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ANNEXURES

A. Selected provisions of the South African Interim Constitution

B. Selected provisions of the South African Constitution, 1996

C. Selected provisions of the Charter

D. Heads of Argument of Professor Stuart in *R v Grant*

ANNEXURE A

The South African Bill of Rights

CHAPTER 3

(OF THE REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT 200 OF 1993)

7 Application

(1) This Chapter shall bind all legislative and executive organs of state at all levels of government.

(2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

(3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.

(4)

(a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in paragraph (a) may be sought by -

(ii) a person acting in his or her own interest;

(iii)an association acting in the interests of its members;

(iv)a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;

(v) a person acting as a member of or in the interest of a group or class of persons; or

(vi)a person acting in the public interest.

13 Privacy

Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches or his or her person, home or property, the seizure of private possessions or the violation of private communications.

22 Access to court

Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

25 Detained, arrested and accused persons

(1) Every person who is detained, including every sentenced prisoner, shall have the right –

(a) to be informed promptly in a language which he or she understands of the reason for his or her detention ;

(b) to be detained under conditions consonant with human dignity, which shall include at lest the provision of adequate nutrition, reading material and medical treatment at state expense ;

(c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state;

(d) to be given the opportunity to communicate with, and to be visited by, his or her spouse or partner, next-of-kin religious counselor and a medical practitioner of his or her choice; and

(e) to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detentions unlawful.

(2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right-

(a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;

(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest or if the said period of 48 hours expires outside ordinary court hours or on a day which is ot a court day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;

(c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and

(d) to be released from detention with or without bail, unless the interests of justice require otherwise

(3) Every accused person shall have the right to a fair trial, which shall include the right-

(a) to a public trial before an ordinary court of law within a reasonable time after having been charged;

(b) to be informed with sufficient particularity of the charge;

(c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;

(d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;

(e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result to be provided with legal representative at state expense, and to be informed of these rights;

(f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;

(g) not to be tried again for any offence of which he or she was previously been convicted or acquitted;

(h) to have recourse by way of appeal or review to a higher court than the the court of first instance;

(i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and

(j) to be sentenced within a reasonable time after conviction.

ANNEXURE B

The South African Bill of Rights

CHAPTER 2

(OF THE REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT, 1996)

7 Rights

(1) This Bill of Rights is a comerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democractic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36 or elsewhere in the Bill.

8 Application

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or juristic person if and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

9 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

34 Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

35 Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to remain silent ;

(b) to be informed promptly –

(c) of the right to remain silent; and

(d) of the consequences of not remaining silent ;

(e) not to be compelled to make any confession or admission that could be used in evidence against that person ;

(f) to be brought before a court as soon as reasonably possible, but not later than –

I. 48 hours after the arrest; or

II. the end of the first court day after the expiry of the 48 hours expire outside ordinary court hours or on a day which Is not an ordinary court day;

(g) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(h) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right-

(a) to be informed promptly of the reason for being detained ;

(b) to choose, and to consult with, a legal practitioner, and to be informed of his right promptly ;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly ;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released ;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's –

(i) spouse or partner ;

(ii) next of kin ;

(iii) chosen religious counselor; and

(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right-

(a) to be informed to the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence ;

(c) to a public trial before an ordinary court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the rights;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.

39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

ANNEXURE C

The Canadian Charter of Rights and Freedoms

1 Rights and freedoms in Canada

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

7 Life, liberty and security of person

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 Search or seizure

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

9 Detention or imprisonment

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

10 Arrest or detention

Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

11 Proceedings in criminal matters

Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission, unless at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations;

(h) if finally acquitted of the offence, not to be tried again for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishmentfor the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

24(1) Enforcement of guaranteed rights and freedoms

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

24(2) Exclusion of evidence that would bring the justice system into disrepute

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 bring the administration of justice into disrepute.

ANNEXURE D

(HEADS OF ARGUMENT OF PROFESSOR D STUART, FILED OF RECORD IN THE SUPREME COURT OF CANADA IN THE MATTER OF *R v GRANT*, IN ITS ORIGINAL FORM)

PART I - STATEMENT OF FACTS

1. The Canadian Civil Liberties Association ("CCLA") files its Factum and Book of Authorities pursuant to the Order of Rothstein J. dated January 2, 2008. The CCLA accepts the facts as outlined in paragraphs 3 to 4 of the Appellant's factum.

PART II – ISSUES

2. #1 Should the Court simplify the principles for excluding of evidence obtained in violation of the *Charter* under section 24(2)?

#2 Should the meaning of "detention" under section s. 9 be extended?

PART III - STATEMENT OF ARGUMENT

Overview

3. The C.C.L.A. respectfully submits that

(1) The Court should adopt a simplified, discretionary approach to the exclusion of evidence under section 24(2) of the *Charter* applying to any *Charter* breach, which abandons the overly complex and unsatisfactory distinction between conscripted and non-conscripted evidence and also the doctrine of discoverability;

(2) The Court should decide that the following general principles it unanimously adopted for non-conscripted evidence cases in *R.* v. *Buhay* should apply to all *Charter* breaches:

(a) There are no rules of automatic exclusion or inclusion;
(b) Deference must be given to section 24(2) rulings of trial judges; and
(c) The central consideration is the seriousness of the breach rather than the reliability of the evidence or the seriousness of the offence;

(3) Instead of using the labels of police good or bad faith, the Court should state clearly that a *Charter* breach will be considered *especially serious* where the police have intentionally breached a *Charter* standard and *serious* where the breach was negligent, and that police misperception or ignorance of *Charter* standards will only mitigate a *Charter* breach where the Crown has shown due diligence by the police in their attempt to comply with *Charter* standards; and

a. The Court should re-affirm that psychological compulsion triggers section 9 protections in both vehicle and pedestrian stops AND decide that detention occurs where police suspicion reaches the point of attempting to obtain incriminating evidence.

ISSUE #1 - A SIMPLIFIED, DISCRETIONARY APPROACH TO SECTION 24(2) SHOULD BE APPLIED TO ALL *CHARTER* BREACHES

(1) Abandoning the Conscripted/Non-conscripted Dichotomy and the Doctrine of Discoverability

4. It is respectfully submitted that the distinction between conscripted and non-conscripted evidence drawn by the Supreme Court in *R.* v. *Collins* by Chief Justice Lamer as a "matter of personal taste", and re-affirmed by Justice Cory in *R.* v. *Stillman*, has proved to be unsatisfactory and overly complex, and should be abandoned.

R. v. Collins, [1987] 1 S.C.R. 265 at para. 36
R. v. *Stillman* [1997] 1 S.C.R. 607 at para., 80

5. For several years the effect of *Stillman* was the drawing of a bright line: conscripted evidence was almost always excluded and non-conscripted evidence almost always included. Clearly that is far from what the framers intended given the legislative history and the discretionary wording of s. 24(2).

R. v. Stillman supra per McLachlin J. (dissenting)
R. v. Orbanski; R. v. Elias [2005] 2 S.C.R. 3 (per Lebel and Fish JJ.)

6. A satisfactory definition of conscription has proved elusive. In *Stillman*, Justice Cory describes conscription broadly as a process in which the accused is "compelled to participate in the creation or discovery of the evidence," and also as a narrow category approach of compelled incrimination "by means of a statement, the use of the body or the production of bodily samples". Courts now tend to rely on the category test when defining conscription. Especially in the case of statements this leads to strange results. Where a statement by accused to the police was obtained in violation of section 10(b) but there was no issue of voluntariness in what sense can the accused be said to have been compelled?

R. v. Stillman supra at paras. *75, 80*

7. In the view of most academics and many judges, the distinction between conscripted and non-conscripted evidence is overly complex and arbitrary. Apart from the difficult issue of definition, different approaches must be followed when considering conscripted and non-conscripted evidence, even in the same trial. Furthermore a breach relating to conscripted evidence is not necessarily more serious than a breach relating to non-conscripted evidence. There is no presumption of exclusion, for example, where a drug squad ransacks a private dwelling without bothering to get a warrant in deliberate violation of s. 8. Exclusion should not be based on artificial categories. Instead, what should be at stake is the integrity of the justice system in admitting evidence obtained in breach of the *Charter* where the breach was serious.

8. In the Court below, Justice Laskin's decision in *R.* v. *Grant* breaks new ground in deciding that it is appropriate in conscripted cases to look at the degree of trial unfairness. Given the reliability of the evidence and the nature of the police conduct the impact on trial fairness was held to lie at the less serious end of the trial fairness spectrum. It seems odd that a judge can acknowledge that a trial is even somewhat unfair and yet admit the evidence. The problem here is of the *Stillman* majority's making in their over-inflated use of the phrase "fairness of the trial".

R. v. *Grant* (2006) 38 C.R. (6th) 58 (Ont.C.A.) at para. 52

9. The doctrine of discoverability set out in *Stillman* allows the second and third *Collins* factors to be considered in conscripted cases where the police would have found the evidence without violating the *Charter*. This adds an obtuse inquiry and does not make sense. Why ask this question at all, other than as a pragmatic device to allow those factors to be considered in some cases? Questions of legal remedy should turn on the evidence before the trier of fact, not on what might have been the reality. Furthermore the fact that the police could have found the evidence without breaching the *Charter* makes the violation more serious and should therefore more likely to result in exclusion. This proposition is accepted in *Collins* and re-asserted in *Buhay* but is often overlooked by lower courts, to the detriment of accused. The doctrine would be superfluous if the distinction between conscripted and non-conscripted evidence were to be abandoned.

R. v. *Collins* [1987] 1 S.C.R. 265 at para. 38
R. v. *Buhay* [2003] 1 S.C.R. 63 at para 63

(2) The Principles Articulated in *R.* v. *Buhay* Should Apply to All *Charter* Breaches

10. The Court should apply the general principles for s. 24(2) it unanimously adopted for non-conscripted cases in *R.* v. *Buhay* to all cases where there has been a *Charter* breach:

(a) There are no rules of automatic exclusion or inclusion;
(b) Deference must be given to s. 24(2) rulings of trial judges; and
(c) The central consideration is the seriousness of the *Charter* breach rather than the reliability of the evidence or the seriousness of the offence.

R. v. *Buhay* *supra*

11. In *R.* v. *Buhay*, Justice Arbour provided a tightly reasoned re-statement of the current position of the Court respecting exclusion of non-conscripted evidence:

> Section 24(2) is not an automatic exclusionary rule [...]; neither should it become an automatic inclusionary rule when the evidence is non-conscripted and essential to the Crown's case.

The combined effect of these pronouncements – deference to trial judges and no automatic inclusion – should, and has, led to greater exclusion of non-conscripted evidence.

R. v. *Buhay* *supra* at para. 71

12. The C.C.L.A. respectfully submits that the Court should make it clear that the central consideration is the seriousness of the breach rather than the reliability of the evidence or the seriousness of the offence. The criteria used to determine the seriousness of the breach should include those long established by the Supreme Court starting in *Collins* and crystallised in *Law* and *Buhay*. The Court should change the presumption that conscripted evidence should be excluded and instead declare that any police compulsion in obtaining evidence in violation of the *Charter* will make the violation more serious.

R. v. *Law* [2002] 1 S.C.R. 227
R. v. *Buhay supra*

13. In his analysis of trial fairness and the second and third *Collins* factors, Laskin J.A. in *Grant* emphasises the reliability of the evidence. This focus is not apparent in the Court's rulings to exclude non-conscripted evidence of drugs in both *Buhay* and *Mann*. Justice Laskin contrasts cases of statements obtained in violation of s. 10(b), which he says raise reliability issues. There is, however, much case law excluding confessions for 10(b) violations where it was clear the statement was voluntary and, therefore, there was likely no issue of reliability. The right focus is on whether the breach was serious.

R. v. *Grant supra* at paras. 53-54 and 65
R. v. *Buhay supra*
R. v. *Mann* [2004] 3 S.C.R. 59

14. Since the time of the drafting of the *Charter* in 1982 the C.C.L.A. has consistently urged that there be an effective remedy of exclusion for *Charter* breaches to ensure that *Charter* rights for all are meaningful. The danger of the *Grant* focus on reliability and seriousness of the offence is that it there will be far less exclusion of evidence found following *Charter* violations. This will considerably diminish the importance of carefully balanced *Charter* standards for policing that the Court has taken great pains to put in place since the entrenchment of the *Charter* in 1982.

R. v. *Grant supra* at para. 65

15. There are dangers in adopting a test of “proportionality" between the seriousness of the violation and the seriousness of the offence. A criminal trial under a system of entrenched *Charter* rights for accused has to concern itself with the truth of police abuse and disregard of *Charter* standards, not just the truth of the accused’s guilt. Without the remedy of exclusion in cases where the court considers the crime serious there will be a large number of criminal trials where the *Charter* will cease to provide protection. There will be a significant risk that the public will see no sanction for *Charter* violations. This could create public cynicism regarding the integrity of our system of law enforcement. There cannot be a *de facto* two-tier system where one zone is *Charter*-free and the police ends always justify the means. There must be a real risk of exclusion for serious *Charter* breaches even in cases of serious crimes, as the Court has previously determined, for example, even in double murder cases.

R. v. *Burlingham* [1995] 2 S.C.R. 206
R. v. *Evans* [1991] 1 S.C.R. 869

16. Commendably there is resistance by some trial judges to *Grant*, especially at the level of the provincial Courts where the vast majority of criminal trials now occur. As

recognised in *Buhay*, judges at this level of local immersion are in the best position to know on a daily basis whether *Charter* standards are being broken and what remedy is warranted. In excluding, these judges have focussed on the seriousness of the violation and the role of courts as guardians of the *Constitution*. Were the Court to confirm the focus in *Grant* on the reliability of the evidence and seriousness of the offence such rulings would be in error.

R. v. *Buhay* *supra* at paras. 46-47

R. v. *Payne* (2006) 41 C.R. (6th) 234 (Nfld. & Lab. S.C.) at paras. 50-63 (bloody socks seized in violation of ss. 8 and 9) [C.C.L.A. Book of Authorities Tab 1]

R. v. *Nguyen* (2007) 45 C.R. (6th) 276 (Ont. C.J.) at paras. 48-49 (roadside breath sample where delay breaching ss.10(a) and (b) [C.C.L.A. Tab 2]

R. v. *D.(J.)* (2007) 45 C.R. (6th) 292 (Ont. C.J.) at paras. 76-79, 85-90 (gun and burglary tools in stop of youth in high crime area in violation of sections 8 and 9) [C.C.L.A. Tab 3]

R. v. *Champion* (2008) 52 C.R. (6th) 201 (Ont. C.J.) at paras. 46-60 (breathalyser evidence due to breach of s. 10(b) right to consult counsel in private) [C.C.L.A. Tab 4]

R. v. *Williams* (2008) 52 C.R. (6th) 210 (Ont. S.C.) at paras. 24-30 (marihuana and crack cocaine found by stop of known drug dealer in violations of ss. 8 and 9) [C.C.L.A. Tab 5]

17. In *R.* v. *B.(L.)* Justice Moldaver of the Ontario Court of Appeal did not have to consider section 24(2), since he found no *Charter* violation, but he indicated that exclusion should only be for egregious police behaviour and that "most Canadians" would not countenance not having a trial on the merits for a person found with a gun. Under this test, exclusion should be rare where the evidence is reliable and the offence serious and should only occur when the community would be shocked. This view was expressly rejected in *Collins*. In the subsequent twenty years of jurisprudence it has only been supported in the dissenting opinion of Justice L'Heureux-Dubé in *Burlingham*. This approach should be clearly rejected again. Otherwise *Charter* standards for policing will become largely meaningless. There must be a sanction for serious *Charter* breaches. Courts must be above law and order politics.

R. v. *B.(L).* (2007) 49 C.R.(6th) 245 (Ont. C.A.) at paras. 80-82
R. v. *Collins* *supra* at para. 41
R. v. *Burlingham* supra

18. The remedy of exclusion for *Charter* breaches has proved to be an important vehicle to hold agents of the State indirectly and publicly accountable. Where there are patterns of inclusion despite police breaches there will be less incentive for police to take the *Charter* seriously. Those preferring alternative remedies, such as civil suits and police complaints procedures, now bear a heavy burden of demonstrating their comparative efficacy. They have thus far proved to be a poor and low visibility response to systemic problems of police abuse or ignorance of their powers. Police are rarely, if ever, disciplined for *Charter* breaches that uncover evidence of criminality. Civil litigation is expensive, uncertain in outcome, and, if successful, likely to be subject to confidentiality agreements. Civil litigation is highly unlikely where the plaintiff is in prison.

Data collected by C.C.L.A. [Tab 6]

19. In considering the s. 24(2) remedy Courts must be concerned with the long-term integrity of the justice system if *Charter* standards for accused are ignored and/or operate unequally against vulnerable groups, such as persons of colour and those who are persons. In developing standards for strip searches the majority of the Court in *R.* v. *Golden* took into account Commission findings of over-representation of African Canadians and Aboriginals in the Canadian criminal justice system and likely disproportionality in arrests and searches. This sensitivity should also inform the development of an effective s. 24(2) remedy. The *Charter* is in place to try to ensure that minorities are fairly treated by the State.

R. v. *Golden* [2001] 3 S.C.R. 679 at para. 83
R. v. *Harris* (2007) 49 C.R. (6th) 270 (Ont. C.A.) at para. 63

(3) No Mitigation for Good Faith if No Diligent Effort to Comply with the *Charter*

20. The Court needs to clarify the meaning of good faith on which s. 24(2) rulings so often turn. Instead of using the politically and emotionally charged labels of "good faith" versus "bad faith", the Court should employ the familiar legal concepts of intention and negligence. A *Charter* breach should be considered *especially serious* where the police have *intentionally* breached the *Charter* and *serious* where the police breach was a result of negligence. Police misperception or ignorance of *Charter* standards should only mitigate the breach where they have shown due diligence in their attempt to comply.

21. According to *Buhay*, police good faith must be reasonably based. Justice Arbour, speaking for the full Supreme Court, was concerned that one officer had demonstrated a "casual attitude" to the accused's *Charter* rights and the other "blatant disregard". Neither officer was found to have acted in good faith.

R. v. *Buhay* *supra* at paras. 59-61

22. According to Justice Laskin in *Grant* there was no bad faith and no institutional indifference to individual rights. Given that the Court decided that the stop was in violation of the *Mann* standards, and that such good faith arguments were not accepted in *Mann* itself, this view is clearly in error.

R. v. *Grant* *supra* at paras. 62-63

23. In *R.* v. *Washington*, the B.C. Court of Appeal wrestled for almost a year over the question of whether the police had acted in good faith when they conducted a warrantless search of a package found to contain drugs by airport authorities. This contravened the Supreme Court's decision in *Buhay*, handed down six weeks prior to the search. Justice Ryan (Lowry J.A. concurring) for the majority decided that it was reasonable for the police to believe that they had the authority to act and that the evidence should therefore be admitted. Justice Rowles in dissent relied on a comprehensive review of the Supreme Court's dicta that good faith cannot be found where police made an unreasonable error as to a *Charter* standard or were ignorant of it. With Justice Rowles in dissent it is hard to accept that the police in *Washington* showed due diligence in failing to comply with, or know about, the *Buhay* ruling.

R. v. *Washington* (2008) 52 C.R. (6th) 1 (B.C.C.A.) at paras. 115-138) [C.C.L.A.Tab 7]
Stephen Coughlan, "Good Faith and Exclusion of Evidence under the *Charter*" (1992) 11 C.R. (4th) 304 [C.C.L.A. Tab 8]

24. Justice Doherty of the Ontario Court of Appeal has pointed to dangers of labels such as good or bad faith in *R.* v. *Kitaitchuk*:

> Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights […]

and in *R.* v. *Harris*:

> Police misconduct resulting in a *Charter* violation can be placed on a continuum [...] between the two extremes of a good faith error and a blatant disregard for constitutional rights

R. v. *Kitaitchuk* (2002), 4 C.R. (6th) 38 (Ont. C.A.) at para. 41, relying on C. Hill, "The Role of Fault in Section 24(2) of the *Charter*", The *Charter*'s Impact on the Criminal Justice System (1996) p.57)
R. v. *Harris supra* at para. 62

25. It is time to expressly disavow the utility of the politically and emotionally charged labels of good or bad faith, which have produced uncertainty and inconsistency. Judges are very familiar with deciding whether conduct was intentional or negligent. Decisions would likely be more consistent if it was made clear that a breach can only be mitigated where the police made a diligent effort to comply with the *Charter*. We should expect police not to be careless about *Charter* rights. As in the case of the tort of negligent investigation, the standard should be that "police act professionally and carefully, not just to avoid gross negligence"

Hill v. *Hamilton –Wentworth Regional Police Services Board* 2007 SCC 41 at para. 70 (per McLachlin C.J. for the majority)

ISSUE #2 - THE MEANING OF DETENTION SHOULD BE WIDENED

(4) Psychological Detention OR Attempting to Obtain Incriminating Evidence

26. Iacobucci J. remarked in *obiter* for the majority in *Mann* that 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 and that constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint. It is respectfully submitted that this test of degree is too uncertain and also misses civil liberty concerns about general stop powers. The Supreme Court could not have intended that the careful limits they were placing on investigative detention based on individualized suspicion could be completely bypassed by the current police practice in Toronto, as in *Grant*, of approaching persons on the street, especially young persons and/or persons of colour, getting their names, doing a C.P.I.C. search and then launching into aggressive questioning aimed at incrimination.

R. v. *Mann supra* at para 19
R. v. *D.(J.) supra*
R. v. *Williams supra*

27. The Court should confirm that Ontario Court of Appeal's ruling in *Grant* that the concept of psychological detention applies to both vehicle and pedestrian stops where

there is a reasonable belief that there is no choice but to comply with a police request. Courts should not play down the coercive realities of all exchanges with police.

Sed contra R. v. *B.(L.) supra*

28. The problem with a sole focus on physical or psychological detention is, however, that this leaves one who naively thinks he or she is free to go without *Charter* protection. The test also encourages police to avoid section 9 and 10 rights by delaying arrest, and resorting to such strategies as telling the detainee he or she is free to leave when in fact they are not and are suspected of criminal activity. These concerns would be addressed by an alternative test that detention also occurs where police have a suspicion which has reached the point that they are attempting to obtain incriminating evidence. This was the compromise test carefully articulated by a majority of the Newfoundland Court of Appeal in *R. v. Hawkins.* On the appeal as of right to the Supreme Court this approach was implicitly rejected in the briefest of reasons consisting of a one sentence assertion that the accused was detained. The CCLA respectfully suggests that it is time to fully reconsider.

R. v. *Hawkins* (1992) 14 C.R. (4th) 286 (Nfld. C.A.) at paras. 26-32 [C.C.L.A. Tab 9]; rev'd [1993] 2 S.C.R. 157

PART IV- COSTS

29. The CCLA respectfully requests that there be no order as to costs given the importance of the *Charter* issues at stake.

PART V - ORDER SOUGHT

30. The CCLA respectfully requests the Court to allow the appeal and substitute an acquittal.

31. The CCLA respectfully requests permission to present oral argument for no longer than 20 minutes.

ALL OF WHICH is respectfully submitted, at Kingston, Ontario, this 22nd day of February 2008, by

Don Stuart
Counsel for the Intervener
The Canadian Civil Liberties Association

PART VI – AUTHORITIES CITED

Cases

Secondary sources