SCC File No.:38213

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

B E T W E E N:

CHRISTIE CULOTTA

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

FACTUM OF THE APPELLANT, CHRISTIE CULOTTA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I: STATEMENT OF THE FACTS

Overview of the Appellant's Position

1. This case raises critical issues surrounding the ability of the state to undermine doctor-patient confidentially and privacy, an integral part of the medical sphere, and an important bond of trust between a doctor and an individual. In the case before this Honourable Court, the state interjected itself into a patient's medical care by recruiting a medical professional to surreptitiously draw excess blood from the patient in order to hand it over to police so that they might use it to incriminate her.

2. Bodily integrity is sacrosanct. Individuals deserve control over what happens to their own bodies. When individuals enter hospitals for medical treatment while under criminal investigation, their *Canadian Charter of Rights and Freedoms*[1] protections do not dissipate. Indeed, individuals are guaranteed *Charter* protections in a hospital environment.[2] When police ignore their constitutional obligations and encourage the physical extraction of bodily substances for police purposes without that person's informed consent, and in circumvention of the law, their actions merit constitutional scrutiny and remedy. State interference with a person's bodily integrity is a profound breach of a person's privacy and an affront to human dignity.[3] It is for this reason that this Honourable Court has held that the privacy of the individual calls for the greatest constitutional protection.[4]

3. In the case at bar, the Appellant respectfully submits that her s.8 and s.10(b) *Charter* rights were infringed before and after she was taken to the hospital after being in a boating accident. The Appellant was denied the implementational component of her rights to counsel, leaving her unable to make an informed decision about whether to provide blood samples to the hospital lab technologist. The Appellant was subjected to a procedure where blood was taken from her body for medical tests the nature of which were not disclosed to her. Further, to exacerbate the situation, at the behest of the police and in violation of the duty to hold off to

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[1] Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[2] *R v Taylor*, 2014 SCC 50 at para 50 [*Taylor*].
[3] *R v Stillman*, [1997] 1 SCR 607 at para 42.
[4] *R v Tessling*, [2004] 3 SCR 432 at para 21.

obtain incriminating evidence, police co-opted the lab technologist into removing more blood from her body than was medically necessary. As such, the Appellant submits that all of the blood samples that were obtained from the Appellant, as well as the hospital records that reflect the analysis of the blood samples, should be excluded pursuant to s.24(2) of the *Charter*.

Statement of the Facts

The Collision, the Ambulance, and the Appellant's Arrest

4. On August 1, 2013, at approximately 2:00 a.m., a boating vessel collided with a rock on Lake Muskoka. Constable John Tunney was dispatched in relation to the collision at 2:30 a.m. In response, he traveled to the Beaumaris Marina arriving there at 2:46 a.m. Cst. Tunney immediately noticed that the scene was chaotic. He explained that it was dark outside, and the heavy downpour of rain made for difficult working conditions and note-taking.[5]

5. There were five people in the boat, including the Appellant. All the passengers were female. Three injured females involved in the accident were placed in an ambulance and treated by paramedics.[6]

6. At 3:03 a.m., Cst. Tunney entered the rear of the ambulance while medical care was being administered. He detected an odour of alcohol emanating from within the ambulance. The three injured women were in the ambulance along with paramedics. With respect to the Appellant specifically, he noted that her face and forehead were swollen and that the left side of her face was covered in blood. He believed that these injuries were the result of the collision and

[5] Trial Testimony of Constable John Tunney, Record of the Appellant, Tab 11, at pp. 12-13 of the transcript [*TT of Cst. Tunney*].

[6] Preliminary Hearing Testimony of Constable John Tunney, Record of the Appellant, Tab 8, at pp. 60-61 of the transcript [*PHT of Cst. Tunney*]. At trial, the Duty Book Notes of Constable John Tunney and Sergeant Michael Tennent, and Preliminary Hearing Evidence of Constable John Tunney, Doctor Karasmanis, and Kim Clark were made part of the trial evidence on consent of all parties. The evidence was augmented by some *viva voce* evidence.

began questioning the occupants of the ambulance in an attempt to ascertain who was driving the vessel.[7]

7. After receiving information that the Appellant was the driver of the vessel, Cst. Tunney attempted to engage her with further questions about the incident. Cst. Tunney asked the Appellant whether she had consumed alcohol and she replied that she had consumed one or two Vodka Smirnoff and tonics "a long time ago".[8] During this interaction in the ambulance, Cst. Tunney observed the Appellant to have watery eyes and noted a slight slurring in her speech. He was unable to tell whether the watery eyes were from intoxication, crying, or the rain. He was unable to tell whether her slurred speech was from intoxication or her facial injury. Cst. Tunney readily conceded that her slurred speech could have stemmed from her facial injuries. Cst. Tunney admitted that he could not isolate the odour of alcohol and it could have been emanating from any of the ambulance occupants.[9]

8. Cst. Tunney arrested the appellant at 3:17 a.m. for impaired operation of a vessel. At the time of the Appellant's arrest, the Appellant was in the midst of receiving treatment for her injuries. Following the arrest of the Appellant, although Cst. Tunney spent time questioning the Appellant, he testified that her medical care was of main concern and that it would be difficult to provide the Appellant with her rights to counsel.[10] Thus, Cst. Tunney did not provide the Appellant with her rights to counsel, pursuant to s.10(b) of the *Charter*, nor caution her with respect to her right to silence.

Rights to Counsel at the Hospital, Caution, and Breath Demand

9. The ambulance took the three women to a local hospital in Bracebridge, Ontario and arrived at 3:40 a.m. The women were triaged in the emergency department. When Cst. Tunney observed a gap in the Appellant's medical treatment, he approached the Appellant and read her rights to counsel at 3:46 a.m. At 3:47 a.m. he read her the standard police caution and at 3:48

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[7] *TT of Cst. Tunney*, *supra* note 5 at pp. 14-19 of the transcript.
[8] *PHT of Cst. Tunney*, *supra* note 6 at p.61 of the transcript.
[9] *TT of Cst. Tunney*, *supra* note 5 at pp. 20-23 of the transcript; *PHT of Cst. Tunney*, *ibid* at pp. 60-62, 77, 79-80 of the transcript; Duty Book Notes of Cst. Tunney, Record of the Appellant, Tab 6, at pp. 77-79 of Cst. Tunney's notes [*DBN of Cst. Tunney*].
[10] *PHT of Cst. Tunney, ibid* at p. 62 of the transcript.

a.m. he read a breath demand. All three were read verbatim off cards. The appellant stated she understood. When asked if she wanted to consult a lawyer, she answered, "No, my parents should be here soon. We have a family lawyer." The Appellant was unsure of the lawyer's name and said she would make inquiries with her parents when they arrived at the hospital.[11]

10. When Cst. Tunney provided the Appellant with her rights to counsel and caution, he noted that she had significant mouth and head injuries. Cst. Tunney was concerned that the Appellant was disoriented, confused, and did not fully comprehend her situation. He understood that she would be waiting for her parents to arrive so she could obtain further information about their family lawyer.[12] When Cst. Tunney issued the breath demand to the Appellant, he was concerned that her facial injuries prevented her from fully understanding what was transpiring. However, Cst. Tunney made no efforts to ensure that she understood.[13]

11. In addition to questioning the Appellant's comprehension of her rights, Cst. Tunney also was concerned about her ability to provide a breath sample in light of her facial injuries. By this time a breath technologist, Constable Kruithof, had arrived at the hospital. Sergeant Tennant, a senior officer, was also present and Cst. Tunney took the opportunity to seek his guidance.[14]

Conversation with Sergeant Michael Tennent

12. According to Cst. Tunney, Sgt. Tennent and the breath technician had been standing close by as he was speaking to the Appellant. Cst. Tunney explained his concern about the Appellant's ability to provide a breath sample to Sgt. Tennent. Shortly after this conversation, at approximately 3:50 am, Sgt. Tennent provided Cst. Tunney with two CFS seals. Cst. Tunney testified that he was instructed by Sgt. Tennent to place seals on vials of the Appellant's blood as soon as drawn by medical staff. Cst. Tunney waited for Kim Clark, the lab technologist, to

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[11] *TT of Cst. Tunney*, *supra* note 5 at pp. 27-31 of the transcript; *DBN of Cst. Tunney*, *supra* note 9 at pp. 79-80 of Cst. Tunney's notes.
[12] *DBN of Cst. Tunney*, *ibid* at pp. 79-80 of Cst. Tunney's notes; *PHT of Cst. Tunney*, *supra* note 6 at p. 84 of the transcript.
[13] *PHT of Cst. Tunney*, *ibid* at p. 64 of the transcript.
[14] *TT of Cst. Tunney*, *supra* note 5 at p. 32 of the transcript.

arrive to draw the Appellant's blood because he was instructed by Sgt. Tennant not to leave the Appellant.[15]

13. Notwithstanding the breath demand and presence of the technician, it was ultimately decided by Sgt. Tennent that they would not attempt to seek a sample of the Appellant's breath, nor would they proceed by way of the *Criminal Code* blood demand provisions. No inquiries were ever made of the Appellant or medical staff with respect to her ability to provide a breath sample. The decision to proceed by way of unauthorized seizure of blood drawn by hospital staff was made by a senior officer within minutes of the Appellant being informed of her rights to counsel.

Attempt to Ascertain Identity of Counsel of Choice and Arrival of the Appellant's Parents

14. At 4:14 a.m., approximately twenty minutes after a decision was made to seize the Appellant's blood, Cst. Tunney made an attempt to ascertain the name of the family lawyer by telephoning the Appellant's father, Victor Culotta. However, he was unsuccessful in doing so as there was a break in the call. At 4:50 a.m., the Appellant's parents arrived at the hospital. Cst. Tunney made no attempt to inquire from them the name of her family's lawyer. Further, he did not ascertain whether the Appellant had received contact information for her family's lawyer from her parents or whether she wished to contact him.[16]

The Taking of the Appellant's Blood

15. Doctor Karasmanis, the on-duty emergency room physician, examined the Appellant. Dr. Karasmanis ordered blood tests for medical purposes. Four vials of blood were needed for these tests. One of the tests he ordered was to measure blood-alcohol concentration. Before Ms. Clark drew blood from the Appellant, Cst. Tunney spoke to her outside of the presence of the Appellant, and told her he wanted to seal some blood for police use. At 5:18 a.m., Ms. Clark drew blood from the Appellant. Cst. Tunney was present and could observe the blood being taken from the Appellant's body. Six vials of blood were taken from the Appellant. After the

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[15] *TT of Cst. Tunney, ibid* at pp. 35, 39 of the transcript; *DBN of Cst. Tunney, supra* note 9 at p. 80 of Cst. Tunney's notes; *PHT of Cst. Tunney, supra* note 6 at pp. 65, 85 of the transcript.
[16] *TT of Cst. Tunney, ibid* at pp. 36, 37 of the transcript; *DBN of Cst. Tunney, ibid* at pp. 80-81 of Cst. Tunney's notes.

blood was drawn, Cst. Tunney accompanied Ms. Clark to the lab to adhere the two CFS seals to the two vials he needed. Cst. Tunney inspected the integrity of the vials and secured the two of them with CFS seals. He recalled the vials being immediately placed in an area in the refrigerator that was labelled to be preserved by police. Cst. Tunney and Ms. Clark completed a corresponding laboratory form routinely used in that jurisdiction for the surrender of hospital blood to police.[17]

16. Ms. Clark testified at both the preliminary hearing and trial. She purported to have no memory of what happened that night and could only speak to her usual practices. She indicated that four vials of blood were apparently required for the specific tests that the emergency room doctor ordered. She testified that it was sometimes her practice to draw extra vials in the event that additional tests were necessary. Two of the six vials of blood taken by Ms. Clark were sealed by Cst. Tunney. Nobody, not even the emergency room physician Dr. Karasmanis, sought the Appellant's consent to draw any blood from her.[18]

The Appellant's Release and Statement to the Police

17. At 5:30 a.m., after placing the seals on the Appellant's blood, Cst. Tunney returned to the Appellant's room and advised her that she was being released unconditionally pending further investigation. He then asked her for a statement about what happened. At 5:32 a.m., Cst. Tunney provided the Appellant with her rights to counsel and caution and now said she was under investigation for impaired operation of a vessel causing bodily harm and dangerous operation causing bodily harm. The Appellant said that she understood and that she did not want to consult a lawyer. Cst. Tunney reiterated that the interview was voluntary and that she could consult

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[17] *TT of Cst. Tunney, ibid* at pp. 9-10, 39-42 of the transcript; *PHT of Cst. Tunney, supra* note 6 at pp. 86-88 of the transcript, *DBN of Cst. Tunney, ibid* at p. 81 of Cst. Tunney's notes.

[18] Trial Testimony of Kim Clark, Record of the Appellant, Tab 12, at pp. 210-212, 215- 219, 223, 227-228 of the transcript [*TT of Ms. Clark*]; Preliminary Hearing Testimony of Kim Clark, Record of the Appellant, Tab 10, at pp. 39, 44-46, 50, 52- 53 of the transcript [*PHT of Ms. Clark*]; Preliminary Hearing Testimony of Dr. George Karasmanis, Record of the Appellant, Tab 9, at pp. 14-16, 18, 20-23, 29-34 of the transcript [*PHT of Dr. Karasmanis*]; Trial Testimony of Victor Culotta, Tab 14, at p. 258 of the transcript [*TT of VC*].

counsel first. The Appellant gave a statement where she admitted to operating the vessel and consuming a relatively small amount of alcohol.[19]

Search Warrant and Seizure

18. The police investigation continued. On August 23, 2013, Cst. Tunney applied for a search warrant to seize the sealed vials of blood and the hospital records from the hospital. A search warrant was granted under s. 487 of the *Criminal Code*. Cst. Tunney attended at the hospital and located the blood he had previously sealed. The blood samples were sent to the Centre of Forensic Sciences and the results placed the Appellant's blood alcohol concentration over the legal limit at the relevant time.[20]

The Appellant's Arrest

19. On October 18, 2013, Cst. Tunney telephoned the Appellant and asked that she turn herself in to be arrested. The Appellant indicated that she wished to speak to a lawyer first. Following consultation with counsel, the Appellant agreed to turn herself in. She attended the detachment with her parents, was arrested, charged, and released on a promise to appear.[21]

Judicial History

20. It should be noted that the following review of the decisions of the lower courts do not encapsulate all the issues raised and discussed. The focus will be on the issues being raised in this present appeal.

The Ruling of the Ontario Court of Justice

21. The learned trial judge, Mulligan J., did not find that the implementational component of the Appellant's s.10(b) *Charter* rights were violated. In fact, it appears that His Honour may have inadvertently glossed over the issue of whether the Appellant asserted her rights to counsel. In reciting the facts of the case, Mulligan J. stated that when the Appellant was provided her

[19] *DBN of Cst. Tunney, supra* note 9 at pp. 81-83 of Cst. Tunney's notes; *TT of Cst. Tunney, supra* note 5 at pp. 43, 45-48, 62 of the transcript.
[20] *TT of Cst. Tunney, ibid* at pp. 66-68 of the transcript; *DBN of Cst. Tunney, ibid* at pp. 53-55, 66.
[21] *PHT of Cst. Tunney, supra* note 6 at pp. 95-96 of the transcript.

rights to counsel for the first time at the hospital, she declined to speak to a lawyer. His Honour indicated that there was some mentioning of a family lawyer known by the Appellant's parents, which he would address later in his decision.[22] However, the next time His Honour mentions the Appellant's family lawyer is in the context of the Appellant providing a statement to Cst. Tunney, after she was provided her rights to counsel a second time. Mulligan J. found that she understood her rights and declined to speak to the lawyer known to her or to duty counsel prior to her providing a statement.[23] This, however, occurred in relation to a different interaction with the Appellant *after* blood samples were taken from her and *after* she was unconditionally released and is not an issue on this appeal. There was therefore no direct finding by the learned trial judge on whether the implementational component of the Appellant's s.10(b) rights were violated prior to blood samples being taken from the Appellant.

22. Mulligan J., however, found that the Appellant's s.8 *Charter* rights were indeed violated. His Honour found that the lab technologist was co-opted into taking additional blood samples by Cst. Tunney and that there was no consent from the Appellant to have blood drawn for police purposes.[24] His Honour held that it was clear that there was a plan by police to seal blood samples so that they could later obtain them through a search warrant. Mulligan J. was not impressed with the actions of Cst. Tunney. Although there was a valid search warrant, Mulligan J. held that police could not breach an individual's *Charter* rights and attempt to cure that breach by obtaining unconstitutionally seized evidence through a search warrant.[25] Therefore, Mulligan J. excluded the two sealed vials of blood. However, His Honour took no issue with the admission of the hospital records as he found that there were reasonable grounds to authorize the issuance of a search warrant for the Appellant's hospital records.[26]

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[22] *R v Culotta* (23 May 2017), Bracebridge CR-15-0021 at para 18 (OSCJ) [*Culotta* SCJ].
[23] *Culotta* SCJ, *ibid* at para 42.
[24] *Culotta* SCJ, *ibid* at paras 33, 37.
[25] *Culotta* SCJ, *ibid* at paras 33-34.
[26] *Culotta* SCJ, *ibid* at paras 79, 83.

The Decision of the Court of Appeal for Ontario

The Majority's Decision

23. Nordheimer and Hourigan J.J.A. found a s.10(b) *Charter* violation when the Appellant was not informed of her rights to counsel immediately upon detention, however, ultimately ruled that it was of no consequence.[27] With respect to whether the Appellant asserted her rights to counsel, the Court found that the Appellant rejected her rights to counsel and did not wish to speak to any lawyer.[28]

24. In agreement with Mulligan J., the majority found that the Appellant's s.8 *Charter* rights were violated when the police sealed two vials of blood. However, because Mulligan J. excluded the two sealed vials of blood, the majority concluded that there was vindication for the breach and therefore no prejudice to the Appellant. Since the majority held that the four vials of blood were taken at the direction of the emergency room doctor and not at the behest of the police, the Court found that the two vials of blood were distinct and therefore the s.8 breach did not taint the hospital records that reflected the analysis of blood taken under the physician's order.[29]

The Dissent

25. Pardu J.A. found that the Appellant invoked her rights to counsel when she stated to Cst. Tunney (prompted by his question) that she was waiting for her parents to arrive and that her parents knew a family lawyer. When Cst. Tunney contacted the Appellant's father to ascertain the name of the Appellant's family lawyer, Pardu J.A. concluded that he did so because he understood that it was with whom the Appellant wished to speak about her legal rights.[30] As such, Pardu J.A. held that it was Cst. Tunney's duty to refrain from taking further steps to obtain evidence against the Appellant.[31]

26. Despite the absence of a causal connection between the s.8 *Charter* violation (when Cst. Tunney co-opted the lab technologist into taking more blood for police purposes) and the

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[27] *R v Culotta*, 2018 ONCA 665 at para 35 [*Culotta* ONCA].
[28] *Culotta* ONCA, *ibid*, at paras 37, 42, 46.
[29] *Culotta* ONCA, *ibid*, at paras 59, 65.
[30] *Culotta* ONCA, *ibid*, at paras 76-78.
[31] *Culotta* ONCA, *ibid*.

creation of the hospital records, Pardu J.A. held that Cst. Tunney's actions were so serious and that there was a sufficient contextual and temporal connection between the breach and the creation of the hospital records that they should have been excluded.[32]

PART II: QUESTIONS IN ISSUE

27. It is respectfully submitted that there are two issues on this appeal:

a. Did the trial judge err in determining that the Appellant's s.10(b) *Charter* rights had not been breached?

b. Did the trial judge err in not excluding all of the blood samples and the hospital records of the analysis of the blood?

PART III: STATEMENT OF ARGUMENT

Were the Appellant's Section 10(b) *Charter* Rights Infringed?

28. The applicable law surrounding an accused's rights to counsel upon arrest or detention is well established. Section 9 of the *Charter* is a triggering mechanism for the rights protected in sections 10(a) and (b) of the *Charter*. Section 10(a) of the *Charter* is premised on the idea that an individual who has been arrested or detained does not have to submit to an arrest or detention if they are not notified of the reasons therefor. This is because if an individual is not aware of the extent of the jeopardy they are facing, it effectively vitiates any meaningful consideration of whether they should consult with a lawyer.[33]

29. A person under arrest or investigative detention has the right to retain and instruct counsel without delay and to be informed of that right.[34] When an individual is arrested or detained, they are put in a precarious position where they may inadvertently incriminate themselves. This would violate the right to silence afforded by section 7 of the *Charter*.[35] Therefore, to mitigate this risk, police officers have a duty to, in a timely manner, not only inform the arrested individual that they have a right to consult with a lawyer, but also provide

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[32] *Culotta* ONCA, *ibid*, at para 71.
[33] *R v Evans*, [1991] 1 SCR 869; see also *R v Black*, [1989] 2 SCR 138 at para 30.
[34] *R v Suberu*, 2009 SCC 33 at paras 2, 41-42 [*Suberu*].
[35] *R v Bartle*, [1994] 3 SCR 173.

them with a reasonable opportunity to do so.[36] In other words, the right to counsel goes beyond simply alerting an arrested individual of their rights. The right to counsel means allowing an individual the opportunity to receive advice on how to implement those rights.[37] Therefore, s.10(b) imposes both an informational and implementational duty on police.[38]

30. Further, the psychological value of being provided with access to counsel cannot be ignored. In a recent decision by the Court of Appeal of Ontario, Doherty J.A. stated:

> The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.[39]

31. It is uncontested that Cst. Tunney fulfilled the informational component of the Appellant's rights to counsel *at the hospital*.[40] One of the issues in this appeal is whether Cst. Tunney provided the Appellant with a reasonable opportunity to contact her counsel of choice. Section 10(b) of the *Charter* entitles an arrested individual to consult with a lawyer *of their choosing*. Police do not fulfil their constitutional obligations by simply providing an accused an opportunity to consult with *any* lawyer.[41] The right to contact counsel of choice is fundamental. When an individual is charged with a criminal offence they face the overwhelming might of the state equipped with a wealth of resources. When placed in such a dire situation, where an individual's interests are at stake, there should be no state intrusion in an arrested individual's

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[36] *Ibid*, but see also *R v Manninen*, [1987] 1 SCR 1233 [*Manninen*].
[37] *R v Sinclair*, 2010 SCC 35 at para 26.
[38] *Suberu*, *supra* note 34 at para 38.
[39] *R v Rover*, 2018 ONCA 745 at para 45 [*Rover*].
[40] The Court of Appeal for Ontario found that there was a s.10(b) violation at the scene of the accident when Cst. Tunney delayed informing the Appellant of her rights to counsel. However, the ONCA concluded that because nothing was derived from that violation it was ultimately of no consequence. See *Culotta* ONCA, *supra* note 27 at para 65. Therefore, while relevant in considering the multitude of *Charter* violations and which will be discussed in the s.24(2) analysis, it is not a focus of this appeal.
[41] *R v Willier*, 2010 SCC 37 at para 35 [*Willier*].

decision to choose their *own* lawyer - a decision that has the potential of having longstanding ramifications on that person's liberty.[42]

32. Upon informing the Appellant of her rights to counsel, the Appellant responded, "No. My parents should be here soon. We have a family lawyer." Indeed, Cst. Tunney understood her response as a desire to speak to her counsel of choice, as Cst. Tunney made efforts to contact the Appellant's father to obtain contact information for her family's lawyer. Unfortunately, the phone call dropped and sometime thereafter the Appellant's parents arrived. After the phone call dropped, Cst. Tunney made no further efforts to facilitate the Appellant's rights to counsel of choice. It is Cst. Tunney's subsequent actions that should be of serious concern to this Honourable Court.

33. As soon as an arrested individual asserts their right to counsel, police have a duty to hold off from attempting to illicit incriminating evidence from an accused until there has been a reasonable opportunity for the accused to consult with counsel.[43] It is respectfully submitted that Cst. Tunney failed in his duties. Within minutes of reading the Appellant's rights to counsel, and prior to the Appellant having an opportunity to speak to counsel, Cst. Tunney and Sgt. Tennent crafted a plan to illegally seize the Appellant's blood and to obtain a later authorization.[44]

34. When the Appellant's parents arrived, Cst. Tunney made no inquiries with the Appellant on whether she had obtained the phone number of her counsel of choice. It appears that Cst. Tunney did not turn his mind to whether this had occurred. Instead, he approached the lab technologist (either with knowledge that the Appellant had not obtained the phone number of her counsel or with indifference about whether it had occurred) and indicated to her his desire to

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[42] *R v McCallen*, [1999] OJ No 202 at para 37 (Ont CA).
[43] *Manninen*, *supra* note 36 at para 23; see also *R v Prosper*, [1994] 3 SCR 236 at para 35 [*Prosper*].
[44] At 3:46 a.m. Cst. Tunney read the Appellant her rights to counsel, at 3:50 a.m. Sgt. Tennent provided Cst. Tunney with two CFS seals for the Appellant's blood, and at 4:14 a.m. Cst. Tunney made an attempt to ascertain the name of the Appellant's family lawyer. See above under '*Rights to Counsel at the Hospital, Caution, and Breath Demand*'; '*Conversation with Sergeant Michael Tennent*'; and '*Attempt to Ascertain Counsel of Choice and Arrival of the Appellant's Parents*'.

obtain and seal some of the Appellant's blood. Cst. Tunney, of course, was aware of the incriminatory potential of the results of the blood samples. Indeed, this is the purpose for which he sought the samples. Despite this knowledge, he did not hesitate to obtain the Appellant's blood samples.

35. Effective implementation of the right to counsel depends on police.[45] Once the Appellant asserted her desire to consult with her family's lawyer, Cst. Tunney had an obligation to facilitate that communication.[46] Absent a clear indication that the Appellant had changed her mind about contacting her family's lawyer, it was unreasonable for Cst. Tunney to proceed as if she had waived her rights to counsel.[47]

36. It is respectfully submitted that the Ontario Court of Appeal erred in finding that the Appellant rejected her rights to counsel and did not wish to speak to a lawyer.[48] The Appellant's response must be read in its *entirety*, not on a piecemeal basis. The fact that she said "no" must be read in conjunction with the rest of her answer to Cst. Tunney. The Appellant indicated that she was waiting for her parents to arrive so that she could be put in contact with her family's lawyer.

37. The mere fact that the Appellant chose not to speak immediately to duty counsel cannot be viewed as a *rejection* of her right to retain and instruct counsel.[49] The standard for an effective waiver of right to counsel is high. It must be clear and unequivocal.[50] This means that there can be no doubt about an accused's decision not to contact counsel. The choice of words used by the Appellant did not suggest that that she did not wish to speak to a lawyer.[51] The language used suggests that she wished to speak to her *counsel of choice*. Had Cst. Tunney sincerely believed that the Appellant had waived her right to counsel, he would not have made efforts to ascertain the contact information for her family's lawyer by calling the Appellant's father.

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[45] *Rover*, *supra* note 39 at para 34.
[46] *Willier*, *supra* note 41 at paras 30, 33; see also *Taylor*, *supra* note 2 paras 23-24.
[47] *R v Leclair*, [1989] 1 SCR 3 at para 17 [*Leclair*].
[48] *Culotta* ONCA, *supra* note 27 at paras 37, 42, 46.
[49] *Leclair*, *supra* note 47 at para 16.
[50] *Prosper*, *supra* note 43 at para 45.
[51] *R v Owen*, 2015 ONCA 652 at para 29.

38. Further, in order for an individual to waive their rights to counsel, they must be able to understand the consequences of giving up that right.[52] If positive evidence exists of special circumstances, such as injury or emotional upset, police are required to satisfy themselves that an accused individual understands their rights to counsel.[53]

39. Victor Culotta, the Appellant's father, testified at trial. He interacted with the Appellant in the immediate aftermath of the accident and described her as crying, sad, banged up, and a mess.[54] He also interacted with the Appellant at the hospital and stated that she was upset and exhausted. He testified that she was not in the best state of mind.[55] Further, as was discussed above, when Cst. Tunney provided the Appellant with her rights to counsel he stated that the Appellant had significant mouth and head injuries and was concerned that she did not fully comprehend her situation.[56] Indeed, he was concerned enough about this that he wrote it in his notes at the time. In light of his concerns about her cognitive state, and the Appellant's serious condition, Cst. Tunney should have explained her rights clearly and ensured that he received clear answers from her. He also should not have proceeded to obtain incriminating evidence against the Appellant.

40. Given these special circumstances, the Appellant respectfully submits that Cst. Tunney had a duty to take further steps to ensure that the Appellant understood her rights to counsel. The Appellant therefore respectfully asks this Honourable Court to find that the Appellant's s.10(b) *Charter* rights were violated.

Were the Appellant's Section 8 *Charter* Rights Infringed?

41. The learned trial judge and the Court of Appeal both found that the Appellant's section 8 *Charter* rights had been infringed when the lab technologist took extra vials of blood from the

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[52] *R v Clarkson*, [1986] 1 SCR 383 at para 26.
[53] *Bartle*, *supra* note 35 at para 20; *R v McAvena*, [1987] 4 WWR 15, 1 WCB (2d) 354 (Sask CA); *R v Dubois*, [1990] RJQ 681, 27 QAC 241 (QCCA); *R v Winzer*, 2003 YKTC 58, [2003] BCWLD 828.
[54] *TT of VC, supra* note 18 at p. 258 of the transcript [*TT of VC*].
[55] *TT of VC, ibid* at pp. 266, 274 of the transcript.
[56] *DBN of Cst. Tunney*, *supra* note 9 at pp. 79-80 of Cst. Tunney's notes; *PHT of Cst. Tunney*, *supra* note 6 at pp. 64, 84 of the transcript.

Appellant at Cst. Tunney's direction.[57] Therefore, the issue of whether the Appellant's s.8 *Charter* rights were violated is not in issue. Rather, the Appellant respectfully submits that given the finding that the Appellant's s.8 *Charter* rights were violated the trial judge and the Court of Appeal erred in their exclusion analysis under s.24(2) of the *Charter*.

Should the Appellant's Hospital Records be Excluded Pursuant to s.24(2) of the *Charter*?

Were the Appellant's Hospital Records Obtained in a Manner in Violation of the *Charter*?

The s.10(b) Charter Violation – "Obtained in a Manner"

42. Section 24(2) of the *Charter* instructs courts to consider whether evidence should be excluded where it has been obtained in a manner in violation of the *Charter*. For evidence to be excluded pursuant to s.24(2) of the *Charter*, both a threshold and substantive requirement must be met. First, an accused must demonstrate that the evidence was *obtained in a manner* in violation of the *Charter*. Then, courts must conduct an analysis into whether admission of the impugned evidence would bring the administration of justice into disrepute.[58]

43. If this Honourable Court finds that the Appellant's s.10(b) *Charter* rights were violated, then pursuant to *Taylor*, the Appellant's hospital blood and hospital records should be excluded as they were *obtained in a manner* in violation of the *Charter*. In *Taylor*, while not explicitly discussed by this Court, the circumstances of the case and this Court's analysis reveals that this Court found that there was a causal connection between Mr. Taylor not being provided with his rights to counsel and police subsequently obtaining Mr. Taylor's hospital blood samples for police use.[59] It is respectfully submitted that *Taylor* is dispositive to the issues in this case, a point conceded by the Crown at the Court of Appeal for Ontario.

44. In the case at bar, when the Appellant was admitted to the hospital, she was not told that blood was going to be drawn or for what purposes. More importantly, the Appellant was not aware that one of the tests being conducted was for blood alcohol concentration, the results of which have the potential to be incriminatory. Even if the Appellant consented to blood being

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[57] *Culotta* SCJ, *supra* note 22 at para 54; *Culotta* ONCA, *supra* note 27 at para 65.
[58] *R v Fountain*, 2015 ONCA 354 at para 39.
[59] *Taylor*, *supra* note 2 at paras 20-37.

drawn for medical purposes, there is no evidence that the Appellant consented to its use in determining her blood alcohol concentration. In *Culotta* ONCA, Nordheimer J.A. stated: "people generally place their health before just about any other concern."[60] However, as this Honourable Court has held, individuals in need of medical care should not be placed in a position where they have to choose between receiving medical treatment and exercising their rights under the *Charter*.[61]

45. The Appellant respectfully submits that there is a direct causal relationship between the s.10(b) violation and obtaining the Appellant's hospital records. It is quite evident that had the Appellant been given an opportunity to consult with counsel there is a possibility that she would have refused to provide any blood samples. Consequently, there would have been no hospital records to reflect the results of the blood samples.

46. Further, Dr. Karasmanis testified that the test for blood alcohol concentration was not essential and if the Appellant stated she did not want the test performed he would not have insisted.[62] It is respectfully submitted that standard legal advice in all cases is not to self incriminate, but to follow the law. If she had followed such advice, she would not have given the hospital blood for alcohol testing.

The s.8 Charter Violation – "Obtained in a Manner"

47. In the alternative, if this Honourable Court does not find a s.10(b) *Charter* violation, the Appellant respectfully submits that the s.8 *Charter* violation that occurred in the case at bar merits exclusion of the Appellant's hospital records. The Appellant appreciates that there may not be a causal connection between the *Charter* breaches and the creation of the hospital records. However, a careful review of the jurisprudence reveals that that finding is not necessary for courts to order the exclusion of evidence in a particular case if admission of that evidence would bring the administration of justice into disrepute.

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[60] *Culotta* ONCA, *supra* note 27 at para 53.
[61] *Taylor*, *supra* note 2 at para 40.
[62] *PHT of Dr. Karasmanis*, *supra* note 18 at pp. 32-33 of the transcript.

48. This Honourable Court first considered the meaning of the phrase "obtained in a manner" in the 1985 decision *R v Therens*.[63] For evidence to be "obtained in a manner" in violation of the *Charter* there must be a connection or relationship between the violation of the *Charter* right and the evidence that was obtained.[64] This Court clarified, however, that there does not have to be a causal relationship. In other words, it was not necessary for the accused to establish that the evidence was obtained as a direct result of the *Charter* violation. If the *Charter* violation preceded or occurred during the course of obtaining the evidence, the threshold of "obtained in a manner" would be met.[65] The Court reasoned that to hold otherwise would ignore the seriousness of a *Charter* violation apart from its affect on the discovery of evidence.[66]

49. This Court in *R v Strachan*[67] further discussed the issues surrounding an approach to the exclusion of evidence that solely focused on a strict causal relationship between a *Charter* infringement and the subsequent obtaining of evidence. This Court explained that the requirement of a strict causal relationship would require courts to speculate on whether the evidence would have been discovered but-for the *Charter* violation – a difficult exercise. This Court stated that since events are quite complex it would never be possible to determine with certitude what would have happened had the *Charter* violation not occurred.[68] Iterating what this Court held in *Therens* regarding the seriousness of a *Charter* violation apart from its impact on the discovery of evidence, this Court held that a causal approach would have the effect of deeming the entire course of events that led to the discovery of the evidence as irrelevant regardless of its seriousness.[69] This is something this Court was not prepared to condone. Therefore, this Court held that evidence is "obtained in a manner" if the *Charter* violation preceded the discovery of the evidence. Thus, this Court stated that *all* evidence should be considered under s.24(2).[70]

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[63] [1985] 1 SCR 613 [*Therens*].
[64] *Therens, ibid* at para 16.
[65] *Therens, ibid* at para 66.
[66] *Ibid*.
[67] [1988] 2 SCR 980 [*Strachan*].
[68] *Strachan, ibid* at para 48.
[69] *Strachan, ibid* at para 49.
[70] *Strachan, ibid* at para 55

50. This Court in *Strachan* concluded that the issues associated with using a causal approach could be avoided if the analysis under s.24(2) focused on "the entire chain of events", beginning with the *Charter* violation and ending with the evidence being subsequently discovered.[71] The concept of temporalism was thus introduced into the s.24(2) analysis. This Court stated that a temporal link between a *Charter* violation and the discovery of evidence is highly relevant, particularly if it occurred "in the course of a single transaction."[72]

51. Both this Court and the Ontario Court of Appeal made clear for many years that temporal connections between *Charter* infringements and the discovery of evidence should be considered under the threshold requirement for the s.24(2) analysis.[73] The Ontario Court of Appeal's decision in *R v Ricketts*,[74] however, introduced an additional consideration to the analysis. The Court stated that an inquiry into whether evidence was "obtained in a manner" in violation of the *Charter* requires consideration of temporal, causal, and *contextual* connections between *Charter* violations and the subsequent discovery of evidence.[75] The additional consideration provided more flexibility to courts in conducting the s.24(2) analysis. This reflected the recognition of the longstanding view that the *Charter* should not be rigidly interpreted.

52. The Ontario Court of Appeal in *R v Plaha*,[76] explained that a *generous* approach must be taken to establish whether evidence was "obtained in a manner" in violation of the *Charter*. The Court stated that the connection between a breach and the discovery of evidence can be temporal, contextual, causal or a combination of any of the three. In *R v Wittwer*,[77] this Court held that a *purposive* and generous approach should be taken in assessing the connection between a *Charter* violation and the discovery of evidence.[78] Although neither Court defined either term, other decisions by this Court have been instructive.

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[71] *Ibid*.
[72] *Ibid*.
[73] See for example *R v Grant*, [1993] 3 SCR 223 at para 71 [*Grant* 1993]; *R v Flintoff*, [1998] OJ No 2337 at paras 30, 33 (Ont CA); *R v Johnson*, 2013 ONCA 177 at para 48; *R v Fountain*, 2015 ONCA 354 at para 43.
[74] [2000] OJ No 1369 (Ont CA) [*Ricketts*].
[75] *Ricketts*, *ibid* at para 9.
[76] [2004] OJ No 3484 at para 45 (Ont CA) [*Plaha*]
[77] 2008 SCC 33 [*Wittwer*].
[78] *Wittwer*, *ibid* at para 21.

53. This Court has held that the connection between a *Charter* breach and the discovery of evidence should be looked at broadly.[79] Indeed, when it comes to interpreting the language of the *Charter* this Court has made clear that courts should avoid a narrow and technical approach to the language of the *Charter* and interpret the words in a *generous* manner. This ensures that the purpose of the *Charter* right in question is being fulfilled and that an individual receives the full benefit of the *Charter*'s protection.[80] This makes clear why the analysis for the threshold requirement in s.24(2) of the *Charter* includes consideration of causal, temporal *and* contextual connections, as restricting it to one form would leave many individuals not entitled to receive the full benefit and protection of the *Charter*. This is also why several courts continue to expand the parameters of each connection.

54. Up until the Ontario Court of Appeal's decision in *R v Pino*,[81] courts consistently held that the threshold requirement in s.24(2) of the *Charter* involved only the analysis of whether evidence found *following* a *Charter* violation was evidence that was "obtained in a manner" in violation of the *Charter*. The Court in *Pino*, however, held that only considering evidence that was discovered after a *Charter* violation was no longer sufficient. The Ontario Court of Appeal held that courts should not only consider whether evidence discovered *after* a *Charter* violation was evidence that was "obtained in a manner" in violation of the *Charter*, but also consider evidence found *prior* to a *Charter* violation that occurred within the same investigation. This was a significant enhancement in terms of the protections afforded to the accused. The *Pino* decision was also important as it was the first appellate authority to specifically define the term "contextual." Laskin J.A. stated in his decision: "I take "contextual" – a word often used by lawyers and judges – to mean pertaining to the surroundings or situation in which something happens."[82]

55. The Appellant submits that there is a strong temporal and contextual connection between the s.8 breach and obtaining the Appellant's hospital records. Both the learned trial judge and the Ontario Court of Appeal in their rulings distinguished the "hospital samples", (taken for medical

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[79] See *R v Brydges*, [1990] 1 SCR 190 at para 19.
[80] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 118. See also *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at para 23.
[81] 2016 ONCA 389 [*Pino*].
[82] *Pino, ibid* at para 74.

purposes) and the sealed "police samples" (taken for police use). This led to the admission of the hospital records since it was viewed by the lower courts to be the result of tests that were conducted for the Appellant's medical care and not as part of the investigation against the Appellant. The Appellant respectfully submits, however, that this is a serious error. It not only masks the circumstances in which blood was drawn from the Appellant, but also pays lip service to the Appellant's *Charter*-protected rights and is contrary to the development of *Charter* jurisprudence.

56. At first blush, there does not seem to be a connection between Cst. Tunney seizing two blood samples and the Appellant's hospital records. Indeed, it is certainly true that the two sealed blood samples were not initially analyzed and therefore did not create the Appellant's hospital records. However, a review of the jurisprudence reveals that this Honourable Court and other courts have warned against courts using a strict causal approach to the s.24(2) threshold requirement.

57. To sever the s.8 breach from the hospital records ignores the fact that all the blood was drawn from the Appellant at the same time. It was all part of the same transaction and course of events. The trial judge found that the lab technologist became an agent of the state when she entered the room to draw blood.[83] A state agent drew all the blood without asking for any permission from the patient. Once the lab technologist became a state agent her conduct cannot be easily divided between a hospital purpose and an illicit police purpose.

58. The jurisprudence is clear that the s.24(2) threshold analysis must be *generous* and the entire chain of events between Cst. Tunney and the Appellant must be considered.[84] In considering the circumstances of the case at bar, the hospital records were created because of the Appellant's arrest and hospital admission, and the s.8 breach surrounded the Appellant's arrest and occurred during the course of her treatment. Thus, there is a temporal and contextual connection between the s.8 breach and the Appellant's hospital records.

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[83] *Culotta* SCJ, *supra* note 22 at paras 46-54.
[84] *Pino*, *supra* note 81 at para 72.

The Grant Inquiry – Assessing the Cumulative Impact of the *Charter* Violations

59. In assessing whether the admission of illegally obtained evidence would bring the administration of justice into disrepute, courts must consider the seriousness of the *Charter* infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and society's interest in the adjudication of the case on its merits.[85] After each of these have been assessed, a balancing must occur in order to determine whether, on balance, the administration of the evidence obtained by the *Charter* breach would bring the administration of justice into disrepute.[86] In balancing the *Grant* factors, courts must not lose sight of the fact that *Charter* protections belong to everyone and courts must guard against sending a message that the ends justify the means.

The Seriousness of the Charter-Infringing Conduct

60. In analyzing the seriousness of the *Charter*-infringing conduct, the focus of the analysis is on the nature and degree of the state conduct.[87] State conduct must be situated on a scale of culpability, ranging from a minor breach to a willful or reckless disregard for an individual's *Charter* rights.[88] While the admission of evidence obtained through a minor *Charter* violation will not erode public confidence in the administration of justice, evidence obtained through a blatant disregard for an individual's *Charter* rights poses a serious risk of bringing the administration of justice into disrepute. This is because a blatant disregard for an individual's *Charter* rights creates a public perception that not only does the state not respect the rule of law, but also that courts condone such behaviour.[89]

61. Multiple *Charter* breaches also have the real potential to elevate the seriousness of the state conduct.[90] In this case, there are four *Charter* violations to consider: the Appellant's arrest without sufficient grounds violating her s.9 *Charter* right not to be arbitrarily detained or

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[85] *R v Grant*, 2009 SCC 32 at para 71 [*Grant* 2009].
[86] *Grant* 2009, *ibid* at para 71, 85; see also *R v Mian*, 2014 SCC 54 at para 88.
[87] *R v Harflett*, 2016 ONCA 248 at para 37 [*Harflett*].
[88] *Grant* 2009, *supra* note 85 at para 74.
[89] *Harflett*, *supra* note 87 at para 37.
[90] *R v McGuffie*, 2016 ONCA 365 at para 83 [*McGuffie*]; see also *R v Mhlongo*, 2017 ONCA 562.

imprisoned; the failure to inform the Appellant of her right to counsel at the scene of the accident without delay and the failure to implement those rights in violation of s.10(b) of the *Charter*, and the unlawful seizure of two extra vials of blood in violation of the Appellant's s.8 *Charter* right.

62. Constable Tunney ought to have known that he needed reasonable and probable grounds to arrest the Appellant, that he needed to inform the Appellant of her right to counsel without delay and implement those rights, that he had a duty to hold off in eliciting incriminatory evidence from the Appellant until she had an opportunity to speak to counsel, and that he could not seize evidence without first obtaining judicial authorization. In *Culotta* ONCA, Nordheimer J.A, found that these *Charter* violations were a result of Cst. Tunney's inexperience in investigating drinking and driving offences and that honest errors by police represent less serious *Charter* infringements.[91] It is true that good faith errors can be an attenuating factor militating in favour of admission and will reduce the need for courts to dissociate itself from such conduct.[92] However, while Cst. Tunney was a relatively junior officer, he was being supervised by Sgt. Tennent throughout the investigation who *surely* would have been aware of the most basic constitutional obligations. In fact, the plan to illegally seize blood came from the *senior* Sergeant Tennent.[93]

63. Further, good faith is rejected, and evidence will be excluded, where the state was ignorant of *Charter* standards, negligent, or willfully blind. Ignorance of *Charter* standards must not be rewarded or encouraged.[94] While Cst. Tunney in this case did not appear to have ignored the Appellant's *Charter* rights with any malice or ill-intent, he nonetheless disregarded them without any apparent understanding of the seriousness of doing so. Even in cases where there is no willful or intentional police misconduct, a significant departure from the standard of state conduct expected of police will increase the severity of the *Charter*-infringing conduct.[95]

64. Cst. Tunney's conduct reveals an unacceptable indifference towards respecting the Appellant's right to speak to a lawyer of her choosing as well as respecting her bodily integrity.

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[91] *Culotta* ONCA, *supra* note 27 at para 67.
[92] *Grant* 2009, *supra* note 85 at para 75.
[93] *TT of Cst. Tunney*, *supra* note 5 at p. 35 of the transcript; *DBN of Cst. Tunney*, *supra* note 9 at p. 80 of Cst. Tunney's notes; *PHT of Cst. Tunney*, *supra* note 6 at pp. 65, 85 of the transcript.
[94] *Ibid*.
[95] *Taylor*, *supra* note 2 at para 39.

The blatant nature of these breaches is such that it cannot be said that Cst Tunney's actions were conducted in good faith. If they were, this would suggest police officers are not aware of the most basic obligations under the *Charter*, forcing the conclusion that these breaches of the Appellant's rights were the product of a monumental institutional failure.

65. It should be of further concern to this Court that in the jurisdiction in question there appears to be a practice that undeniably creates a recipe for repeated *Charter* violations. Courts must not only consider *Charter* violations in the cases that come before them, but also practices that are inconsistent with the *Charter*. This is because repeated *Charter* violations negatively impact the administration of justice regardless of whether an accused has been formally charged and been brought before the Court.[96] As this Court stated:

> While the purpose of s. 24(2) is not to deter police misconduct, the courts should be reluctant to admit evidence that shows the signs of being obtained by an abuse of common law and *Charter* rights by the police.[97]

66. In an area in the laboratory fridge at the local hospital in Bracebridge, there is a dedicated area where patient blood samples are kept and stored for police. Preserving blood samples for police is apparently a common enough hospital practice that the institution has created a form that can be found in the hospital's approved lab manual. Cst. Tunney filled out the form in the case at bar.[98] These entrenched practices invite police to seize unconstitutionally obtained evidence and obtain authorizations later. Undoubtedly, police misconduct symptomatic of institutional indifference erodes constitutional protections afforded by the *Charter*.[99]

67. The seriousness of these breaches and these approved practices, which allows for the continuance of *Charter* violations, is near the highest end of the spectrum and militates strongly in favour of exclusion of the evidence.

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[96] *Rover*, *supra* note 39 at para 40.
[97] *R v Genest*, [1989] 1 SCR 59 at para 57.
[98] See Tab 18 of the Appellant's Record. The first section of the form is to be filled out by police indicating their desire to seal samples of blood (prior to a warrant being obtained) and instructing lab technologists to place the sealed samples in the "save for police" rack in the fridge. The second section of the form allows police to seize those samples once a warrant has been issued.
[99] *R v Harrison*, 2009 SCC 34 at para 25.

The Impact of the Breach on the Charter-Protected Interests of the Accused

68. The second *Grant* consideration is the impact of the breach on the *Charter*-protected interest of the accused. Just as breaches vary in seriousness, the extent to which the breach undermines the *Charter* interest also varies. A greater impact militates in favour of exclusion:

> The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.[100]

Considerations of the Impact of the Section 10(b) Charter Violation

69. The decision in *Taylor* is most apposite to the case at bar and is integral to this Court's analysis in considering whether the Appellant's hospital records should be excluded. In *Taylor*, this Court emphasized the legal vulnerability of a detained accused in the hospital context and the critical relationship between rights to counsel and receiving advice with respect to participating in the collection of self-incriminating evidence, such as the seizure of blood for medical purposes:

> Arrested individuals in need of medical care who have requested access to counsel should not be confronted with a Hobson's choice between a frank and open discussion with medical professionals about their medical circumstances and treatment and exercising their constitutional right to silence. The police placed Mr. Taylor's medical interests in direct tension with his constitutional rights. His legal vulnerability was significant, and, correspondingly, so was his need for his requested assistance from counsel.[101]

70. The Appellant submits that had the Appellant been given an opportunity to speak to her counsel of choice she may not have consented to providing any blood samples, especially not any that would establish her blood alcohol concentration. The Appellant respectfully submits that it is an erroneous finding by the trial judge and the Ontario Court of Appeal that the Appellant consented to having her blood drawn for medical purposes. Firstly, she was not aware of the purposes for which the blood was being drawn. Secondly, and more importantly, an individual who is not aware of the consequences of consenting to something cannot be said to have truly

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[100] *Grant* 2009, *supra* note 85 at para 76.
[101] *Taylor*, note 2 at paras 40.

made a voluntary decision.[102] Indeed, the only evidence of the presence or absence of consent came from Mr. Culotta who testified that no consent was sought or given.[103]

71. In *Culotta* ONCA, Nordheimer J.A. stated:

> [W]e do not know what the appellant would have done with any advice that she may have obtained, assuming the advice was not to consent to blood samples being taken. As is often pointed out, the nice thing about advice is that you do not have to take it.[104]

72. However, respectfully, it does not matter that the Appellant could have refused to listen to her lawyer's advice. The fact of the matter is that she was deprived of the opportunity to make that decision in the first place and it had deleterious legal consequences. As this Court stated in *Taylor*:

> There is no need to speculate about the advice Mr. Taylor might have received had he been given access to counsel as he requested, such as whether he would have refused to consent to the taking of any blood samples for medical purposes. It is clear that the denial of the requested access had the effect of depriving him of the opportunity to make an informed decision about whether to consent to the routine medical treatment that had the potential to create -- and in fact ultimately did create -- incriminating evidence that would be used against him at trial.[105]

73. Drawing blood from the Appellant without her consent in violation of her s.10(b) *Charter* right was extremely serious and had a significant impact on the Appellant's bodily integrity and dignity, which militates in favour of the exclusion of the Appellant's hospital records. As was stated in *Taylor*:

> The impact of the breach on Mr. Taylor's s. 10(b) rights was exacerbated when Mr. Taylor was placed in the unnecessarily vulnerable position of having to choose between his medical interests and his constitutional ones, without the benefit of the requested advice from counsel. Mr. Taylor's blood samples, taken in direct violation of his right to counsel under s. 10(b), significantly compromised his autonomy, dignity, and bodily integrity. This supports the exclusion of this evidence. As this Court said in Grant, "it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the

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[102] *R v Wills*, [1992] OJ No 294 at para 51 (Ont CA).
[103] *TT of VC*, *supra* note 52 at pp. 266-269 of the transcript.
[104] *Culotta* ONCA, *supra* note 27 at para 55.
[105] *Taylor*, *supra* note 2 at para 41.

> accused's ... bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability" (para. 111).[106]

Considerations of the Impact of the Section 8 Charter Violation

74. While the Appellant respectfully submits that her hospital records should be excluded due to the violation of her s.10(b) *Charter* rights based on this Court's decision in *Taylor*, the impact of the s.8 *Charter* violation must also be considered. In *Taylor*, this Court did not consider whether Mr. Taylor's s.8 *Charter* rights were violated. This was because this Court found a violation of s.10(b).[107] However, the Appellant respectfully submits that even if this Honourable Court finds a s.10(b) *Charter* violation, the s.8 *Charter* violation was so serious that its impact on the Appellant must also be considered by this Court.

75. The Appellant was not aware of the pre-arranged plan between Cst. Tunney and the lab technologist to draw *extra* blood from the Appellant for police purposes in violation of the Appellant's s.8 *Charter* right. With respect to bodily evidence, consideration must be given to the degree to which the state conduct intrudes upon the privacy, bodily integrity, and human dignity of the accused.[108]

76. The Ontario Court of Appeal minimized the severity of the impact of this *Charter* violation by stating that the Appellant was vindicated for this breach because the trial judge excluded the two vials of blood sealed by Cst. Tunney.[109] It must not be forgotten that a state agent inserted a needle into a vein in her arm. Blood was physically removed from her body. More blood was taken than was medically necessary for her treatment without her permission and without judicial authorization. This was a serious interference with the Appellant's bodily integrity.[110] An intrusion on an individual's body is more serious than one that occurs in that individual's office or even of their home.[111] There is a high expectation of privacy in one's own

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[106] *Ibid*.
[107] *Ibid* at para 36.
[108] *Grant* 2009, *supra* note 85 at para 109.
[109] *Culotta* ONCA, *supra* note 27 at para 65.
[110] *R v Golden*, [2001] 3 SCR 679 at para 76.
[111] *R v Pohoretsky*, [1987] 1 SCR 945 at para 5.

bodily fluids. Conduct that intrudes in an area where an individual is entitled to a high expectation of privacy is more serious than behaviour that does not.[112]

77. Respectfully, there was absolutely no vindication here. In fact, the *Charter* relief was meaningless to the Appellant. As was stated above, *Charter* breaches cannot be rewarded or encouraged. Admitting the Appellant's hospital records sends the message to police that they can violate a person's bodily integrity and still be gifted evidence. This type of police conduct cannot be condoned. This Court has been clear that police cannot skirt their *Charter* obligations and then cure unconstitutionally obtained evidence with a warrant authorizing its seizure.[113]

78. Constable Tunney took advantage of the Appellant's physical and legal vulnerability in a persistent and flagrant fashion, which led to the production of self-incriminating evidence by an incursion on the Appellant's bodily integrity and dignity. This supports the exclusion of the Appellant's hospital records:

> While each case must be considered on its own facts, it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's privacy, bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability.[114]

79. Without providing a remedy for these significant breaches, the functionality of the Appellant's *Charter* rights becomes questionable.[115]

Society's Interest in an Adjudication on the Merits

80. The last *Grant* criterion requires consideration of society's interest in having a case brought to trial and dealt with on its merits. This requires an assessment of whether the truth-seeking function of the criminal justice system would be better served by admission or exclusion of any impugned evidence.[116] The reliability of the evidence and its import to the prosecution's

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[112] *R v Colarusso*, [1994] 1 SCR 20 at para 36 [*Colarusso*]; *Grant* 2009, *supra* note 85 at para 78.
[113] *Taylor*, *supra* note 2 at para 36.
[114] *Grant* 2009, *supra* note 85 at para 111.
[115] *R v 974649 Ontario Inc*, 2001 SCC 81 at para 20.
[116] *Grant* 2009, *supra* note 85 at para 79.

case must be considered. However, the manner that reliable evidence was obtained is highly relevant and does not make it automatically admissible.[117]

81. In applying the *Grant* test, it is useful to understand the lens through which s.24(2) of the *Charter* is viewed. This Court describes s.24(2) as having a long term, prospective, and societal focus. The long-term focus means that courts must consider whether "the overall repute of the justice system, viewed in the long-term, will be adversely affected by the admission of evidence."[118]

82. The prospective aspect of s.24(2) acknowledges that a breach has already occurred, and that the administration of justice has been harmed by that breach. As such, the purpose of s.24(2) is to ensure that the admission of such evidence does not do further damage to the repute of the criminal justice system.[119] The exclusion of evidence is focused on the repute of the criminal justice system, as opposed to punishing the police or compensating the accused for *Charter* violations.[120]

83. The seriousness of the offence must also be considered. However, it cannot be the predominate focus when considering society's interest in the adjudication of the case on its merits. As this Court stated:

> The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.[121]

84. Drinking and driving offences are serious and the evidence that was obtained in this case is both reliable and important to the prosecution's case. Indeed, drinking and driving offences are offences that we all as a society have an interest in having adjudicated, especially in

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[117] *Grant* 2009, *ibid* at para 80.
[118] *Grant* 2009, *ibid* at para 68.
[119] *Grant* 2009, *ibid* at para 69.
[120] *Grant* 2009, *ibid* at para 70.
[121] *Grant* 2009, *ibid* at para 84.

circumstances where individuals are injured such as is the case before this Honourable Court. However, the right to counsel and our reasonable expectation of privacy, bodily integrity, and dignity are fundamental rights. The repute of the justice system would be seriously eroded if police could so effortlessly breach *Charter* rights in order to proceed with their investigations more expeditiously. More significantly, the repute of the criminal justice system would be completely damaged if police officers, with the assistance of hospital staff, could take advantage of accused individuals seeking medical care.

85. This Court for decades has warned against the constitutional perils of taking advantage of vulnerable detainees in a hospital setting. For instance, in *Colarusso*, this Court emphasized the heightened concerns for a detainee's constitutional rights in the hospital context, providing that "hospitals have been identified as specific areas of concern in the protection of privacy, given the vulnerability of individual's seeking medical treatment."[122] In *R v Dyment*,[123] this Court stated:

> The courts must be especially alert to prevent undue incursions into the private lives of individuals by loose arrangements between hospital personnel and law enforcement officers. The *Charter*, it will be remembered, guarantees the right to be secure against unreasonable searches and seizures.[124]

86. Of particular concern is the "unwelcome complicity" that may develop between police and medical personnel. Such complicity has the obvious result of undermining the physician-patient relationship. As this Court has stated:

> […] the accused would likely interpret these facts as a sign that the medical staff was operating in conjunction with the police investigation. Such a scenario could have catastrophic results if an accused resisted essential treatment for fear it might incriminate him in future criminal proceedings.[125]

87. Public confidence in the administration of justice and the administration of hospitals would be seriously undermined if police officers were given the unfettered authority to obtain not only personal information about an individual receiving medical care without that person's consent in violation of the *Personal Health Information Protection Act*,[126] but also the ability to

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[122] *Colarusso*, *supra* note 112 at para 19.
[123] [1988] 2 SCR 417 [*Dyment* SCC].
[124] *Dyment* SCC, *ibid* at para 40.
[125] *Colarusso*, *supra* note 112 at para 28.
[126] SO 2004, c 3, Schedule A, ss. 1, 4, 10-14, 18-24, 29, 31, 38-41.

control what happens to their bodies in the hospital i.e. asking hospital staff to remove substances from a person's body without their consent.[127] As was stated by Mitchell J. in the trial decision of *Dyment*:

> If the court received evidence obtained by taking a blood sample without consent, medical necessity or lawful authority, and without the police having any probable cause, it would bring the administration of justice into disrepute ... What happened here constitutes such a gross violation to the sanctity, integrity and privacy of the appellant's bodily substances and medical records ***that the community would be shocked and appalled*** if the court allowed the admission of this evidence in the face of the *Charter* [emphasis added].[128]

88. The severity of the violations inflicted upon the Appellant and the impact of these violations on the Appellant's basic constitutional rights were numerous and significant. This Honourable Court cannot condone the failure of Cst. Tunney to respect and uphold the Appellant's *Charter* rights. As Doherty J.A. stated in *McGuffie*:

> In practical terms, the third inquiry [under section 24(2)] becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of evidence… If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility.[129]

89. This is such a case and thus the Appellant's hospital records should be excluded pursuant to s.24(2) of the *Charter*.

PART IV: SUBMISSIONS ON COSTS

90. The Appellant makes no submissions on costs.

PART V: ORDER REQUESTED

91. The Appellant respectfully requests the following:

a. That this appeal be granted;

b. An Order declaring that the Appellant's s.10(b) *Charter* rights have been violated;

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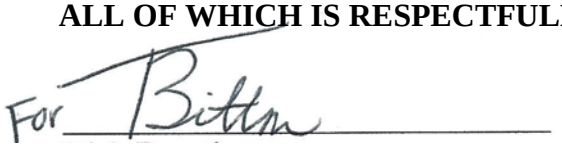
[127] *Dyment* SCC, *supra* note 123 at para 49.
[128] *R v Dyment*, [1984] 9 DLR (4th) 614 at para 22 (PEI SC).
[129] *McGuffie*, *supra* note 90 at para 63.

c. An Order excluding all hospital blood and the Appellant's hospital records pursuant to s.24(2) of the *Charter*; and

d. Such further and other Orders as counsel may request and this Honourable Court may grant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of September, 2018.



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PART VI: TABLE OF AUTHORITIES

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STATUTORY PROVISIONS

Legislation	**Sections**
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