FILE NO. 32037

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF SASKATCHEWAN)

BETWEEN:

CURTIS SHEPHERD

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

FACTUM OF THE RESPONDENT

Office of the Attorney General for the Province of Saskatchewan
Saskatchewan Justice
Public Prosecutions
300 - 1874 Scarth Street
Regina, Saskatchewan
S4P 4B3
(Solicitor for the Respondent)
PHONE: (306) 787-5490
FAX: (306) 787-8878

Gowling Lafleur Henderson LLP
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
(Ottawa Agent for the Respondent)

PHONE: (613) 232-1781
FAX: (613) 563-9869

Michael W. Owens
Barristers and Solicitor
704 - 224 4th Ave. South
Saskatoon, Saskatchewan
S7K 5M5
(Solicitor for the Appellant)
PHONE: (306) 665-8828
FAX: (306) 665-5519

Gowling Lafleur Henderson LLP
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
(Ottawa Agent for the Appellant)
PHONE: (613) 232-1781
FAX: (613) 563-9869

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PART I

STATEMENT OF FACTS

A. Overview

1. On January 11, 2003, at approximately 3:30 in the morning, a police officer saw the Appellant commit a traffic violation. He activated a siren and several flashing lights in an effort to stop the Appellant. The Appellant did not stop. He led the officer on a pursuit covering a total distance of more than three kilometres. When he finally pulled over, the police officer observed several symptoms of alcohol impairment. Based on the totality of circumstances, the officer honestly believed the Appellant was impaired. The officer made a breath demand pursuant to s. 254(3) of the *Criminal Code*. The Appellant was transported to the police station, consulted with counsel and complied with the demand. The breath test results revealed that his blood alcohol level was more than twice the legal limit.

2. The Appellant applied pursuant to s. 24(2) of the *Charter* to exclude evidence of the breath test results, contending his *Charter* right to be secure from unreasonable search and seizure had been violated. The trial judge allowed the application and excluded the evidence. The trial judge said he was excluding the evidence because he was "not convinced" the officer had reasonable grounds to make a breath demand.

3. The Saskatchewan Court of Appeal ordered a new trial. A majority of the court held that the trial judge committed several legal errors in finding a *Charter* violation. The majority also held that s. 24(2) should not be interpreted or applied to automatically exclude evidence from criminal proceedings.

4. The Appellant submits the Court of Appeal did not have jurisdiction to interfere with what he considers to be a finding of fact and that the Court of Appeal erred in the application of the

appellate standard of review. He also submits that there is a need for predictability such that s. 24(2) should be applied as if it were a general rule of exclusion.

5. The Respondent respectfully disagrees. The Court of Appeal did not exceed its jurisdiction. The facts were never in issue on the appeal. Instead, that court identified several legal errors committed at trial and applied the appropriate legal standard of "correctness". Further, the Respondent submits s. 24(2) is not an automatic or quasi-automatic rule of exclusion and that it is an error to suggest otherwise.

B. Trial in the Provincial Court of Saskatchewan

6. Most of the relevant facts are contained in the dissenting judgment of Smith J.A. which has been reproduced in the Appellant's factum. We adopt that statement of facts and make the following additional observations.

7. The Appellant was charged with three offences: impaired driving (s. 253(a)), driving with a blood alcohol level in excess of the permissible limit (s. 253(b)) and flight from police (s. 249.1). He was found not guilty of all three.

8. The trial was held on October 7, 2003. When it commenced, the Appellant advised the court that he was making a *Charter* application. He submitted the police did not have reasonable grounds to make a breath demand. The court made an *ad hoc* procedural ruling concerning the examination and cross-examination of witnesses to be called on the *Charter* hearing.[1] As a result, the Appellant was not required to present any evidence in support of the application but he was permitted to cross-examine the only witnesses who testified. The Appellant did not call any witnesses and he did not testify in the *Charter* hearing.

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1 *Trial transcript, Appellant's Record, Part IV, pp. 5-7*

9. The Crown called two witnesses. Sgt. Sellers was the police officer who made the breath demand. He was then a twenty year veteran of the Saskatoon Police Service. He has investigated hundreds of impaired driving cases in his career.[2] Sgt. Sellers saw the Appellant disobey a stop sign. The distance between the intersection where the Appellant ran the stop sign and the intersection where the pursuit finally ended was just over three kilometres.[3]

10. After running the stop sign, the Appellant accelerated heavily and was soon exceeding the speed limit by travelling at 80 to 85 km./hr. in a 60 km./hr. zone. Sgt. Sellers activated the siren, the flashing overhead lights and the flashing headlight equipment on the emergency vehicle. The Respondent pulled over and reduced his speed, but not by much. He was still travelling at 60-65 km./hr. in the right hand lane.[4] Then the Appellant moved from the right lane, across the centre lane, and into the left lane. He stopped for a traffic light. Sgt. Sellers was right behind him and the siren and flashing lights were still on. When the light turned green, the Appellant drove his vehicle through the intersection. In doing so, he violated s. 67(8) of the *Highway Traffic Act*.[5] Over the next one and one half kilometres, he violated that law several more times by failing to stop for the emergency vehicle and by failing to stay in the right hand lane. At the same time, he was committing another traffic offence: speeding at 90 km./hr. in a 50 km./hr. zone. He went through at least one controlled intersection at that speed. He committed other traffic offences when he made another sweeping lane change from one side of the road to another without signalling and as he was being pursued.[6]

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2 *Ibid., pp. 6-7*

3 *Ibid., p.17, line 3*

4 *Ibid., pp. 12-13; p. 46, line 13*

5 *Highway Traffic Act, s. 67(8), Respondent's Book of Authorities, Tab 39*

6 *Ibid., pp. 13-16*

11. When the Appellant finally stopped, after making an illegal left turn,[7] Sgt. Sellers told him that he was under arrest for fleeing from police, an offence contrary to s. 249.1 of the *Criminal Code*. The Appellant immediately responded by telling Sgt. Sellers that he thought the police vehicle was an ambulance. He did not provide any other information to Sellers before the breath demand was made. To be clear, the Appellant did not tell Sgt. Sellers why he went through a stop sign, why he was speeding, why he did not simply pull over and stop for the emergency vehicle or why he changed lanes several times.[8]

12. The Appellant's statement of facts, and Justice Smith's summary of the facts, omits an important detail: Sgt. Sellers testified that, in his opinion, the Appellant was intoxicated.[9] The Appellant's statement of facts, and Justice Smith's summary of the facts, also omits reference to Sgt. Sellers' opinion that the Appellant was driving in a "very erratic" fashion and that he thought it would be unsafe to pull up beside the Appellant's vehicle during the pursuit.[10]

13. Constable Horsley arrived on the scene a few minutes later. Sgt. Sellers directed Cst. Horsley to transport the Appellant to the police station. Horsley escorted the Appellant from one police vehicle to another and searched him. He asked the Appellant for his name, date of birth, address and telephone number. Horsley detected a moderate odour of alcohol on the Appellant's breath. The Appellant slurred his words when he answered Cst. Horsley's questions.[11] Shortly thereafter, Sgt. Sellers got into Horsley's vehicle and made a breath demand pursuant to s. 254(3)(a) of the *Criminal Code*. Sgt. Sellers also informed the Appellant of his rights to counsel.[12]

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7 The turn was illegal because it was performed in violation of s. 67(8) of the *Highway Traffic Act*. *See Respondent's Book of Authorities, Tab 39.*

8 *Trial transcript, Appellant's Record, Part IV, p. 21, lines 6-7*

9 *Ibid., p. 21, line 12; p. 22, line 13; p. 41, lines 19-26; p. 42, lines 1-16*

10 *Ibid., p. 42, line 22; p. 64, line 21 to p. 65, line 4*

11 *Ibid., pp. 71-75*

12 *Ibid., pp. 23-24 and 74*

14. Horsley transported the Appellant to the police station. On the way, the Appellant:

> ... blurted out that he wasn't trying to get away from the cops, that he believed that an ambulance was following him, that's why he moved from left to right on the road. And every time he'd pulled over, the vehicle which he believed to be an ambulance would pull in behind him and this freaked him out, and all he wanted to do was get home and that he's not a criminal and that his sister was a cop.[13]

15. Horsley noted other impairment symptoms at the police station. He saw the Appellant walking abnormally when he got out of the police car. He observed the Appellant to have bloodshot, glassy eyes. The Appellant continued to slur his words. Based on his observations of the Appellant at the scene and at the police station, Horsley believed that the Appellant was impaired.[14]

16. The Appellant was afforded a reasonable opportunity to consult with counsel. He spoke to a lawyer of his choice. The police gave him a pen and paper to make notes. The first lawyer apparently suggested that he should call someone else. The Appellant made several calls to another lawyer but no one answered. The Appellant left a message for the lawyer and told the police that he would speak to the lawyer later. He said he did not want to contact anyone else, including Legal Aid duty counsel. Then he complied with the breath demand.[15]

17. At trial, the Appellant made an application pursuant to s. 8 of the *Charter*.[16] In final argument on the *Charter* motion, the Appellant made several questionable assertions of fact and law. For example, he asserted that Sgt. Sellers considered the Appellant's driving actions "to be uneventful in terms of any impairment".[17] That was not a fair or an accurate summary of Sgt. Sellers' opinion. The various and numerous traffic violations and the "erratic driving" were

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13 *Ibid., p. 76, lines 3-11*

14 *Ibid., pp. 77-78 and p. 85, line 24*

15 *Ibid., pp. 79-84*

16 *Ibid., p. 128*

17 *Ibid., p. 130, lines 16-17*

important factors in the officer's opinion. The Appellant suggested that he signalled all of his lane changes.[18] That submission contradicted the undisputed evidence. He asserted there was nothing wrong with the Appellant's driving actions except for speeding.[19] That too contradicted the undisputed evidence. He argued that Sgt. Sellers' opinion the Appellant was intoxicated was not entitled to any weight because it was a "conclusion".[20] He argued that there were no obvious signs of gross impairment, such as weaving within a traffic lane or a staggering walk.[21] He suggested that it was proper to consider the impairment symptoms in a piecemeal fashion rather than considering the impairment symptoms as a whole.[22] He repeatedly asserted that the breath test results should automatically be excluded if the court found a s. 8 violation.[23]

18. Unfortunately, some of those questionable assertions found sanctuary in the trial judge's decision. In that decision, the trial judge misstated the facts when summarizing Sgt. Sellers' testimony. For example, he stated that the Appellant made two lane changes during the pursuit and signalled his intention to do so both times.[24] In fact, the uncontradicted evidence was that the Appellant changed lanes four times, and failed to signal at least once. He also stated that the Appellant did not "swerve" from one lane to another.[25] However, the uncontradicted evidence established the Appellant was driving erratically from one lane to another. The trial judge also failed

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18 *Ibid., p. 131, line 26 to p. 132, line 2*

19 *Ibid., p. 133, line 25*

20 *Ibid., p. 135, line 10*

21 *Ibid., p. 136, line 20*

22 *Ibid., p. 142, line 22-28*

23 *Ibid., p. 121, line 16; p. 142, line 3; and p. 147, line 20*

24 *Appellant's Record, Part II, p. 5, lines 2-8*

25 *Ibid., p. 5, lines 3-4*

to mention that the lane changes were unusual in that the Appellant went from one side of the road to the other at least twice.[26]

19. The trial judge said he would consider the reasonableness of Sgt. Sellers' grounds on the "totality of circumstances known to the officer". Instead, he focussed on something Sgt. Sellers knew nothing about - the plausibility of the Appellant's post-demand statement to Cst. Horsley. He said the Applicant's explanation to Cst. Horsley about why he did not stop and why he made several lane changes during the pursuit was "just as valid" as Sgt. Sellers' belief that the Applicant was impaired. Further, the trial judge thought the post-demand statement was reasonable because it demonstrated compliance with the *Highway Traffic Act* during the pursuit.[27]

20. The trial judge did not say why, considering the facts as a whole, Sgt. Seller's honest belief was unreasonable. He did not instruct himself in accordance with *R. v. Stellato*,[28] except to mistakenly refer to that case as authority for excluding the evidence under s. 24(2). He excluded the breath test results without engaging in any analysis of the legal principles applicable to s. 24(2). He made it perfectly clear that he thought exclusion under s. 24(2) was automatic on a finding of "no reasonable grounds", but he did not explain why that might be so.[29]

21. The Crown applied to have the evidence heard on the *Charter* hearing read into evidence at the trial. The application was granted and the Crown closed its case.[30] The Appellant did not apply for a directed verdict on any of the charges.

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26 *Ibid., p. 5, lines 2-8*

27 *Ibid., pp. 6-7*

28 *R. v. Stellato*, [1994] 2 S.C.R. 478; *Respondent's Book of Authorities, Tab 30*

29 *Appellant's Record, Part II, p. 8*

30 *Respondent's Record, Part III, pp. 2-4*

22. The Appellant called his friend, Doug Romphf, as a defence witness. Mr. Romphf testified the Appellant gave him a ride home from a lounge at 3:30 in the morning. Mr. Romphf lived near the intersection where Sgt. Sellers saw the Appellant run the stop sign. The Appellant and Mr. Romphf had been at a fund-raising event sponsored by their hockey team. Attendees who paid ten dollars were entitled to drink as much alcohol as they could consume in two hours. He did not see how much the Appellant drank but opined that the Appellant was walking, talking and operating the car normally.[31]

23. The Appellant testified that he was at the lounge for eight and one half hours, between 6:30 p.m. and 3:00 in the morning. He consumed no more than two pints of beer and he was not feeling any alcohol-induced effects when he encountered Sgt. Sellers.[32] He pulled over into the right hand lane "the moment" he saw the vehicle with the flashing lights behind him.[33] He did not know it was a police vehicle because he did not have a clear view of it.[34] When the emergency vehicle followed him into the right lane, he thought it was going to make a right hand turn, so he moved into the left lane.[35] When it followed him into the left lane, he thought the vehicle was going to make a left hand turn so he drove back into the right lane. He continued to drive in this manner until he saw that it was a police vehicle as he was making a left hand turn.[36] He knew that he was violating the law by speeding and he realized that he ran a stop sign. Even so, it never occurred to him that the emergency vehicle following him from one lane to another might be a police vehicle.[37]

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31 *Ibid., pp. 4-17*

32 *Ibid., p. 18, line 12*

33 *Ibid., line 22*

34 *Ibid., p. 18, lines 24-26 to p. 19, line 1*

35 *Ibid., p. 19, lines 3-7*

36 *Ibid., p. 19, lines 8-21*

37 *Ibid., p. 39*

24. The trial judge acquitted the Appellant of all three offences. Having already excluded the breath test results, the verdict on the s. 253(b) charge was a foregone conclusion. Concerning the impaired driving charge, he said:

> The explanation as given by the accused, although suspicious under all of the circumstances, does leave a doubt -- a reasonable doubt and there is, in my mind, a reasonable doubt on the whole of the evidence, the third portion of the test in *The Queen v. McKenzie*.[38]

25. *McKenzie* is a Saskatchewan decision that reiterates the principles concerning the relationship between the presumption of innocence and the assessment of an accused person's testimonial credibility. The "third portion" of the *McKenzie* test provides that even if a trier of fact does not believe an accused person's testimony, if it raises a reasonable doubt, there must be an acquittal.[39]

B. The Appeal to the Court of Queen's Bench

26. The Crown appealed the acquittals on the s. 253 charges. The Crown did not appeal the verdict on the s. 249.1 charge. The Crown submitted that the trial judge committed legal error by ruling that the officer did not have reasonable grounds to make a breath demand, by excluding the breath test results and by acquitting the Appellant of impaired driving. The appeals were dismissed.

27. The learned appeal court judge made three significant rulings. He found that the trial judge erred by considering the plausibility of the Appellant's post-demand statement to Cst. Horsley in the assessment of the reasonableness of Sgt. Sellers' grounds. However, he considered the Appellant's pre-demand statement to Sellers to be "identical" to the post-demand statement. Thus, the error did not occasion a "miscarriage of justice".[40] He disagreed with Crown submissions that the trial judge failed to consider all the circumstances. He thought the trial judge had "noted the lack of other

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38 *Ibid., pp.*

39 *R. v. McKenzie* (1996), 141 Sask. R. 221 (Sask. C.A.), *Respondent's Book of Authorities, Tab 22 para. 4*

40 *Appellant's Record, Part II, p. 12, paras. 12-13*

objective evidence of the accused's manner of driving".[41] The appeal court judge also disagreed with the Crown's s. 24(2) submissions. The appeal court judge acknowledged that the trial judge "did not articulate his s. 24(2) analysis in detail", but concluded that the current state of the law made it unnecessary for the trial judge to say anything more than he did.[42]

C. The Appeal to the Saskatchewan Court of Appeal

28. The Crown applied for leave to appeal. On March 14, 2007, the Saskatchewan Court of Appeal, in a majority decision, allowed the appeal and ordered a new trial.

29. Sherstobitoff J.A., for the majority, held that the Appellant's *Charter* rights were not violated. He concluded that the lower court judges committed several legal errors. For example, the trial judge erred by failing to apply the correct legal test to assess reasonableness of the officer's grounds.[43] He found legal error in the trial judge's failure to consider the evidence as a whole. He concluded that the lower courts also misapprehended the evidence and the law.[44] Lane J.A. wrote a separate concurring judgment. He was in substantial agreement with Justice Sherstobitoff, but focussed on the trial judge's error in the interpretation of the *Highway Traffic Act*. He concluded that this error went to the heart of the trial judge's *Charter* finding.[45]

30. The majority judges expressed disagreement with the contention that s. 24(2) should be applied as if it were an automatic rule of exclusion. Mr. Justice Sherstobitoff wrote:

> In a case such as this, where the trial judge found that the officer honestly believed he had reasonable and probable grounds to demand and obtain the breath sample, an

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41 *Ibid., p. 13, para. 16*

42 *Ibid., p.*

43 *Ibid., p. 19, para. 8*

44 *Ibid., p. 19, paras. 11-12*

45 *Ibid., p. 12, para. 21*

> almost automatic exclusion of the result of the breath test would, in my view, bring the administration of justice into disrepute.[46]

31. Smith J.A. wrote a dissenting judgment stating that she would have dismissed the Crown appeal. In Justice Smith's opinion, the Appellant's post-demand statement to Horsley was "implicit" in the pre-demand statement to Sellers.[47] Therefore, in her view, not much turned on the trial judge's obvious error in relying on it. She concluded there was no reason to believe the trial judge applied the wrong test or that he failed to consider all of the facts. Concerning the Crown's argument that the trial judge erred by automatically excluding the evidence, she observed that the trial judge likely intended to refer to *Stillman* [48] instead of *Stellato* as authority for exclusion. Justice Smith, after a helpful and detailed analysis of the law, held that trial judges are not required to undertake a "full analysis" of s. 24(2) principles before excluding an unconstitutionally obtained breath sample.[49]

PART II

POINTS IN ISSUE

32. The Appellant's application for leave set out five issues. They are listed in paragraph 14 of the Appellant's factum. The Appellant has not chosen to present any argument on some of them. The Appellant's argument focusses on two issues. First, he submits that a majority of the Court of Appeal erred in the application of the appellate standard of review. He contends that the trial judge's *Charter* finding is immune to appellate review because it was does not involve a question of law and, in any event, the trial judge's decision was reasonable. Second, the Appellant submits that the trial judge did not err in the application of s. 24(2).

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46 *Ibid., p. 20, para. 14; p. 22, para. 22*

47 *Ibid., p. 25, para. 40*

48 *R. v. Stillman*, [1997] 1 S.C.R. 607, *Respondent's Book of Authorities, Tab 31*

49 *Appellant's Record, Part II, p. 49, para. 118*

33. The Respondent respectfully submits that the Appellant's statement of the points in issue can be reduced to two issues of law:

> Did the majority of the Saskatchewan Court of Appeal err in law by holding that the Appellant's rights under s. 8 of the *Charter* were not infringed?
>
> Did the majority of the Saskatchewan Court of Appeal err by concluding that it is an error to exclude evidence under s. 24(2) of the *Charter* without legal analysis?

PART III

ARGUMENT

Issue One: Did the majority of the Saskatchewan Court of Appeal err in law by holding that the Appellant's rights under s. 8 of the *Charter* were not infringed?

34. Section 254(3)(a) of the *Code* authorizes a peace officer to make a breath demand if the officer honestly believes a suspect has recently committed an offence under s. 253 and that belief is supported by objective or reasonable grounds.[50] A court reviewing the lawfulness of a demand must determine if a reasonable person, standing in the shoes of the police officer, would have believed the suspect's ability to operate a motor vehicle was impaired.[51] The reasonableness of an officer's subjective belief must be measured on all of the circumstances known to the officer. It is an error of law to dissect and consider the *indicia* of impairment in a piecemeal fashion.[52]

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50 *R. v. Bernshaw*, [1995] 1 S.C.R. 254, *Respondent's Book of Authorities, Tab 5, para. 48.*

51 *R. v. Storrey*, [1990] 1 S.C.R. 241, *Respondent's Book of Authorities, Tab 32, para. 17*

52 *R. v. Jacques*, [1996] 3 S.C.R. 312, *Respondent's Book of Authorities, Tab 18, para. 23*; *R. v. Todd* (2007), 49 M.V.R. (5th) 26 (B.C.C.A.), *Respondent's Book of Authorities, Tab* 34; and *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, *Respondent's Book of Authorities, Tab 1, para. 27*

35. The test for reasonable grounds is not onerous.[53] The appropriate standard is one of reasonable probability rather than proof beyond a reasonable doubt or proof of a *prima facie* case. The phrase "reasonable belief" also approximates the requisite standard.[54]

36. Given that the threshold for "reasonable and probable grounds" is lower than the threshold for a "*prima facie* case", it might be helpful to define the legal test for a *prima facie* case. That test, which is the same as the test for a directed verdict, is well-known:

> ... a preliminary inquiry judge must determine whether there is sufficient evidence to permit a properly instructed jury, acting reasonably, to convict, and the corollary that the judge must weigh the evidence in the limited sense of assessing whether it is capable of supporting the inferences the Crown asks the jury to draw. As this Court has consistently held, this task does not require the preliminary judge to draw inferences from the facts or to assess credibility. Rather, the preliminary inquiry judge must, while giving full recognition to the right of the jury to draw justifiable inferences of fact and assess credibility, consider whether the evidence taken as a whole could reasonably support a verdict of guilty.[55] [Emphasis added]

37. The offence of impaired driving is made out on proof of impairment to any degree, from slight to great. Trial judges must not apply a legal test for impairment which assumes or implies a tolerance for impairment that does not exist in law.[56]

38. Therefore, given that there was and can be no argument that Sgt. Sellers subjectively believed the Appellant was driving while impaired, the first *Charter* issue to be decided was whether it was reasonable to infer that the Appellant's ability to operate a motor vehicle was impaired by alcohol, even if only slightly, based on all of the circumstances. The Respondent respectfully submits that the trial judge clearly did not apply the proper test.

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53 *R. v. Charles*, [2007] O.J. No. 2268 (Ont. Ct. Jus.); *Respondent's Book of Authorities, Tab 7*

54 *R. v. Storrey, supra, para 17*; *R. v. Debot*, [1989] 2 S.C.R. 1140, *Respondent's Book of Authorities, Tab 10, para. 47*

55 *R. v. Arcuri*, [2001] 2 S.C.R 828, *Respondent's Book of Authorities, Tab 3, para. 1*

56 *R. v. Campbell* (1991), 26 M.V.R. 319 (P.E.I.C.A.), *Respondent's Book of Authorities, Tab 6*; *R. v. Stellato* (1993), 12 O.R. (3d) 90 (Ont. C.A.), *Respondent's Book of Authorities, Tab 29*

39. The Respondent respectfully submits the reasonableness of the officer's belief is self-evident on the totality of the following established facts:

> the Appellant appeared to be intoxicated;
>
> he smelled of alcohol;
>
> he appeared to be lethargic, fatigued and "slack-jawed";
>
> he walked and talked in slow deliberate manner as if he were making a conscious effort to do "everything right";[57]
>
> he had red eyes;
>
> he disobeyed a stop sign;
>
> he drove substantially above the posted speed limit; and
>
> he violated the law by failing to stay in the right lane and by failing to stop for an emergency vehicle before entering an intersection.

40. In making that submission, we rely on more than just common sense. A consideration of the facts in *Stellato*, *Bernshaw* and in *R. v. Rhyason* [58] cases compels a submission that the trial judge's ultimate conclusion was so unreasonable that it must have been occasioned by the application of the wrong legal test, one that set the standard far too high.

41. For example, in *Bernshaw,* the officer saw the accused's vehicle travelling over the speed limit and drifting from the far side of the shoulder to the centre of the road, and back again, with the brake lights flickering. The officer noted a smell of liquor coming from the accused, whose eyes were red and glassy. Cory J. stated in paragraph 37:

> I would have thought that those symptoms, in themselves, would have constituted reasonable and probable grounds for making the demand.[59]

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57 *Trial transcript, Appellant's Record, Part IV, p. 20, lines 15-16*

58 *R. v. Rhyason*, 2007 SCC 39; *Appellant's Book of Authorities, Tab 18*

59 Sopinka J., writing for the majority, appears to agree with this opinion in para. 77.

42. The trial judge said that he "was not convinced" the officer had reasonable grounds because he viewed the Appellant's statement to Horsley as an exculpatory statement capable of negating a reasonable inference of impairment. The statement was "just as valid" as the officer's belief the Appellant was impaired.[60] We will later explain why the Appellant's statement was not capable of negating an inference of impairment and why it was wrong to consider it at all. For now, even assuming that the statement was relevant or probative, the trial judge articulated a legal test reminiscent of that used by a trier of fact in determining a verdict in a circumstantial evidence case. In doing so, he set the bar far too high.

43. It is telling that the Appellant did not apply for a directed verdict of acquittal on the charge of impaired driving. To sustain a directed verdict application, the Appellant would have to establish that a properly instructed jury could not reasonably convict. A trial judge hearing an application for a directed verdict would determine if the evidence, taken as a whole, was reasonably capable of supporting an inference of impaired driving and would only weigh the evidence to the extent necessary to answer that question. On the facts of this case, a directed verdict of acquittal was unavailable. If the Appellant could not succeed in an application for a directed verdict on the facts of this case, he most certainly could not succeed in demonstrating his s. 8 *Charter* rights had been violated.

44. The trial judge said that he was going to consider the totality of the circumstances known to Sgt. Sellers. He did not. Instead, he focussed on the plausibility of the Appellant's post-demand statement to Horsley. There are at least four reasons why this was a fatal error of law.

45. First, it was wrong to assess the reasonableness of the officer's belief using a fact the officer knew nothing about. Justice Smith, writing in dissent, would ignore the error because, in her opinion, the Appellant's post-demand statement was "implicit in" the pre-demand statement. The Respondent respectfully disagrees. The second statement was much more detailed than the first and the trial judge relied on that detail to undermine the reasonableness of the officer's belief. In those

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[60] *Appellant's record, Part II, pp. 6-8*

circumstances, it was not open to Justice Smith to correct the trial judge's error on appeal by supplementing Seller's testimony with evidence that was not there.[61]

46. Secondly, the statement to Horsley could not logically negate the reasonableness of Sgt. Sellers' belief. It was an "explanation" that explained little of what the officer saw, and certainly did nothing to disentitle the officer or any other reasonable person from disbelieving it and only being more satisfied the Appellant was impaired. The Appellant did not deny being impaired or say that he did not consume enough alcohol to be impaired. Indeed, it appears that the Appellant tried to persuade Horsley that he should be given a break because his sister was a police officer and he just wanted to go home. The so-called "explanation" was not capable of refuting Sellers' personal observations of physical symptoms of impairment or Sellers' experienced opinion that the Appellant was intoxicated. The Appellant's "explanation" did not explain why he ran a stop sign or why he was speeding. He did not explain why, if he wanted the emergency vehicle to pass, he was travelling at almost twice the legal speed limit. He did not explain why it took him minutes to recognize what should have been obvious to any sober driver within seconds. Again, if anything, the post-demand statement provided additional compelling evidence supporting the reasonableness of the officer's belief.

47. Third, the trial judge committed legal error by focussing on one item of evidence in isolation and to the exclusion of the other evidence. He determined the reasonableness of the officer's belief without regard to the evidence as a whole.[62]

48. Finally, the trial judge erred by failing to properly interpret s. 67(8) of the *Highway Traffic Act*. Motorists in Saskatchewan who encounter an emergency vehicle must pull over to the right of the roadway. Motorists are not permitted to enter an intersection until the emergency vehicle has

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61 *R. v. Daley*, 2007 SCC 53, *Respondent's Book of Authorities, Tab 9, para. 4*

62 *R. v. Todd, supra, para. 36*; R. *v. Feeney,*[1997] 2 S.C.R. 13, *Respondent's Book of Authorities, Tab 14, para. 31*

gone by.[63] Sgt. Sellers knew that to be the law and he knew the Appellant violated the law. It formed an important basis for his conclusion that the Appellant was trying to evade him and it also figured in his assessment of the Appellant's impairment.[64] The trial judge ignored this evidence by erroneously holding that the Appellant complied with the *Highway Traffic Act*. He compounded that error by reasoning that the Appellant's compliance with the law undermined the reasonableness of Sellers' grounds to make the demand.[65]

49. The trial judge also erred by failing to apply the proper legal test for "impairment". *Stellato* made it clear, once and for all, that a "marked departure from the norm" is not the test for impairment. Absence of gross impairment symptoms cannot and do not negate evidence that a person's ability to drive was impaired. Put simply, it was an error of law to reason that because the Appellant was not staggering drunk or too drunk to keep the vehicle straight in one traffic lane, the rest of the evidence could be safely ignored or even discounted. For that reason, the trial judge erred when he distinguished the facts of a similar case because there was no "swerving" in this one.[66]

50. This court has recognized that it is often difficult for witnesses to articulate all of the subtle signs that a person is impaired. For that reason, witnesses are permitted to give opinion evidence about a person's degree of intoxication or impairment because they are in a position to give the court real help.[67] The trial judge was not obliged to accept Sgt. Sellers' opinion. However, contrary to the Appellant's submissions, neither should he have considered it to be only as relevant as the officer's ability to articulate why he held it. Sgt. Sellers was in a position to give the court real help. His opinion was honest and it was based on a constellation of articulated objective grounds. The trial judge erred by failing to explain why he was not prepared to give it any weight.

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63 *Highway Traffic Act, s. 67(8), Respondent's Book of Authorities, Tab 39*

64 *Appellant's record, Part IV, p. 46, line 26 to p. 47, line 3*

65 *Appellant's record, Part II, p. 7, lines 7-13*

66 *Appellant's record, Part II, p. 8, lines 4-5*

67 *R. v. Graat*, [1982] 2 S.C.R. 819, *Respondent's Book of Authorities, Tab 16, pp. 836-838*

51. In summary, it is not difficult to understand how the trial judge came to a result which is so clearly unreasonable. He committed numerous legal errors. He considered the evidence in a piecemeal fashion by isolating and focussing on the plausibility of irrelevant evidence. In assessing the plausibility of irrelevant evidence, he misinterpreted the law and ignored the evidence as a whole. He failed to explain why the officer's honest opinion based on a constellation of numerous objective circumstances was not entitled to any weight. He failed to explain why the evidence considered as a whole could not lead a reasonable person to conclude the Appellant was impaired. He casually disregarded relevant, credible and uncontradicted evidence without providing a proper reason for doing so. He failed to instruct himself in accordance with *Stellato*, failed to instruct himself that threshold for reasonable grounds was not onerous and then decided the issue as if he was the trier of fact determining a verdict. For all of these reasons, the Respondent respectfully submits the trial judge erred in law by finding the Appellant's right to be free from unreasonable search and seizure was violated.

52. The Appellant has argued at some length about the standard of review. With respect, he fails to appreciate that the standard of review on questions of law is "correctness". If the trial judge applied the wrong legal test, or if he committed other legal errors, his decision was not entitled to any deference. For that reason, the Respondent must also respectfully disagree with the analysis offered by Smith J.A. on this issue.[68] The kind of detailed analysis she provides was notably lacking in the reasons for judgment at trial. It was not open to correct the trial judge's legal errors by speculating that the trial judge engaged in a detailed factual analysis not apparent on the record. Even if that kind of appellate intervention is appropriate, that there were more reasonable ways to arrive at an unreasonable result was not particularly germane.

53. The majority of the Court of Appeal did not err in identifying these legal deficiencies in judgment at trial. The majority understood and applied the correct standard of appellate review by finding legal error and ordering a new trial.

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[68] *Appellant's Record, Part II, pp. 29-30, paras. 54-56*

Issue Two: Did the majority of the Saskatchewan Court of Appeal err by concluding that it is an error to exclude evidence under s. 24(2) of the *Charter* without legal analysis?

54. The standard of review applicable to s. 24(2) *Charter* issues is well known. A reviewing court may intervene if the trial judge erred in law or in principle. A reviewing court may also intervene to correct an unreasonable decision.[69]

55. The Appellant applied to exclude the breath test results based on a s. 8 violation. The trial judge found a *Charter* violation after stating that he "was not convinced" the officer's belief was reasonable. The Appellant asserted several times in argument that exclusion flowed automatically from a finding of *Charter* breach. The trial judge apparently agreed with those submissions. He did not even look at the breath test results before excluding them.[70] His entire s. 24(2) "analysis" was contained in one sentence:

> In the absence of such grounds the Certificate of Analyses is excluded from evidence, pursuant to section 24(2) of the *Charter of Rights and Freedoms* as directed by the decision in *The Queen v. Stellato*.[71]

56. From this, we make several observations. The trial judge said that the evidence should be excluded because there was a *Charter* violation. He did not provide any other reason supporting the decision. He did not classify the evidence as "conscriptive". He did not say if the admission of it would impair the Appellant's fair trial rights. He did not say the administration of justice would be brought into disrepute if it was admitted. He did not cite any relevant authority to explain the law he applied or the reasoning he employed.

57. Thus, the trial judge must have reasoned that exclusion flows automatically from *Charter* breach. That was an error of law. Section 24(2) does not permit exclusion unless there has been a

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69 *R. v. Law*, [2002] 1 S.C.R. 227, *Respondent's Book of Authorities, Tab 20, para. 32*

70 *Appellant's Record, Part IV, pp. 31-34*

71 *Appellant's Record, Part II, p. 8*

Charter violation and a finding the admission of the evidence would bring the administration of justice into disrepute.[72] Moreover, the onus is on an applicant to establish that the admission of the evidence would bring the administration of justice into disrepute.[73]

58. Smith J.A., in dissent, was prepared to make several assumptions about what the trial judge was thinking when he excluded the evidence. She was prepared to assume, and not unreasonably so, that the trial judge's reference to *Stellato* was a slip of the tongue. She thought the judge likely meant to refer to *Stillman*. On that assumption, the trial judge likely reasoned that:

> an unconstitutionally obtained breath sample is conscriptive evidence;
> the admission of conscriptive evidence generally renders a trial unfair; and
> therefore the administration of justice would be brought into disrepute if it were admitted in this trial.

Smith J.A. concluded that this reasoning was legally sound. Consequently, the trial judge was not required to say anything more than he did.

59. With respect, all of this assumes too much. The trial judge had a legal obligation to provide a reasoned analysis sufficient to permit meaningful appellate review.[74] The court's obligation to provide a reasoned analysis was of critical importance given the issue at stake - the potential exclusion of highly relevant evidence from a criminal trial. This Honourable Court has never suggested that anything less than careful consideration of the evidence and issues will suffice in determining an application under s. 24(2). For example, the need for cautious deliberation was emphasized in *Collins*:

> The decision is thus not left to the untramelled discretion of the judge. In practice, as Professor Morissette wrote, the reasonable person test is there to require of judges that they "concentrate on what they do best: finding within themselves, with

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72 *R. v. Strachan*, [1988] 2 S.C.R. 980, *Respondent's Book of Authorities, Tab* 33, *para. 52*; *R. v. Collins*, [1987] 1 S.C.R. 265, *Respondent's Book of Authorities, Tab 8*; *R. v. Fliss*, [2002] 1 S.C.R. 535, *Respondent's Book of Authorities, Tab 15, para. 75*

73 *Collins, supra, para. 30*

74 *R. v. Sheppard*, [2002] 1 S.C.R. 869, *Respondent's Book of Authorities, Tab* 28

> cautiousness and impartiality, a basis for their own decisions, articulating their reasons carefully and accepting review by a higher court where it occurs." It serves as a reminder to each individual judge that his discretion is grounded in community values, and, in particular, long term community values. He should not render a decision that would be unacceptable to the community when that community is not being wrought with passion or otherwise under passing stress due to current events.[75]

60. More recently, LeBel J. aptly observed that the application of section 24(2) involves a delicate consideration of the integrity of the justice system which:

> ... requires a strong emphasis on assuring the fairness of the criminal trial. At the same time, the concept of fairness should not be reduced to a ritual incantation that spares judges from any further thought once the word is said.[76]

61. The delivery of reasoned decisions is inherent in the role of the judiciary and is an important aspect of the judiciary's accountability for the discharge of the responsibilities of the office. Although it is generally presumed that judges know the law, judges can and do commit errors. Therefore, parties in a legal proceeding are entitled to know why a judicial determination has been made. Meaningful appellate review is impossible otherwise.[77]

62. The Respondent respectfully submits it was improper to correct the trial judge's failure to give sufficient reasons by speculating that he might have undertaken a complex legal analysis when there was no reason to suppose that he did. The reason for his decision was clearly stated - exclusion is automatic on a finding of breach. If that was an error of law, a new trial could not be avoided.[78]

63. To be fair, the reasons of Smith J.A. can also be interpreted to mean that even if the trial judge erred by failing to engage in a reasoned analysis, the decision to exclude was not wrong because there is an "almost absolute rule" of exclusion in cases like this one. She wrote:

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75 *Collins, supra, para. 34*

76 *R. v. Orbanski*, [2005] 2 S.C.R. 3, *Respondent's Book of Authorities, Tab 24, para. 96*

77 *Sheppard, supra, para. 55*

78 *Sheppard, supra, para. 46*

> In effect, we are bound by *Stillman* and *Bartle*, which have not been overturned. Evidence of a breath sample obtained in violation of an accused's *Charter* rights is conscriptive evidence and, as a general rule, its admission would render the trial unfair and bring the administration of justice into disrepute. While this view does not rule out exceptions ... it does confirm that, in the absence of the Crown advancing reasons for departing from the general rule, a full analysis of the *Collins* factors is not required of a trial judge in the application of s. 24(2) prior to excluding evidence of an unconstitutionally obtained breath sample.[79]

64. The Respondent respectfully disagrees with Justice Smith's analysis and ultimate conclusion. The Respondent submits that s. 24(2) is not an automatic or quasi-automatic rule of exclusion. Put simply, and in the words of Justice LeBel, the law is not so clear that judges are spared "from any further thought once the word is said". The Respondent will highlight some of the legal issues and uncertainties below.

A. Issues Pertaining to Evidence Classification

65. Smith J.A. relied heavily on the *Stillman* decision in support of the contention that exclusion of breath samples obtained following a *Charter* breach is, if not automatic, very nearly so. The first step in Justice Smith's reasoning concerns the *Stillman* definition of "conscriptive evidence":

> Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples. The traditional and most frequently encountered example of this type of evidence is a self-incriminating statement made by the accused following a violation of his right to counsel as guaranteed by s. 10(b) of the *Charter*. The other example is the compelled taking and use of the body or of bodily substances of the accused, such as blood, which lead to self-incrimination. It is the compelled statements or the conscripted use of bodily substances obtained in violation of *Charter* rights which may render a trial unfair.[80]

66. The second step involves the *Stillman* "general rule" for conscriptive evidence:

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79 *Appellant's record, Part II, p. 49, para. 118*

80 *Stillman, supra, para. 80*

> [T]he admission of evidence, which was obtained following the breach of an accused's *Charter* rights resulting in the accused being compelled or conscripted to incriminate himself by a statement or the use as evidence of his body or bodily substances will, as a general rule, be found to render the trial unfair.[81]

67. Thus, breath samples obtained following a *Charter* violation are conscriptive evidence because they emanate from the body. Exclusion follows as a general rule. With respect, it is unlikely that the *Stillman* majority intended the broad definition of "conscriptive evidence" and the resultant "general rule" of exclusion to apply in cases like this one. We must review the facts of *Stillman* to explain our submission.

68. Stillman was a 17 year old youth suspected of and arrested on a murder charge. He told police he would not permit them to take evidence from his body. The police, under threat of force, seized several bodily substance samples. The police purported to act pursuant to the common law power of search incidental to arrest. The trial judge found there was a violation of Mr. Stillman's s. 8 *Charter* rights, but did not exclude the evidence under s. 24(2).

69. When the case reached this court, the appellant contended, perhaps for the first time, the police violated his section 7 and section 8 *Charter* rights. The appellant's section 7 position was summarized by Justice McLachlin, as she was then, in paragraph 197:

> The appellant argues, however, that the searches and seizures also violated s. 7 of the *Charter*, which provides that a person's life, liberty and security of the person may be violated only in accordance with the principles of fundamental justice. The searches and seizures affected his "liberty" because they were used to assist in his prosecution. ... However, establishing a state act that affects liberty or security of person does not necessarily violate s. 7. The act must also have been carried out in contravention of a principle of fundamental justice for s. 7 to be invoked. <u>The principle of fundamental justice engaged here, the appellant argues, is the privilege against self-incrimination</u>. [Emphasis added]

70. The scope of the section 7 protection of the privilege against self-incrimination divided the court. Justice McLachlin held that the privilege against self-incrimination protected by s. 7 does not

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[81] *Stillman, supra, para. 98*

apply to real evidence unless it is derivative evidence.[82] The *Stillman* majority disagreed. The majority concluded the appellant's privilege against self-incrimination protected by s. 7 extended to evidence emanating from the body and was not restricted to testimonial evidence.

71. That was an important ruling, but exactly how far beyond the facts of *Stillman* does it extend? Many courts have since interpreted the majority judgment as holding that all unconstitutional seizures of evidence emanating from the body engage section 7 rights against self-incrimination. In impaired driving cases, "statutorily compelled" breath samples are always classified as conscriptive evidence because they emanate from the body and are "self-incriminatory". However, there are reasons to submit that the majority did not intend its judgment to be interpreted so broadly.

72. First, the majority emphasized more than once that Mr. Stillman's section 7 rights were at stake and were violated because the police were not acting pursuant to statutory authority, they purported to rely on common law powers they did not have, the evidence was seized under threat of force and the search was highly intrusive.[83] Then, after highlighting those important facts, the majority suggested that not all evidence "emanating from the body" should or would necessarily be subject to the same *Charter* protection:

> So soon as that is said, it is apparent that a particular procedure may be so unintrusive and so routinely performed that it is accepted without question by society. Such procedures may come under the rare exception for merely technical or minimal violations referred to earlier. For example, assuming that fingerprinting is conscriptive, it is minimally intrusive and has been recognized by statute and practice for such an extended period of time that this Court readily found that it was acceptable in Canadian society. See the carefully crafted reasons of La Forest J. in *Beare*, *supra*. Similarly, the *Criminal Code* provisions pertaining to breath samples are both minimally intrusive and essential to control the tragic chaos caused by drinking and driving.
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> In the case at bar to proceed in the face of a specific refusal to compel the accused to submit to the lengthy and intrusive dental process, to force the accused to provide the pubic hairs and to forcibly take the scalp hairs and buccal swabs was, to say the least,

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82 *Stillman, supra, para. 208*

83 *Stillman, supra, para. 89*

> unacceptable behaviour that contravened both s. 7 and s. 8 of the Charter. It was a significant invasion of bodily integrity. It was an example of the use of mental and physical action by agents of the state to overcome the refusal to consent to the procedures.[84] [Emphasis added]

73. The Respondent submits that the majority intended these comments to limit or restrict the broad application of the *Stillman* principles. These observations suggest that the *Stillman* majority did not conclude that the s. 7 protection of the privilege against self-incrimination would be operative in all cases involving "evidence emanating from the body".

74. The Respondent's interpretation of this passage of the *Stillman* majority judgment is consistent with pre-Stillman decisions of this court, starting with *Collins*. We start with *Collins* because the *Stillman* majority said that it did not intend to overrule the basic principles enunciated in *Collins*. Rather, the majority thought it necessary to address confusion about the application of the *Collins* "real evidence" classification test and to clarify the principles that govern the assessment of fair trial concerns under s. 24(2).[85]

75. *Collins* identified how trial fairness concerns should normally be assessed:

> It is clear to me that the factors relevant to this determination will include the nature of the evidence obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was violated. Real evidence that was obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the *Charter* and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence will generally arise in the context of an infringement of the right to counsel.[86] [Emphasis added]

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84 *Stillman, supra, paras. 90-91*

85 *Stillman, supra, para. 71*

86 *R. v. Collins, supra, para. 37*

76. The *Collins* focus on the nature of the evidence obtained, the nature of the right violated and the connection between "conscription" and the infringement of the right to counsel provides important context in the interpretation of *Stillman.*

77. The link between "conscription" and "self-incrimination" was also the focus of the decision in *Bartle*[87]. In *Bartle*, the police violated the accused's right to counsel by failing to provide information explaining how he could access the services of Legal Aid or duty counsel. The *Bartle* majority noted that the admission of evidence following a s. 10(b) violation tends to impact directly on adjudicative fairness. The majority observed that evidence obtained following a s. 10(b) violation "is inherently more suspect than real evidence" because its use may infringe an accused's privilege against self-incrimination. The majority also stated that incriminatory evidence obtained following a s. 10(b) violation will "generally have a negative effect on the fairness of the trial".[88] The majority summarized the Crown's argument that the breath test results were not conscriptive evidence:

> In the case at bar, not only is the appellant's statement about having five to six beers clearly self-incriminatory, but so too are the results of the breathalyser tests. The breath samples provided by the appellant emanated from his body and, unlike real evidence, could not have been obtained but for the appellant's participation in their construction ... The conscriptive character of breathalyser evidence in the impaired driving context warrants further discussion in light of a line of argument which seeks to down play or even deny the self-incriminatory nature of breath samples. ... The argument can be summarized as follows: because the breathalyser evidence was statutorily compellable whether or not the appellant spoke to counsel, it could not have affected the fairness of the trial and, therefore, should be admitted under s. 24(2) of the Charter.[89]

78. Ultimately, the court in *Bartle* concluded that the conscriptive nature of the breath evidence in that case had a significant impact on trial fairness because:

> One of the purposes of s. 10(b) is to provide detainees with an opportunity to make informed choices about their legal rights and obligations. This opportunity is no less significant when breathalyser charges are involved. I am, therefore, not prepared to

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87 *R. v. Bartle*, [1994] 3 S.C.R. 173; *Appellant's Book of Authorities, Tab 3*

88 *Bartle, supra, para. 53*

89 *Bartle, supra., para. 57*

> hold, *ipso facto*, either that breathalyser evidence in the impaired driving context does not qualify as self-incriminating evidence or, if it does, that its admission does not affect the fairness of a trial.[90] [Emphasis added]

79. Thus, the majority in *Bartle* held that s. 10(b) violations will often have a significant impact on trial fairness. In those instances, section 7 and its protection of the privilege against self-incrimination operates. *Bartle* does not support the broad proposition that s. 7 will be engaged in every breath test case. Neither does the majority decision in *Stillman*. The *Stillman* majority referred to *Bartle* simply as an example of a case in which evidence emanating from the body was found to be self-incriminatory conscriptive evidence.[91]

80. The Respondent respectfully submits that paragraphs 90 and 91 of the *Stillman* majority decision explain why s. 7 was engaged in that case and why it might not be similarly engaged in other cases. Self-incrimination concerns were of paramount importance in *Stillman* because the appellant was subjected to an intrusive and wholly unauthorized seizure of "evidence emanating from the body" under threat of physical force.

81. The situation was different in *Dewald*.[92] There, the police violated the suspect's s. 8 rights by failing to administer a roadside breath test "forthwith". As a consequence, the officer did not have lawfully obtained grounds to make a breathalyzer demand. The breathalyzer test results were excluded from evidence at trial. On appeal, a majority of the Ontario Court of Appeal held that the accused's s. 8 rights were not violated.

82. Concerning s. 24(2), the trial judge in *Dewald*, like the trial judge in this case, excluded the evidence without finding that its admission would bring the administration of justice into disrepute. Mr. Justice Galligan found that to be an error of law. He wrote:

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90 *Bartle, supra, paras. 61-62 and 64*

91 *Bartle, supra, para. 94*

92 *R. v. Dewald* (1994), 92 C.C.C. (3d) 160 (Ont. C.A.), *Respondent's Book of Authorities, Tab 11*

> I am unable to find any indication in the reasons for judgment given by the trial judge that he made a determination pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms* that the admission of the evidence would bring the administration of justice into disrepute. It is my opinion ... that evidence obtained in a manner which infringes Charter rights of an accused person "will be excluded if and only if it is determined pursuant to s. 24(2) that in all of the circumstances of the particular case its admission would bring the administration of justice into disrepute". In this case, as in *Marshall*, no such determination was made.[93]

83. Justice Arbour dissented on the s. 8 and s. 24(2) issues. She concluded there was a violation of the respondent's section 8 rights and she was "prepared to assume" the trial judge was aware of the s. 24(2) factors that should be considered.[94]

84. On further appeal, this court agreed with Justice Arbour's s. 8 analysis. However, the court dismissed Mr. Dewald's appeal on s. 24(2) grounds. The court concluded that admission of the evidence would not result in an unfair trial. The court also held that the breach was technical, the police acted in good faith and the exclusion of the evidence would not bring the administration of justice into disrepute. Section 7 was never mentioned.[95]

85. On the other hand, in *Knox,*[96] this court held that a deficiency in a blood sample demand violated both s. 7 and s. 8 of the *Charter*. The demand in *Knox* was deficient because the police did not tell the accused that the sample would be taken by a qualified medical practitioner. The court went on to suggest that the admission of the evidence would not likely bring the administration of justice into disrepute. The court did not explain why it concluded that Mr. Knox's section 7 rights were engaged or violated and it is not clear the issue was argued.

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93 *Dewald, supra, p. 164*

94 *Ibid., p. 171*

95 *R. v. Dewald*, [1996] 1 S.C.R. 68, *Respondent's Book of Authorities, Tab 12*

96 *R. v. Knox*, [1996] 3 S.C.R. 199, *Respondent's Book of Authorities, Tab 19, para. 16*

86. In *Feeney*, a post-Stillman case, a majority of this court held that the seizure of Mr. Feeney's fingerprints violated s. 8 of the *Charter*. The court classified the fingerprints as conscriptive evidence because Mr. Feeney was "compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily sample".[97] At first blush, *Feeney* seems to support the notion that s. 7 is automatically engaged in any case involving evidence emanating from the body after a *Charter* violation and that we are to assume the admission of such evidence will always imperil fair trial rights. However, this analysis may oversimplify why the majority in *Feeney* held as they did. Section 2(2) of the *Identification of Criminals Act* states that police may take fingerprints using force if necessary. Mr. Feeney, like Mr. Stillman, did not have a right to refuse to provide fingerprints and it is not clear if that fact might have figured in the *Feeney* judgment.

87. In summary, the Respondent submits that the *Stillman* majority did not hold that section 7 is automatically engaged in all cases involving the seizure of evidence "emanating from the body". Consequently, we should not simply assume that evidence emanating from the body following a *Charter* violation imperils the privilege against self-incrimination and must necessarily be classified as "conscriptive" evidence for the purposes of s. 24(2).

88. That principle is relevant here because the trial judge's s. 8 reasoning was less than clear. He found a section 8 violation after stating he "was not convinced" the police had reasonable grounds to make a breath demand. Even if the trial judge applied the correct legal test, it seems clear that he was uncertain about whether reasonable grounds existed or not. In those circumstances, it is cannot fairly be assumed that the Appellant's s. 7 rights were at stake or that his fair trial rights were threatened.

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97 *Feeney, supra, para. 63*

B. Conscriptive Evidence and the "General Rule of Exclusion"

89. The *Stillman* majority anticipated that fair trial rights will be imperilled more in some conscriptive evidence cases than in others. They stated that courts must carefully consider the impact admission of conscriptive evidence will have on trial fairness. They noted that the admission of conscriptive evidence will "generally tend" to render a trial unfair. There can be little doubt that they understood there would be exceptions to the broad proposition that the admission of conscriptive evidence will render a trial unfair because they said as much several times.[98]

90. In other words, *Stillman* made it clear that exclusion without analysis is improper. The *Stillman* majority never suggested that s. 24(2) should be interpreted as if it were an automatic rule of exclusion and they never suggested that a s. 24(2) analysis would be unnecessary or pointless in any case.

91. The majority specifically referred to exceptions that might arise in impaired driving cases in paragraph 90. This was a recognition that conscriptive breath test evidence will not always be subject to a "general rule" of exclusion because breath test evidence is seized under statutory authority using an unintrusive and routinely performed procedure that is "accepted without question by society". In these kinds of cases, courts must consider the full range of *Collins* factors.

92. Applying those factors to this case, the Respondent respectfully submits that the *Charter* breach here, assuming one occurred, was technical. The officer could not have missed the mark on reasonable grounds by much. He honestly believed the Appellant was impaired. He acted in good faith and believed for good, if not sufficiently good reason that he was properly discharging his public duty.

93. The violation was minimal. The breath demand followed the Appellant's lawful arrest for another offence. He was not unnecessarily detained by an improper breath demand because he

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98 *Stillman, supra, para. 73*

would have been in custody in any event. The Appellant was treated fairly at all times. The police ensured that he had a reasonable opportunity to consult with counsel and he was given a choice about whether he would provide a breath sample or not.

94. The s. 8 violation was not serious. The Appellant's reasonable expectation of privacy was markedly decreased because he was a motorist engaging in a licenced and highly regulated activity on public streets. As stated in *R. v. Wise*:

> Society . . . requires and expects protection from drunken drivers, speeding drivers and dangerous drivers. A reasonable level of surveillance of each and every motor vehicle is readily accepted, indeed demanded, by society to obtain this protection. All this is set out to emphasize that, although there remains an expectation of privacy in automobile travel, it is markedly decreased relative to the expectation of privacy in one's home or office.[99]

95. The Appellant's reasonable expectation of privacy was further reduced because he voluntarily chose to drive after consuming alcohol. The Respondent appreciates that it is not an offence to drive after drinking alcohol. Even so, motorists who consume alcohol before driving understand they might be detained longer and investigated more thoroughly than motorists who do not. Further, the Appellant violated several traffic safety laws. Two of the violations - running a stop sign and speeding - were deliberate. Although he claimed ignorance of law with respect to other violations, that ignorance does little to enhance the reasonableness of his expectation of privacy in all of the circumstances.

96. Both Sgt. Sellers and Cst. Horsley saw physical indicia of impairment but technical legal rules prevented the trial judge from considering Horsley's observations in assessing the reasonableness of Sgt. Sellers' belief. In these circumstances, a proper s. 24(2) analysis arguably would have led the trial judge to conclude the physical indicia of impairment observed by the second officer would have been inevitably discovered and should be considered in the s. 24(2) analysis.

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[99] *R. v. Wise*, [1992] 1 S.C.R. 527, *Respondent's Book of Authorities, Tab 37, para. 6*

97. The evidence was highly reliable and the exclusion of it would tend to bring the administration of justice into disrepute.

98. For all of these reasons, a fair review of the principles in *Stillman* supports the Respondent's submission that the evidence, even if it was conscriptive, should not have been excluded under s. 24(2).

99. More importantly, a fair review of the principles in *Stillman* makes it clear that it was an error of law to automatically exclude the evidence without reason or analysis. Having said that, we agree with Justice Smith's observation that courts have often excluded breath sample or other "conscriptive" evidence without any real analysis after the *Stillman* decision. When these decisions have been challenged, the so-called *Stillman* "general rule of exclusion" has usually been cited to support the proposition that s. 24(2) analysis is not necessary. With respect, such a reflexive view is incorrect and, unfortunately, is exactly what Justice Smith did in this case.

100. With respect, those who contend that *Stillman* permits courts to exclude conscriptive evidence without engaging in a s. 24(2) analysis misinterpret the case. Even if *Stillman* created a "general rule of exclusion", the *Stillman* majority obviously anticipated there would be exceptions. If analysis is unnecessary, exceptions will never be discovered.

101. *Mohl*[100] or *Tremblay*[101] are two examples where conscriptive breath sample evidence was not excluded. Both cases were decided before *Stillman*. Both involved violations of s. 10(b). In *Tremblay*, the police violated the accused's s. 10(b) rights by failing to provide a reasonable opportunity for the accused to speak to counsel. Even so, the court held the breath test evidence should not be excluded because the police had "understandable" reasons for acting as they did.

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100 *R. v. Mohl*, [1989] 1 S.C.R. 1389, *Respondent's Book of Authorities, Tab 23*

101 *R. v. Tremblay*, [1987] 2 S.C.R. 435, *Respondent's Book of Authorities, Tab 35*

102. The scope of the *Stillman* "general rule of exclusion" has been questioned in some cases. For example, in *R. v. Richfield* [102], Weiler J.A. observed in para. 18:

> The general rule that conscripted evidence obtained in violation of an accused's s. 10(b) *Charter* rights should automatically be excluded because it impacts on trial fairness has the advantage of predictability. This general rule may, however, provide a disproportionate remedy when the resulting *Charter* violation is minimal.

103. In 2003, the Manitoba Court of Appeal questioned the assumption that breath samples obtained following a s. 8 violation will almost automatically be excluded.[103] In another case, the Manitoba Court of Appeal referred to academic criticism about the rote application of the *Stillman* "rule of exclusion":

> Indeed, the automatic exclusion of conscripted evidence has been the subject of much academic criticism. Critics argue trial fairness factors have become too dominant, resulting in automatic exclusion regardless of other considerations, and that it is not always the case that admission of conscriptive evidence renders a trial unfair. ...
>
> More recently, David M. Paciocco, "*Stillman, Disproportion and the Fair Trial Dichotomy under Section 24(2)*" (1997), 2 Can. Crim. L. Rev. 163, opined in his article (at p. 168):
>
> > It is not readily apparent how the admission of relevant and probative evidence will make unfair a trial that is intended to test the truth of the Crown's allegation that the accused committed an offence.
>
> And later, the next page:
>
> > Whether we should be excluding unconstitutionally obtained evidence is not the question here. It is whether we must exclude it to preserve the fairness of the trial. It has to be asked whether an accused person who is offered every opportunity to present full answer and defence, who is proved guilty beyond a reasonable doubt, can reasonably claim that his trial has been rendered unfair because the court has relied upon relevant and probative evidence? He can certainly assert that the police acted unfairly in breaching his rights, but does that mean that his trial was thereby rendered unfair?

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102 *R. v. Richfield* (2003), 178 C.C.C. (3d) 23 (Ont. C.A.), *Respondent's Book of Authorities, Tab* 26

103 *R. v. Petri* (2003), 171 C.C.C. (3d) 553 (Man. C.A.), *Respondent's Book of Authorities, Tab 25, paras. 36-37*

> As noted in the article by Richard Mahoney, "*Problems with the Current Approach to s. 24(2) of the Charter: an Inevitable Discovery*" (1999), 42 C.L.Q. 443, to be overly concerned with the proposition that the method of obtaining evidence can influence the fairness of the trial is to be diverted from what should be the central inquiry. In his view, s. 24(2) directs itself to whether the admission of the evidence would bring the administration of justice into disrepute and not whether its admission would result in an unfair trial. Logically, of course, permitting an unfair trial to proceed is likely to meet the section's threshold and bring the administration of justice into disrepute. However, as that author writes, at p. 455, this elementary proposition offers little assistance in any practical application of s. 24(2).[104]

104. Justice LeBel recently focussed attention on the issue in *Orbanski*. Speaking for himself and Fish J., he made it very clear that previous decisions of the court did not create a "quasi-automatic" rule of exclusion. Rather, they reference a "structured discretion to assess the impact of the breach" which is conferred by s. 24(2).[105] Justice LeBel wrote in paragraphs 98 and 102:

> The creation and application of a rule, based on a presumption that conscriptive evidence necessarily affects the fairness of a trial, of almost automatic exclusion whenever such evidence is involved might be viewed as a clear and effective method to manage aspects of the criminal trial. Nevertheless, our Court has never adopted such a rule, which could not be reconciled with the structure and the wording of s. 24(2). ...
>
> To refuse to concede that the *Charter* may apply to a wide range of very different situations and that its implementation requires careful attention to context and a sensitive analysis would in the end be to trivialize it.

105. Since then, these comments have been adopted in several decisions. For example, in *Lotozky*, Rosenberg J.A. stated:

> As is made clear in more recent decisions of the Supreme Court of Canada, most notably in the concurring opinion of LeBel J. in *R. v. Orbanski* ... the fact that evidence is conscriptive does not necessarily mean that admission of the evidence would render the trial unfair. In any event, the trial court must still consider the seriousness of the violation and the effect of exclusion, even of conscriptive evidence. It is only after considering all three sets of *Collins* factors that a court is in

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104 *R. v. Dolynchuk* (2004), 184 C.C.C. (3d) 214 (Man. C.A.), *Respondent's Book of Authorities, Tab 13, paras. 48 and 50-51*

105 *Orbanski, supra, para. 91*

> a position to determine whether admission of the evidence would bring the administration of justice into disrepute.[106]

106. In *R. v. Wilding*,[107] the court considered the admissibility of a certificate of analysis in an impaired driving case. The lower court found a s. 10(b) violation and the issue on appeal was whether the breath test results should be excluded. In considering the impact admission would have on trial fairness, the seriousness of the breach and whether the administration of justice would be brought into disrepute, the court stated:

> First, dealing with trial fairness, assuming that the breath samples constituted "conscriptive" evidence, they were minimally intrusive and essential to control the societal problem of drinking and driving. They were also entirely reliable, a fact conceded by the respondent at trial. Those features militate in favour of inclusion. ...[I]f there was a s. 10(b) breach here, it was minor and inconsequential. ... In this case, we are satisfied that the exclusion of reliable evidence needed to establish the serious offence with which the respondent was charged would do more harm than good to the administration of justice. The breach here was neither flagrant nor wilful and as we have already observed, the evidence did not substantiate a finding of institutional indifference to individual rights. Accordingly, the repute of the justice system would suffer if the evidence were excluded.[108] [Emphasis added]

107. In summary, it must be remembered that *Stillman* majority intended to clarify the application of the *Collins* "real evidence" test. Clarification was necessary because some courts were so focussed on evidence classification that they were losing sight of more important constitutional principles. It is perhaps ironic that eleven years later we are still debating whether a decision under s. 24(2) can or should be reduced to a mechanical application of the revised evidence classification test. That is especially so considering that our Constitution clearly states that s. 24(2) decisions must be based on a consideration of all of the circumstances.

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106 *R. v. Lotozky* (2006), 210 C.C.C. (3d) 509 (Ont. C.A.), *Respondent's Book of Authorities, Tab 21, para.44. See also R. v. Grant* (2006), 209 C.C.C. (3d) 250 (Ont. C.A.), *Respondent's Book of Authorities, Tab 17, paras. 51-52.*

107 *R. v. Wilding*, [2007] O.J. No. 4776 (Ont. C.A.), *Respondent's Book of Authorities, Tab* 36

108 *Ibid., paras. 8, 10 and 16*

108. In the final analysis, the *Collins* test for exclusion is as valid now as it was when *Collins* was decided. That test - "would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case" - is the one that should be applied in all cases after a careful consideration of all relevant facts.[109] Evidence classification rules assist in the application of the s. 24(2) test. They cannot and should not be permitted to replace it.

C. Section 24(2) and the "Presumption of Unreasonableness"

109. The Respondent has already made submissions that the *Charter* breach in this case, assuming one occurred, was technical, minimal and not serious. In making those submissions, the Respondent did not mean to suggest that s. 8 violations based on the absence of grounds are never serious or will never have a significant impact on trial fairness. However, given the trial judge's finding that he was "not convinced" reasonable grounds existed, the Respondent respectfully submits there is no reason to suppose or presume the violation was serious or that there would be a measurable impact on trial fairness if the breath test results were admitted.

110. In the court below, the Respondent submitted that the trial judge erred by reversing the onus of proof. The Respondent submitted that the onus was on the Appellant to establish the officer did not have reasonable grounds. The majority of the Court of Appeal did not address the issue. Justice Smith did. She concluded that the burden of persuasion at the first stage of the *Charter* hearing was on the Crown because the search was a warrantless one. She relied on *R. v. Arsenault*,[110] *R. v. Saulnier* [111] and other cases in support of that conclusion. The Respondent does not intend to argue that Justice Smith erred. It would likely be inappropriate to do so because the issue is not squarely

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109 *Collins, supra, para. 33*

110 *R. v. Arsenault* (2005), 204 C.C.C. (3d) 75 (N.B.C.A.), *Respondent's Book of Authorities, Tab 4*

111 *R. v. Saulnier* (2006), 205 C.C.C. (3d) 245 (N.B.C.A.), *Respondent's Book of Authorities, Tab* 27

before this court. However, this issue has relevance to the s. 24(2) analysis and it was not addressed by Justice Smith.

111. In most cases, the person alleging a *Charter* violation is obliged to call evidence and prove the violation.[112] However, the "presumption of unreasonableness" applicable to warrantless searches shifts the burden of proof to the Crown.[113] Section 8 violations are sometimes found on an absence of evidence. For example, in *Arsenault*, the prosecutor's failure to ask a police officer about the model number of the roadside screening device led the court to exclude breathalyzer evidence. In *Saulnier*, breathalyzer evidence was excluded because the officer who made the breath demand did not say that he was advised of the time of driving by the detaining officer.

112. In some cases, the presumption of unreasonableness has followed into the second stage of the *Charter* hearing. Thus, the officer in *Arsenault* was presumed to have made an unlawful breath demand. The presumption of unreasonableness applicable to the first stage of the *Charter* proceedings was used in the second stage to presume the accused's fair trial rights were adversely affected and that the violation was serious.

113. There are several reasons to submit the "presumption of unreasonableness" should not operate at the s. 24(2) stage of a *Charter* application, especially in impaired driving cases. First, an applicant bears a separate and discrete onus when applying for relief under s. 24(2). An applicant must establish on a balance of probabilities that the administration of justice would be brought into disrepute if the evidence was admitted.[114] The kind of balanced, careful and judicious consideration of all the circumstances called for by s. 24(2) ought to permit courts to distinguish between cases where reasonable grounds do not exist in fact from those where their absence is presumed by law.

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112 *Collins, para. 21*

113 *Collins, para. 25*

114 *Collins, supra, para. 30*

114. Secondly, the court in *Hunter v. Southam* made it clear that the presumption of unreasonableness operates only where it is feasible to obtain a warrant.[115] The constitutional imperatives associated with the investigation of suspected impaired drivers, coupled with the geographic and practical realities of policing road safety, make it infeasible to seek prior authorization in the vast majority of impaired driving investigations.

115. The immediacy of the public safety threat posed by an impaired driver and a police officer's legal duty to effectively respond to that threat suggests that the presumption of unreasonableness has no place in a s. 24(2) analysis. A police officer is expected to quickly assess a motorist's condition in all manner of unfavourable roadside circumstances. An officer who honestly believes a motorist is a threat to public safety will always conclude that he has a legal duty to respond to that threat. We do not mean to suggest that courts should automatically discount the seriousness of *Charter* violations in those kinds of cases. Police officers can and do make mistakes and sometimes they are of the egregious variety. However, the presumption of unreasonableness should not operate at the second stage of a *Charter* hearing so as to permit a court to presume bad faith or egregious error in contradiction to established fact.

116. Finally, it is important to remember that the *Criminal Code* and the *Canada Evidence Act* do not contain any provisions governing *Charter* procedure. In some jurisdictions, *Charter* applications are made orally at the commencement of a trial and without prior notice to the court or the Crown. The loose *ad hoc* procedural "rules" governing *Charter* applications sometimes take the court or Crown by surprise. In *Saulnier*, for example, the defence raised a s. 8 *Charter* argument for the first time after the Crown closed its case. The argument was based on the failure of the Crown to prove the officer who made the demand knew the time of driving. The presumption of unreasonableness operated in support of finding a *Charter* violation and it continued to operate at the s. 24(2) stage even though it was clear from the record that the demand was made within the prescribed time limit.

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115 *Hunter v. Southam*, [1984] 2 S.C.R. 145, *Respondent's Book of Authorities, Tab 2, p. 161*

117. In summary, the Respondent submits that courts should focus on the real impact the admission of unconstitutionally obtained evidence will have on trial fairness, undertake a reasoned assessment of the actual seriousness of the violation and consider the true effect admission will have on the repute of the administration of justice. It is important to discourage flagrant or blatant violations of constitutional rights and to protect the integrity of the administration of justice by jealously guarding the fair trial rights of all. However, it is not necessary to resort to presumption or pretence to do so. In the final analysis, and as stated by Justice LeBel in *Orbanski*, courts must not apply s. 24(2) in a manner that trivializes the *Charter*.

118. At trial in this case, s. 24(2) was interpreted and applied in a manner that trivialized the *Charter*. For that reason, the Court of Appeal did not err in ordering a new trial.

PART IV
SUBMISSIONS AS TO COSTS

119. The Respondent makes no submission as to costs.

PART V

NATURE OF THE ORDER SOUGHT

120. The Respondent respectfully requests that this Honourable Court dismiss the appeal.

ALL OF WHICH is respectfully submitted.

DATED at the City of Regina, in the Province of Saskatchewan, this 28th day of January, A.D. 2008.

W. DEAN SINCLAIR
Agent of the Attorney General for the
Province of Saskatchewan.

PART VI

TABLE OF AUTHORITIES

PART VII

STATUTORY PROVISIONS CITED

Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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

24(2). Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Criminal Code

253. Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not

a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

254(3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand

made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

(a) such samples of the person's breath as in the opinion of a qualified technician are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

Charte canadienne des droits et libertés

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit quen conformité avec les principes de justice fondamentale.

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

24(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Code criminel

253. Commet une infraction quiconque conduit un véhicule à moteur, un bateau, un aéronef ou du matériel ferroviaire, ou aide à conduire un aéronef ou du matériel ferroviaire, ou a la garde ou le contrôle d'un véhicule à moteur, d'un bateau, d'un aéronef ou de matériel ferroviaire, que ceux-ci soient en mouvement ou non, dans les cas suivants:

a) lorsque sa capacité de conduire ce véhicule, ce bateau, cet aéronef ou ce matériel ferroviaire est affaiblie par l'effet de l'alcool ou d'une drogue;

b) lorsqu'il a consommé une quantité d'alcool telle que son alcoolémie dépasse quatre-vingts milligrammes d'alcool par cent millilitres de sang.

254(3) L'agent de la paix qui a des motifs raisonnables de croire qu'une personne est en train de commettre, ou a commis au cours des trois heures précédentes, par suite d'absorption d'alcool, une infraction à l'article 253 peut lui ordonner immédiatement ou dès que possible de lui fournir immédiatement ou dès que possible les échantillons suivants:

a) soit les échantillons d'haleine qui de l'avis d'un technicien qualifié sont nécessaires à une analyse convenable pour permettre de déterminer son alcoolémie aux fins de prélever les échantillons de sang ou d'haleine, l'agent de la paix peut ordonner à cette personne de le suivre.