scenarios is to make the point. There is a significant difference between the lawful compulsion in exchange for protection in the cases relied on by the appellant and the innumerable types of interactions between the state and a citizen on the street or elsewhere that may lead to the elicitation of conscriptive evidence. Context is everything when it comes to the principle against self-incrimination. Section 24(2) applications are uniquely designed to explore that context, yet the automatic exclusionary rule precludes such an assessment.

77. Moreover, s. 24(2) is a remedial provision and not a substantive right. To approach self-incrimination and trial fairness in the robotic manner advocated by the appellant would give s. 24(2) a reach it was never intended to have. It would have the effect of turning the provision into a substantive right. This effect would be entirely out of step with the purpose of the provision. There is nothing in the s. 7 body of jurisprudence relied on by the appellant that precludes a flexible approach to fair trial issues in s. 24(2).

v. In search of the meaning of a "fair trial"

a) Overview

78. All reasonable people agree that unfair trials cannot be countenanced. Unfortunately, like other fundamental principles we all hold so dear, the term "fair trial" cannot be easily defined. The difficulty with the appellant's approach to conscriptive evidence is that it deals with sophisticated principles of fundamental justice, like the right to a fair trial and the principle against self-incrimination, as though they were mathematical equations, devoid of any contextual sensitivity.

[120] A prosecution for perjury is, of course, an exception to the protection offered by s.13 of the *Charter*.

Issues surrounding the admissibility of non-*Charter*-compliant evidence operate on a higher level and demand more.

b) The critical distinction between unfair aspects of a trial and an unfair trial

79. There exists a fundamental distinction between unfair aspects of a trial and an unfair trial. McLachlin J. (as she then was) in her dissenting judgment in *Stillman* best captured this important distinction as follows:

> [the majority judgment] erroneously assumes that anything that affects trial fairness automatically renders the trial so fundamentally unfair that other factors can never outweigh the unfairness, with the result that it becomes unnecessary to consider the other factors.[121]

80. While the admission of conscriptive evidence may, in some circumstances, cause some unfairness within a trial, it does not automatically create an unfair trial.[122] This Court has repeatedly emphasized that the right to a fair trial does not guarantee a perfect trial. Bearing in mind other interests at play, including a strong public interest in having trials decided on their merits, we accept that a constitutionally fair trial may have unfair aspects. The important distinction between some unfairness in a trial and an unfair trial forms the foundation of Justice Laskin's judgment in the court below and is entirely consistent with *Charter* jurisprudence from this Court delineating the scope of the fair trial.[123] An automatic exclusionary rule for non-discoverable conscriptive and derivative conscriptive evidence removes all judicial discretion in assessing degrees of unfairness caused by the admission of the evidence and balancing them against other relevant factors. To say the least, this can lead to highly questionable outcomes that do a disservice to the concept of a fair trial and, ultimately, a disservice to the long term repute of the administration of justice.

81. To underscore how such an inflexible rule can actually do violence to the concept of a fair trial and the repute of the administration of justice, consider the following hypothetical shift in the facts in this case. Laskin J.A. concluded that the handgun in this case was derivative conscriptive evidence because the police learned of its existence from Mr. Grant during what the court concluded

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[121] *R. v. Stillman, supra, per* McLachlin J. at para. 250.

[122] The respondent acknowledges that if the admission of evidence created an environment that could result in an unsafe verdict, then, and only then, would trial fairness, for all practical purposes, eclipse the other *Collins* criteria for consideration. (See McLachlin J. in dissent in *Stillman, supra,* at para. 257) In other words, unsafe verdicts will always bring the administration of justice into disrepute.

[123] *Judgment of the Court of Appeal for Ontario*, *Appellant's Record*, Vol. I, p. 63, para. 52

was an unlawful detention. Now, shift the facts slightly. While unlawfully detaining Mr. Grant, the police ask no questions, but pat him down and find the firearm. Pursuant to *Mann*, the pat-down search would offend s.8 of the *Charter.* Nonetheless, in these circumstances, the firearm would not be conscriptive evidence. It would not be dispositive of trial fairness and would be deserving of a full *Collins* analysis. What would the average citizen say is worse? Police officers asking a few questions, or police officers patting down citizens without any basis? It may be that this does not admit of a certain answer. But, that's the very point of the exercise. The meaning of a fair trial requires a more nuanced approach, directed at more than just a simple categorization of evidence.

82. It is equally troubling to look at the ritualistic approach from the inclusionary side of the coin. How can it be that a breathalyzer sample taken in breach of a s.10(b) right, or a strand of hair taken during a fleeting unlawful detention on the street, can result in a presumptively unfair trial and end the inquiry (and often the trial), yet a strip search done in public or an anal cavity search done without proper grounds or medical assistance can result in a presumptively fair trial, deserving of a full three prong *Collins* analysis? Professor Sankoff notes the following hypothetical:

> The Supreme Court of Canada has long held that a *Charter* violation occurring prior to the taking of a breath sample leads to a conclusion that the sample was conscriptive. Essentially, the accused's participation in breathing into a machine renders the sample unfair. The same result, however, would not occur if science were able to provide a machine that measured the air emanating naturally out of the accused's mouth, simply because breathing is involuntary. Such a sample would in no way be "compelled" and would not affect trial fairness.[124]

Common sense suggests there is something wrong with this approach to a fair trial. With the greatest of respect, it underscores the frailties of assessing trial fairness solely through the lens of conscription (or non-conscription). It underscores the fickle nature of a rule that allows the simple nature of evidence to govern what we will label a fair or unfair proceeding.

c) Meaning of a "fair trial" elsewhere in the *Charter*: Striving for coherence

83. In order to properly assess the impact of admitting conscriptive evidence on a trial proceeding, it is first necessary to gain some insight into the scope and meaning of a fair trial. To be sure, it extends well beyond the interests of the accused. The classic and oft cited statement as to what constitutes a "fair trial" is located in the concurring judgment of McLachlin J. (as she then was) in *Harrer:*

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[124]Peter Sankoff, *"Rewriting the Charter of Rights and Freedoms: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process*", *supra,* at p. 8

> At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R. v. Lyons* [cite omitted]. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.[125]

84. In the majority *Harrer* judgment, La Forest J. was careful to note that broad concepts of "fairness" and "principles of fundamental justice" are not susceptible to "absolute or immutable requirements; these concepts vary with the context in which they are invoked ...". Ultimately, for La Forest J., the goal is to engage a "delicate balancing to achieve a just accommodation between the interests of the individual and those of the state in providing a fair and workable system of justice".[126]

85. There is a significant body of *Charter* jurisprudence, both pre-dating and post-dating *Harrer,* supporting the notion that a host of considerations inform a fair trial. While this body of jurisprudence is grounded primarily in an assessment of evidentiary and procedural rules, it is nonetheless informative on the issue of what constitutes a fair trial. As noted recently by LeBel J. in *Orbanski,* determining what constitutes a fair trial involves a "rich and complex" assessment.[127] Among other things, it is informed by the interests of the accused in making full answer and defence and the interests of society in arriving at the truth. In *Levogiannis,* L'Heureux-Dubé J. held:

> While the objective of the judicial process is the attainment of the truth, as this Court has reiterated in *L.(D.O.), supra,* the principles of fundamental justice require that the criminal process be a fair one. It must enable the trier of fact to "get at the truth and properly and fairly dispose of the case" while at the same time providing the accused with the opportunity to make full defence.[128]

86. In *L.(D.O.),* L'Heureux-Dubé J. specifically noted that a "fair trial must encompass a recognition of society's interests. Our Canadian society has a vested interest in the enforcement of criminal law in a manner that is both fair to the accused and sensitive to the needs of those who

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[125] *R. v. Harrer,* [1995] 3 S.C.R. 562 *per* McLachlin J. at para. 45

[126] *R. v. Harrer, supra, per* La Forest J. at para. 14

[127] *R. v. Orbanski, supra, per* LeBel J. at para. 97

[128] *R. v. Levogiannis*, [1993] 4 S.C.R. 475 at para. 19. See also: *R. v. Seaboyer,* [1991] 2 S.C.R. 577 *per* McLachlin J. at p. 603

participate as witnesses.[129] In *O'Connor,* McLachlin J. (as she then was) made the following apposite remarks:

> ... the *Canadian Charter of Rights and Freedoms* guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair: *R. v. Harrer* [cite omitted]. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice.[130]

87. In *Mills,* McLachlin (as she then was) and Iacobucci JJ. observed that an assessment of the "fairness of the trial process must be made 'from the point of view of fairness in the eyes of the community and the complainant' and not just the accused".[131] An accused does not have a constitutional right to the most perfect trial imaginable or, as La Forest J. put it in *Lyons:* "the most favourable procedures that could possibly be imagined".[132] In *Corbett,* La Forest J., in dissent, but not on this point, held:

> It is true that s.11 of the *Charter* constitutionalizes the right of an accused and not that of the state to a fair trial before an impartial tribunal. But "fairness" implies, and in my view demands, consideration also of the interests of the state as representing the public. Likewise the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser.[133]

88. Trial fairness is not to be measured against the accused's unilateral interests. Such an approach would be entirely out of step with *Charter* jurisprudence that breathes life into this multi-faceted concept. Yet this is the effect of an automatic exclusionary rule that blindly accepts that the admission of conscriptive evidence will result in an unfair trial, without regard to any other factors, not the least of which is how the evidence was compelled by the state and the societal interest in having a trial on the merits. Surely s.24(2) and the trial fairness prong of *Collins* is intended to operate on a more sophisticated level. While the respondent accepts that conscriptive evidence may

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[129] *R. v. L.(D.O.),* [1993] 4 S.C.R. 419 at para. 46

[130] *R. v. O'Connor,* [1995] 4 S.C.R. 411 at p. 517

[131] *R. v. Mills,* [1999] 3 S.C.R. 668 at paras. 72-74. For inset quote see: *R. v. E.(A.W.),* [1993] 3 S.C.R. 155 *per* Cory J. at pp. 198-99

[132] *R. v. Lyons,* [1987] 2 S.C.R. 309 at p. 362. While in a non-*Charter* context, this Court reinforced in *R. v. Latimer,* [2001] 1 S.C.R. 3 at para. 50 that the "benchmark for measuring trial fairness is not perfection".

[133] *R. v. Corbett,* [1988] 1 S.C.R. 670 at p. 745

cause some unfairness within a trial, the task of the court in its s.24(2) analysis must be to properly position the evidence on the fairness line and then balance that criteria with the other *Collins* factors for consideration.

vi. Identifying the impact of admitting conscriptive evidence on the fairness of the trial

a) Overview

89. Not all conscriptive evidence is made the same. Once it is accepted that the categorization of evidence as non-discoverable conscriptive or derivative conscriptive evidence does not automatically result in an unfair trial, bearing in mind all other relevant considerations, the question becomes how to identify the impact of the conscriptive evidence on the fairness of the trial. There is a significant difference between conscriptive evidence arising out of minor or technical intrusions involving little state compulsion and that resulting from more serious intrusions involving extreme forms of compulsion.[134]

90. The respondent suggests that it may be helpful to develop some articulable criteria against which to assess the impact of conscriptive evidence on the fairness question. It is submitted that those criteria can be located in the jurisprudence pertaining to the principle against self-incrimination and its underlying concepts and rationales, an approach that is largely reflected in the judgment of Justice Laskin from the court below.

b) Degrees of compulsion

91. The concept underlying the principle against self-incrimination is that the state should not be permitted to compel a case-to-meet from the accused. As noted in dissent by Lamer C.J. in *Jones,* but later adopted by Iacobucci J. in *S.(R.J.),* state coercion is one of the underlying requirements of self-incrimination. He held:

> Any state action that coerces an individual to furnish evidence against him- or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion ... means the denial of free and informed consent."[135]

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[134]See, for instance, the comments of Rosenberg J.A. in *R. v. Backhouse* (2005), 194 C.C.C. (3d) 1 (Ont. C.A.) at paras. 147-154. While he concluded that the gun shot residue evidence taken from hand washing was non-conscriptive evidence, even if it were conscriptive, it "involved only a very minor intrusion" and did not affect trial fairness. (see para. 153)

[135]*R. v. Jones,* [1994] 2 S.C.R. 229*, per* Lamer C.J. dissenting at p. 249. See also: *R. v. B.(S.A.), supra, per* Arbour J. at para. 59; *R. v. Fitzpatrick, supra, per* La Forest J. at para. 33

While Cory J. in *Stillman* used the term 'conscripted' to describe "the situation where the police have compelled the accused to participate in providing self-incriminating evidence",[136] these words are capable of broad application. As noted by Professor Peter Hogg, the words "conscriptive" and "compelled" can actually be quite misleading in this context and mean nothing more than "evidence obtained in breach of the *Charter* with the participation (which may be voluntary or compulsory) of the accused".[137] As Professor David Tanovich notes:

> In most cases, where the police make a request or demand, either explicitly or implicitly, without complying with constitutional standards, the necessary compulsion will exist. In other cases, where the individual is detained, this alone may suffice to amount to compulsion, even in the absence of an overt demand or request by the police given the psychological forces at play when one is in police custody and the inability of the individual to take control of his or her surroundings.[138]

92. Very few s.24(2) decisions have engaged in a detailed analysis of the term "compelled".[139] The few that have engaged in this analysis have decided that the requirement of "compulsion" is met when the self-incriminating evidence evolves in the context of a *Charter* breach.[140] Indeed, in this case, Laskin J.A. concluded that the "arbitrary detention created the context in which the appellant admitted possession of the loaded revolver" and, as such, the revolver was classified as derivative conscriptive evidence.[141] Note that this conclusion was made in the absence of a s.10(b) breach.

93. Quite clearly, there exists a wide spectrum of compulsion. It can range from polite answers to questions posed on the street in the context of an unlawful detention, to a statement emanating from a violent and lengthy encounter with the police where the accused is unlawfully detained and without the benefit of counsel. It can range from a fleeting request for a saliva sample at the front

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[136] *R. v. Stillman, supra, per* Cory J. at para. 70. See the repeated reference to "compelled" evidence throughout the majority judgment, including paras. 73, 75, 77, 78, 80, 81, 82, 84, 86, 88, 89, 3, 98, 103, 113, 114, 120

[137] Peter Hogg, *Constitutional Law of Canada,* 5th ed. (Toronto: Carswell, 2005) at pp. 239-40

[138] David Tanovich, *Making Sense of the Meaning of Conscriptive Evidence Following Stillman* (1999) 20 C.R. (5th) 233 at p. 234. Black's Law Dictionary defines "compel" as "[t]o cause or bring about by force, threats, or overwhelming pressure". The Oxford Dictionary defines "compel" as "[t]o urge irresistibly, to constrain, oblige, force".

[139] *R. v. Aguirre*, [2006] O.J. No. 5071 (S.C.) *per* Hill J. at para. 236; *R. v. Dolynchuk*, *supra, per* Huband J.A. (dissenting) at paras. 64-72

[140] Don Stuart makes the observation in "*Charter Standards for Investigative Powers: Have the Courts Got the Balance Right?", supra,* at pp. 45-46, that courts too often rely on a very broad interpretation of compulsion. He notes that if statements taken in violation of s.10(b) are voluntary, it is difficult to determine how they can be considered compelled.

[141] *Judgment of the Court of Appeal for Ontario, Appellant's Record*, Vol. I, at p. 62, para. 48

door of an accused's home, where the person is not given sufficient information to provide a constitutionally informed consent, to an officer taking a person by the head and pulling out a number of hairs without any prior attempt to get consent or judicial authorization. As noted by Hill J. in *Aguirre*: there is an "interpretative line of coercion" and placing the police-state interaction on that line may not be a simple task.[142] Yet, it is a task that must be undertaken in order to gain insight into the impact of the admission of the conscriptive evidence on the fairness of the trial.

94. In *Orbanski,* LeBel J. seized on the issue of compulsion. He found that while the evidence in question was conscriptive, it did not adversely impact the fairness of the trial because Mr. Orbanski received some information, albeit incomplete, about his right to refuse to comply. While sufficient to qualify the evidence as conscriptive, the compulsion related to the production of the incriminatory evidence was minimal because Mr. Orbanski was compliant in the face of a technical s. 10(b) breach. While the appellant attempts to distinguish *Orbanski* and distance it from this case, on the basis that LeBel J. concluded the evidence was discoverable,[143] this reading of the judgment is far too narrow. With respect, the respondent reads the concurring *Orbanski* judgment as recognizing the differing degrees of state compulsion and how it can inform the question of trial fairness.[144]

c) Reliability and abuse of state power

95. Another way to assess the impact of non-discoverable conscriptive and derivative conscriptive evidence on the fairness of a trial is to engage the rationales underlying the principle against self-incrimination. This Court has held on a number of prior occasions, that in order to determine the particular requirements of and limits on the principle against self-incrimination, the underlying rationales for the principle must be considered. The two rationales that have been identified by this Court are protecting against unreliable confessions or evidence and protecting against abuse of power by the state.[145] Laskin J.A. considered both of these when assessing trial fairness:

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[142] *R. v. Aguirre*, *supra*, *per* Hill J. at para. 236

[143] Appellant's factum, para. 20

[144] *R. v. Orbanski, supra,* at para. 100

[145] *R. v. B.(S.A.), supra,* Arbour J. at para. 57; *R. v. White, supra, per* Iacobucci J. at paras. 61-66; *R. v. Fitzpatrick, supra, per* La Forest J. at paras. 43-48

> ... before considering the other two *Collins* factors, I will focus on the criteria that might be used to assess the impact on trial fairness resulting from the admission of conscriptive evidence. Although there may be others, two criteria that immediately come to mind are the potential effect of the state's misconduct on the reliability of the evidence, and the nature of the police's conduct that led to the accused's participation in the production or obtaining of evidence.[146]

96. Reliability goes to the very core of trial fairness issues. As noted by McLachlin J. in *Stillman*, there is a "golden thread" that runs through the criminal law: innocent people must not be convicted. If the evidence is so unreliable that it could result in an unsafe verdict then it would cause an unfair trial.[147] Conversely, if evidence is entirely reliable, the exclusion of that evidence could skew the fact finding process, keeping critical information from the trier of fact. This is one of the primary complaints surrounding the automatic exclusionary rule. It serves to automatically exclude, without regard to any other factors, the most reliable evidence that comes before the courts: DNA, breathalyzer, and fingerprint evidence, to mention just a few. As noted in this Court's judgment in *Belnavis*: "the exclusion of reliable evidence essential to the prosecution of a significant criminal charge must, in the long term, have some adverse effect on the administration of justice".[148] Since the Court of Appeal's judgment in this case was released, there has been a discernible sigh of relief from trial courts respecting the ability to exercise some meaningful discretion to admit reliable evidence.[149]

97. In addition to reliability, trial judges may assess the impact of the admission of conscriptive evidence on the fairness of the trial by considering the police conduct used to obtain the subject evidence. Police conduct and abuse of state power in the obtaining of self-incriminating evidence in the course of a *Charter* breach, again, spans a broad spectrum of possible behaviour. Does an

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[146] *Judgment of the Court of Appeal for Ontario, Appellant's Record*, Vol. I, p. 64, para. 54

[147] See McLachlin J. in *Stillman, supra,* at para. 257. As well, it is worthy of note that while the New Zealand Court of Appeal in *R. v. Shaheed,* [2002] 2 N.Z.L.R. 377 (C.A.), when assessing the proper approach to the admissibility of DNA evidence that was the product of an unreasonable search, rejected the conscriptive evidence criteria from *Stillman,* (see paras. 85-102, 145-52), concluding that a trial could not be regarded as unfair by the simple admission of self-incriminating evidence, the Court commented that if evidence would result in an unsafe verdict, it must be excluded on that basis alone.

[148] *R. v. Belnavis,* [1997] 3 S.C.R. 341 *per* Cory J at paras. 45-46, quoting from Doherty J.A.'s judgment in the court below. This factum discusses the third prong of *Collins* later.

[149] See, for instance: *R. v. Davis-Harriot,* [2007] O.J. No. 2481(S.C.) *per* Shaugnessy J. at paras. 53-61; *R. v. Ramage,* [2007] O.J. No. 3450 (S.C.) *per* Sosna J. at paras. 11-30; *R. v. Boeck,* [2007] O.J. No. 1726 (S.C.) *per* Glass J. at paras. 4-26; *R. v. Aguirre, supra*, *per* Hill J. at paras. 221-69; *R. v. Portela,* [2006] A.J. No. 1664 (Q.B.) *per* Moen J. at paras. 31-47

unlawful arrest set the context for the statement or does the deprivation of access to counsel or both? How did the police behave in relation to the accused? Did the police not only deprive the accused of his right to counsel, but also denigrate counsel in the process of a lengthy interview?[150] These are the types of questions that will inevitably inform the degree of the state's abuse of power, if any, in the gathering of evidence and the impact of admitting that evidence on the fairness of the trial.

98. It is, of course, appreciated that these factors for consideration under the trial fairness prong of *Collins* will necessarily overlap with considerations under the other two prongs: seriousness and repute of the administration of justice. This overlap underscores the interrelationship between the various categories and the fluidity of the analysis under s.24(2).

vii. Toward a balanced future

a) Overview

99. To be clear, the Attorney General for Ontario is not before this Court asking for what the appellant describes as a radical re-write of s.24(2) jurisprudence.[151] Nor did the court below engage in a radical re-write of s.24(2) jurisprudence. There is a narrow issue, albeit important one, before the Court in this appeal: how should the courts deal with discoverable conscriptive and derivative conscriptive evidence? In its submissions, the respondent asks for nothing more than a reinforcement of the careful balancing approach deeply ingrained in this Court's prior jurisprudence.

b) A structured discretion

100. Parliament made an explicit choice to include in the *Charter* a remedial provision that walked a line between the American rule of automatic exclusion [152] and the Canadian pre-*Charter* approach favouring inclusion:[153] the language chosen to walk this line: "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". In this Court's seminal judgment in

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[150] *R. v. Burlingham, supra; R. v. Hape,* [2007] S.C.J. No. 26, *per* LeBel J. at paras. 107-109

[151] Appellant's factum, paras. 37-39

[152] It is of some interest to note that, as recently summarized by Scalia J. in *Hudson v. Michigan*, 547 U.S. 586; 126 S.Ct. 2159 (2006), the U.S.S.C. has been steadily moving away from a full exclusionary approach because of its impact on the proper administration of justice. See: James Stribopoulos, *"Lessons From the Pupil: A Canadian Solution to the American Exclusionary Rule* (1999), 22 B.C. Int'l & Comp. L.Rev. 77 for an interesting discussion of the evolution of the rule of exclusion in the United States.

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

Collins, great emphasis was placed on the need to consider "all the circumstances" in determining the impact of the evidence on the repute of the administration of justice.[154] There can be no automatic rule of exclusion because, as Professor David Paciocco notes, it would bring into question the "spirit of the provision, if not [the] very language..." of the provision.[155]

101. McLachlin C.J. got it right in *Stillman* when she said that the wording of s.24(2) supports a "flexible multi-factored approach"[156] which is to be applied on a case-by-case basis regardless of the evidence in issue. The factors for consideration have been broadly grouped into three categories and are well known: effect of the admission of the evidence on the fairness of the trial, seriousness of the violation, and effect of admission on the repute of the administration of justice.[157] No one factor should take priority over another. A hierarchy of factors must be avoided.[158] Ultimately, the accused bears the onus of establishing why it is that the admission of the evidence will, in all the circumstances, harm the administration of justice.

102. The application of this three-pronged inquiry is grounded in judicial discretion and demands the exercise of a "substantial amount of judgment".[159] It requires that the trial judge balance the facts of each individual case,[160] while bearing in mind the interests of the community, the individual accused and the broader interests involving the reputation of the administration of justice. None of the three categories are air tight compartments. Rather, they represent a "structured discretion to assess the impact of the breach of constitutional rights on the obtaining of the evidence in order to determine whether it should be excluded".[161] There will be an inevitable flow of considerations from one category to the next.[162] In the case of conscriptive evidence, for instance, there will necessarily be a consideration of reliability of the evidence as it relates to the fairness of the trial and as it relates

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[154]*R. v. Collins, supra, per* Lamer J. at pp. 283-84

[155]David Paciocco, *The Judicial Repeal of s.24(2) and the Development of the Canadian Exclusionary Rule* (1990), 32 Crim. L.Q. 326 at pp. 354

[156]*R. v. Stillman, supra,* at para. 234

[157]*R. v. Law*, *supra, per* Bastarache J. at para. 33; *R. v. Buhay, supra, per* Arbour J. at paras. 41-42

[158]*R. v. Collins, supra,* at pp. 283-84

[159]*R. v. Buhay, supra, per* Arbour J. at para. 44; *R. v. Harrison*, [2008] O.J. No. 427 (C.A.)

[160]*R. v. Fliss, supra, per* Binnie J. at para. 89

[161]*R. v. Orbanski, supra, per* LeBel J. at para. 90

[162]As noted by the Rt. Hon. Antonio Lamer, *Protecting the Administration of Justice From Disrepute: The Admissibility of Unconstitutionally Obtained Evidence in Canada* (1998), 42 St. Louis U. L.J. 345 at p. 356, "these three sets of factors were intended to operate in a rather fluid way".

to the repute of the administration of justice. As noted by LeBel J. in *Orbanski,* from a practical perspective, there may be times where it is "impossible to divorce the different stages of the analysis given the logical and factual interplay between them in many cases".[163] As noted by McLachlin C.J. in *Hynes,* whether the administration of justice will be brought into disrepute is not a question that can be answered with "scientific precision".[164] Nonetheless, it is one that trial courts are well positioned to assess.

103. In recent years, this Court has demonstrated great confidence in the ability of trial judges to engage in sensitive, factually dense exercises of discretion that admit of no bright-line rules and no easy answers. As noted by Carol Brewer, writing extra-judicially, in *Stillman and Section 24(2): Much To-Do About Nothing*:

> In recent years the Court has specifically disapproved the categorization and pigeon-holing of evidence. A rule-based orientation towards hearsay, similar facts and character evidence has been stripped away and replaced by a discretionary regime, which focuses on balancing probative value against prejudice.[165]

104. The principled approach that has been embraced by this Court over the last number of years demonstrates confidence in the ability of trial judges to engage in difficult balancing exercises, taking into account many different circumstances, and make admissibility rulings that often go to the very heart of a fair trial. In the hearsay context, threshold reliability and necessity requirements are carefully balanced.[166] The principled approach has continued in relation to the admissibility of opinion evidence,[167] voluntariness[168] and bad character evidence.[169]

105. There is no reason to show less confidence in the ability of trial judges to exercise their discretion appropriately when dealing with admissibility under s. 24(2). A full balancing of all factors ensures that technical and minor *Charter* breaches do not result in the exclusion of evidence. At the same time, a full balancing of all factors through the structured discretion provided in *Collins*

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[163] *R. v. Orbanski, supra,* at para. 99

[164] *R. v. Hynes,* [2001] 3 S.C.R. 623 at para. 42

[165] Carol Brewer, *Stillman and Section 24(2): Much To-Do About Nothing, supra,* at p. 242

[166] *R. v. Khan,* [1990] 2 S.C.R. 531; *R. v. Khelawon*, [2006] 2 S.C.R. 787

[167] *R. v. Mohan*, [1994] 2 S.C.R. 9

[168] *R. v. Oickle,* [2000] 2 S.C.R. 3

[169] *R. v. Handy,* [2002] 2 S.C.R. 908

ensures that state actors are held to account, sometimes in the most serious of all prosecutions, for their flagrant violations of constitutional rights.[170] What is important is that the inquiry into the admission of the evidence must reach the last stage so that, as LeBel J. noted in *Orbanski*, "it can be determined whether the admission of the evidence would bring the administration of justice into disrepute".[171] There must be an emphasis on the long-term impact of inclusion and exclusion of evidence on the administration of justice.[172] Ultimately, the provision is designed to safeguard the administration of justice.[173] Only a full balancing of all factors can accomplish this task.

viii. Application to this case

106. Justice Laskin concluded that the handgun was derivative conscriptive evidence. It was seized in the context of a s.9 *Charter* violation. Mr. Grant was approached on the street, in broad daylight. Even if this Court concludes that he was psychologically detained, the officers made no specific demands of Mr. Grant. At the most, they engaged him in conversation. The level of compulsion relating to his acknowledgment of the existence of the firearm was minimal. As correctly noted by Justice Laskin, the firearm was entirely reliable evidence. The police questioning was innocuous and, in the circumstances, quite understandable. As noted by the court below, the impact of the admission of the firearm on the fairness of the trial would have been "at the less serious end of the scale".[174]

107. Some of these same considerations inform the seriousness of the breach. The questioning and detention were brief, Mr. Grant was not physically restrained in any way until after he admitted to having a firearm, there was nothing wilful, flagrant or deliberate about the *Charter* violation,[175] and, as noted by Laskin J.A., it was "close case" as to whether there even was a violation. All of these factors suggest that the violation falls at the less serious end of the scale.

108. Finally, when considering the repute on the administration of justice, the seriousness of this offence must be considered. Mr. Grant had a loaded handgun outside a downtown Toronto school

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[170] *R. v. Feeney, supra, per* Sopinka J., at para. 83

[171] *R. v. Orbanski, supra, per* LeBel J. at para. 94

[172] *R. v. Bartle, supra*, *per* Lamer C.J., at para. 67; *R. v. Matheson*, [1994] 3 S.C.R. 328

[173] *R. v. Orbanski, supra,* at paras. 94-100

[174] *Judgement of the Court of Appeal for Ontario, Appellant's Record*, Vol. I, pp. 64-66, paras. 54-59

[175] *R. v. Fliss, supra; R. v. Buhay, supra; R. v. Kokesch, supra*

during learning hours. In similar circumstances involving a non-conscriptive handgun, Moldaver J.A., recently held:

> This case involves a loaded handgun in the possession of a student on school property. Conduct of that nature is unacceptable without exception. It is something that Canadians will not tolerate. It conjures up images of horror and anguish the likes of which few could have imagined twenty-five years ago when the *Charter* first came to being. Sadly, in recent times, such images have become all too common – children left dead and dying; families overcome by grief and sorrow; communities left reeling in shock and disbelief.[176]

Laskin J.A. correctly considered the seriousness of this offence. Exclusion of the handgun, an entirely reliable piece of evidence, would have brought the prosecution to a halt. The repute of the administration of justice required that this evidence be admitted.

Issue 3: The Meaning of "Transfer" in ss. 84, 99 and 100 of the *Criminal Code*

i. General position of the respondent

109. The appellant suggests that s. 100 of the *Criminal Code* is concerned only with the transferring of possession of a firearm from one person to another. Neither the language of the statute nor the overall legislative scheme supports that position. Instead, the Court of Appeal and the trial judge were correct to give the word "transport" its ordinary meaning, which captures the conduct of the appellant in moving this prohibited firearm from one location to another.[177]

ii. Governing principle of statutory interpretation

110. The starting point for statutory interpretation is that the word in question should be considered in the context in which it is used, "and read in a manner that is consistent with the purpose of the provision and the intention of the legislature". A court should apply the ordinary meaning of a word if that meaning is consistent with the context in which the word is used and the object of the *Act*.[178]

iii. Ordinary meaning of "transport"

111. As Justice Laskin explained, the word "transfer", as used in ss. 99 and 100, is defined in s. 84 to mean, "sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver" [emphasis added]. The ordinary definition of "transport" encompasses the movement of an object

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[176] *R. v. L.B.,* [2007] O.J. No. 3290 (C.A.) at para. 80. See also: *R. v. Clayton,* [2007] S.C.J. No. 32

[177] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record*, v. I, pp. 69-73; *Reasons for Conviction (Ontario Court of Justice)*, *Appellant's Record*, v. I, pp. 29-30

[178] *R. v. Heywood*, [1994] 3 S.C.R. 761 at para. 29; *R. v. Clark, supra*, at paras. 43-46

from one place to another.[179] Accordingly, for the appellant's argument to succeed, he must demonstrate why this ordinary meaning would be inconsistent with Parliament's intention to heavily regulate the possession and movement of prohibited firearms in our communities.

iv. *Firearms Act*: Statutory scheme and purpose

112. Sections 99 and 100 were added to the *Criminal Code* through the *Firearms Act* as part of a comprehensive statutory scheme to promote "public safety through the reduction of the misuse of firearms". In identifying this purpose, this Court identified a number of "mischiefs" the legislation is designed to address, including "the link between guns and violent crime, suicide and accidental deaths". Parliament was motivated by the belief that the availability of firearms increases these threats to public safety.[180] Thus, in the *Firearms Act*, Parliament extended its licensing and registration requirements to "ordinary firearms" to ensure that "only those who prove themselves qualified to hold a licence are permitted to possess firearms of any sort".[181]

113. Gun control laws have existed in Canada since Confederation, and the Alberta Court of Appeal has noted that "the most stringent controls have applied to prohibited firearms".[182] This approach continues in the *Firearms Act* and applies to the handgun found on the appellant, which is a prohibited firearm because of its short barrel length.[183]

114. The possession, transfer and transportation of firearms are extremely curtailed under the *Firearms Act* and the *Criminal Code*, which are inextricably intertwined both in lineage and operation. Thus, s. 93 of the *Code* makes it an offence to possess any firearm at a place not permitted in an authorization or licence or in the *Act*. Sections 99(1), 100(1) and 101(1) of the *Code* create offences in relation to the transfer of firearms in a manner not authorized by the *Act*.[184] The *Act* then creates a system for licensing and authorizations that permit individuals to possess or

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[179] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record*, v. I, p. 70

[180] *Firearms Act*, S.C. 1995, c. 95, s. 139; *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783 at paras. 19-24; aff'g (1998), 128 C.C.C. (3d) 225

[181] *Reference re Firearms Act (Canada)*, *supra*, at paras. 23, 38. The appellant was not licenced to possess any firearm, let alone the prohibited firearm he was carrying: *Affidavit of L.A. MacDonald*, *Exhibit 5, Appellant's Record,* v. II, p. 323.

[182] *Reference re Firearms Act (Canada)*, *supra*, at para. 53; at 128 C.C.C. (3d) 225 at para. 52

[183] *Firearms Report*, *Exhibit 4, Appellant's Record*, v. II, p. 308

[184] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, ss. 91-93, 99-101

transfer firearms in a manner which "would otherwise constitute an offence" under one of these provisions in the *Code*.[185] At the same time, breaching the conditions of a licence or authorization will expose the individual to a charge under the *Act*.[186]

115. It is important to note that the *Act* divides the "transfer" of firearms into two categories – one relating to the transfer of firearms from one person to another, and the second relating to the transportation of firearms from one location to another. Thus, Parliament states that one purpose of the *Act* is:

> 4. ... (b) to authorize, ...
>
> (ii) notably by sections 21 to 34 and 54 to 73, the transfer of or offer to transfer, firearms ... in circumstances that would constitute an offence under subsection 99(1), 100(1) or 101(1) of the *Criminal Code*, ...

116. Section 21 of the *Act* defines "transfer" for the purposes of ss. 22-32 as meaning to "sell, barter or give".[187] Sections 22 to 32 then set out conditions and procedures for the change of ownership of a firearm from one person to another.[188] Sections 33 and 34 similarly set out the conditions for lending a firearm to another person.[189] It can be seen, therefore, that there is cohesion between the *Act* and the *Code* in that the change of possession of a firearm is an offence under the *Code* unless it is done in accordance with a licence or authorization under the *Act*. Moreover, a breach of such a licence or authorization may attract liability under both the *Act* and the *Code*. This cohesion continues with the transportation of firearms.

117. To repeat, s. 4 of the *Act* states that ss. 54 to 73 provide a mechanism for the lawful "transfer" of firearms in circumstances which would otherwise amount to weapons trafficking contrary to ss. 99(1) or 100(1) of the *Code*. It follows, therefore, that the conduct permitted by ss. 54 to 73 would otherwise constitute a "transfer" in the *Code*. Of particular concern is the "transport" of firearms. Pursuant to s. 57, a chief firearms officer may issue an authorization to transport a firearm and may

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[185] *Firearms Act, supra*, ss. 4, 110-111

[186] Section 110 of the *Act* makes it an offence to contravene, without lawful excuse, a condition of a licence, registration certificate or authorization held by the person. This is a hybrid offence punishable by up to 2 years in jail if proceeded with by indictment: s. 111.

[187] Each of these means of transferring a firearm is included in the definition of "transfer" in s. 84 of the *Code*.

[188] This includes compliance with the *Conditions of Transferring Firearms and Other Weapons Regulations*, SOR/98-202.

[189] "Lending" is another form of transfer that is included in s. 84 of the *Code*.

include reasonable conditions designed to protect "the safety of the holder or any other person" (s. 58). Additional provisions govern the procedure for the issuance, revocation and expiration of "authorizations to transport", which are defined in ss. 2 and 19 of the *Act*.

118. Pursuant to s. 19 of the *Act*, an "authorization to transport" prohibited or restricted firearms can only be issued to a person who holds a licence to possess such firearms. That person may then be authorized to "transport a particular prohibited firearm ... *between two or more specified places*". The permissible purposes for transporting the type of prohibited handgun found on the appellant are narrow and include reasons such as target shooting, changing residence, registration or disposal, repair, storage, sale or appraisal, and exhibition at a gun show. The individual licence holder is also bound by *Regulations* which require that a gun in transit be unloaded, inoperable and securely contained.[190] Although Parliament could have made the contravention of these *Regulations* an offence under the *Act*,[191] it chose not to, leaving such conduct to be punished under *Code* provisions such as s. 86 instead.

119. The *Act*, therefore, addresses the transportation of firearms from one location to another. As well, it expressly states that, in the absence of a valid authorization to transport, such transportation constitutes an unlawful "transfer" contrary to ss. 99(1) or 100(1) of the *Code*. It follows, therefore, that by transporting the prohibited firearm from one place to another without an authorization, the appellant was properly convicted under s. 100(1).

v. Appellant's interpretation produces "absurd" result

120. The appellant argues, however, that this interpretation should not be adopted because it leads to the "absurd" result that an otherwise law-abiding licence holder could be prosecuted for a criminal offence under the *Code* rather than for a "regulatory offence" under the *Act* should he or she breach the terms of an authorization. This argument is unsupportable. First, contraventions of both the *Code* and the *Act* are criminal offences, rendering the legislation under which the prosecution occurs inconsequential.[192] Second, although it is true that a licence holder may be liable to prosecution for more than one offence, this is not uncommon in criminal law. Indeed, s. 12 of the *Code* expressly

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[190] *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations*, SOR 98/209, s. 12

[191] See *Act*, s. 117(*o*) and *cf.* section 17 of the *Regulations* which makes it an offence to contravene s. 13 (transportation of replica firearms) but not s. 12 (transportation of prohibited firearms).

[192] *Reference re Firearms Act (Canada)*, *supra*, at para. 58

contemplates that one act might be punished under more than one statute, and the *Kienapple* principle addresses any injustice that might arise from multiple convictions for the same delict.[193] As well, s. 11(*h*) ensures that an individual will not be prosecuted twice for the same offence, regardless of whether one is considered "regulatory" or not.[194] Finally, as explained below, the present case demonstrates the absurdity of the appellant's interpretation.

121. The *Firearms Act* and its *Regulations* ensure that persons who are fit to hold a licence to possess a prohibited firearm do not transport those guns except for limited purposes in accordance with a valid authorization. If the holder of an authorization transports the prohibited firearm from one place to another in contravention of the legislation or the terms of the authorization, he or she is liable to punishment under the *Act* or the *Code*. By contrast, applying the appellant's interpretation, a person who does not hold an authorization to transport a prohibited weapon would not be subject to any similar penalty. The holder of a valid authorization who carries a loaded prohibited firearm down a city street rightly faces prosecution for contravening the *Act* and/or the *Code*. It is absurd to suggest that Parliament, in enacting legislation designed to control the presence of firearms in the community, did not intend to similarly punish those who are unfit, unable or unwilling to obtain an authorization to transport a firearm in the first place.

vi. Drug trafficking ≠ weapons trafficking

122. Finally, the appellant suggests that the word "transport" should be given the same meaning it has in the context of drug trafficking. In dismissing this argument, Justice Laskin correctly indicated that it is premised on the "faulty assumption" that "Parliament intended to treat the possession of firearms and drugs in the same way".[195] As summarized above, Parliament has controlled and penalized the movement of firearms from location to location in a manner not found in drug legislation.[196]

123. Without minimizing the public harm caused by illicit drugs, the danger posed by loaded firearms in the community is undeniable and virtually unparalleled. As this Court noted in *Felawka*,

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[193] *R. v. Kienapple*, [1975] 1 S.C.R. 729; *R. v. Prince*, [1986] 2 S.C.R. 480

[194] *R. v. Wigglesworth*, [1987] 2 S.C.R. 541

[195] *Reasons for Judgment (Court of Appeal for Ontario), Appellant's Record*, v. I, p. 73

[196] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, ss. 2, 4, 5

a "firearm is expressly designed to kill or wound".[197] The *Firearms Act* is intended to address the dangers posed by firearms, and does so by severely constraining their availability and movement. Although Parliament has also enacted stringent drug laws, the fact remains that the transportation of narcotics down a city street does not pose the same risk to public safety as does the transportation of a loaded handgun. Thus, removing even a kilo of cocaine from one's pocket on Yonge Street in Toronto cannot be expected to generate the same panicked response as would removing a loaded .357 Magnum handgun like the one being carried by the appellant. As noted above, the modern reality of handguns was poignantly expressed by Justice Moldaver in *B.(L.)*.[198]

124. It is true that the ordinary meaning of "transport" has not been accepted in the context of drug offences, where the offence of possession is considered sufficient to penalize the act of moving illicit substances from one place to another.[199] But moving drugs from one location to another for personal use does not promote the danger sought to be avoided, namely, the distribution of illicit substances. In the firearms context, however, the danger sought to be avoided is not only the distribution of firearms but also the availability and presence of these inherently dangerous weapons in the community. The interpretation that some appellate courts have given to the word "transport" in relation to drug trafficking cannot, therefore, be expected to govern the use of that term in the context of the new weapons trafficking offences.[200]

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[197] *R. v. Felawka,* [1993] 4 S.C.R. 199 at para. 21 *per* Cory J.; at para. 6 *per* Lamer C.J.C. See also: *Reference re Firearms Act (Canada)*, *supra*, at paras. 21, 40-45["all guns pose a threat to public safety", through violent crime, suicide, and accidental death].

[198] *R. v. B.(L.)*, *supra*, at para. 80; see also *R. v. Clayton and Farmer*, *supra*, at paras. 36, 108-113

[199] It should be noted that this Court has yet to pronounce on whether or not "transport" in the context of drug trafficking includes the movement of drugs from one location to another.

[200] *R. v. Harrington and Scosky*, [1964] 1 C.C.C. 189 at 193-195 (B.C.C.A.); *R. v. Gardiner* (1987), 35 C.C.C. (3d) 461 at 463-465 (Ont.C.A.); *R. v. Binkley* (1982), 69 C.C.C. (2d) 169 at 170-171 (Sask.C.A.);*R. v. Greyeyes* [1997] 2 S.C.R. 825 at paras. 31, 32; *Reference re Firearms Act (Canada)*, *supra*, at paras. 21, 40-45

PART IV:
SUBMISSIONS ON COSTS

125. The Attorney General for Ontario makes no submissions as to costs.

PART V:
ORDER REQUESTED

126. It is respectfully requested that the appeal be dismissed.

ALL OF WHICH is respectfully submitted by

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PART VI:
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PART VII:
STATUTORY PROVISIONS

Statutory provisions are contained in the respondent's authorities.