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
(Appellant)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent)

RESPONDENT'S FACTUM
ATTORNEY GENERAL OF ONTARIO

Rule 42 of the *Rules of the Supreme Court of Canada*

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW OF RESPONDENT'S POSITION

1. On August 1, 2013, the appellant was operating a boat with excess blood alcohol. Around 2:00 a.m., she crashed – headlong and at high speed – into a small rocky island. Three of her four passengers flew out of the boat. Two passengers were severely injured; the appellant and the other two passengers less so. Paramedics and police arrived at the staging area at a nearby marina. The scene was "chaotic". There was a "torrential downpour". There was "screaming". Among the first responders was P.C. Tunney, a newly-minted and inexperienced police officer who "acted, at all times, with consideration for the appellant's situation and a desire to respect her rights".

2. The appellant's appeal rises or falls on two questions of fact. First, did the appellant invoke her right to counsel? The majority of the Court of Appeal for Ontario found that she did not. Second, did the lab technician draw blood from the appellant at the behest of the police? Again, the majority found that she did not. The disagreement between the majority and the dissenting judge stems from their differing views of these two facts. However, the majority's factual findings were reasonably made and solidly grounded in the evidence. There is no palpable and overriding error warranting this Court's intervention.

3. The absence of palpable and overriding error is sufficient to dispose of the appeal. It dismantles the factual premise of the appellant's position and prevents the legal issues raised by the appellant and the interveners from crystallizing. No one gainsays the importance of doctor-patient relationships or of proper boundaries between hospital personnel and law enforcement. Those concerns simply do not arise in the appellant's case.

4. The totality of the evidence amply supports the majority's finding that the appellant "affirmatively rejected invoking her rights to counsel". She was properly informed of and fully understood her rights. When P.C. Tunney asked whether she wanted to speak to a lawyer, she said, "*No. My parents should be here soon. We have a family lawyer.*" She never evinced any desire to speak to counsel, even after she spoke to her parents. Indeed, when she was re-informed of her rights for the aggravated offence, she again expressly declined to speak to counsel. Without her invocation of the right, there are no implementational du-

ties, no question of waiver, and no basis upon which to impugn the majority's reasoning.

5. The majority also reasonably rejected "the central tenet of the appellant's argument" that the lab technician drew blood at the behest of the police. The emergency room physician ordered blood tests, including for alcohol. The lab technician drew four vials in direct response to that order. She drew two more vials for "somewhat unclear" reasons, but not at police request. The police sealed the two vials pending a search warrant. They believed that the vials remained available for medical use. The trial judge found that the sealing, *in effect but not in fact*, "co-opted" the lab technician into drawing blood for the police. Having so found, he exercised his discretion to admit the medical tests in the hospital laboratory report, and to exclude the forensic tests of the two sealed vials. As the majority held, "[w]hether the lab technician did or did not take other blood samples for the police, some blood would have been taken from the appellant, and it would have been tested for blood-alcohol concentration regardless. Consequently, the *Charter* infringement regarding the two vials of blood is independent of the other blood samples taken."

6. The respondent urges this Court to accept the facts as found by the majority below, and to dismiss the appeal without need to revisit the s. 24(2) *Charter* analysis. Should this Court engage in its own s. 24(2) *Charter* inquiry, the respondent rejects the appellant's reliance on *R. v. Pino* as unnecessary in this case, and contrary to this Court's foundational jurisprudence. The respondent also challenges the legal character of the lab technician's actions as "state conduct", and of P.C. Tunney's preservation of evidence through sealing as a "seizure", within the meanings of ss. 32(1) and 8 of the *Charter*.

7. At bottom, the appellant invites this Court to exclude a hospital laboratory report – a report that was generated from blood drawn by a laboratory technician, at the express direction of an emergency room physician, solely for medical reasons. The report was not seized by police until three weeks later, pursuant to a valid search warrant. It has no nexus to any *Charter* missteps on the part of P.C. Tunney. The majority below reasonably held that the *Grant* factors availed in favour of admitting the report. The appeal should be dismissed.

B. RESPONDENT'S STATEMENT OF FACTS

8. The respondent accepts the appellant's statement of facts, subject to the exceptions and additions set out in the remainder of this section.

9. The respondent raises two concerns about the appellant's record. First, the appellant's original and amended records are missing portions of the trial judge's written *Charter* ruling. The respondent relies on the complete copy of the ruling in the Respondent's Record. Second, the notes of P.C. Tunney and Sgt. Tennent, cited by the appellant as "duty book notes" or "DBN", are not evidence before this Court. They formed part of the application record at trial, but defence counsel specifically disavowed reliance on them for evidentiary purposes.

Ruling of Mulligan J., R.R. Tab 1 pp. 1-25

Duty Book Notes, A.R. vol. II pp. 1-196

Transcript excerpt from May 15, R.R. p. 29

Ruling of Mulligan J., R.R. p. 2, para. 4

i. The appellant crashes her boat into an island on a dark rainy night

10. On August 1, 2013, the appellant and four other women left a social gathering at a yacht club on Lake Muskoka. They left on the appellant's boat. The appellant was the operator. She took them toward her family cottage on an island in the lake.

Agreed facts, Transcript excerpt from May 23, R.R. pp. 50-52

11. It was extremely dark. There was no moonlight. It was raining heavily. The appellant's father, who had boated on the lake almost daily since 1964, explained that one could usually see the silhouette of an island on the lake against the night sky. That particular night was so dark that he could not even distinguish between land and sky.

Evidence of V. Culotta, A.R. vol. III, p. 243 and p. 253

12. The appellant's boat was 14½ foot, fibreglass-hulled recreational boat with a 40 horsepower outboard engine. It had no roof or other rain protection, and no windscreen.

Agreed facts, Transcript excerpt from May 23, R.R. pp. 48-49

Trial exhibits 6B – 6E, A.R. vol. III pp. 371-74

13. Around 2:00 a.m., the appellant crashed her boat straight into a small rocky island. The island was at the end of a chain of small islands connected by foot bridges. The boat was moving fast enough that the hull was planing above the water. It did not slow down before the collision. The bow of the boat incurred major damage, and left a white v-shaped mark on the rock above the water line.

Agreed facts, Transcript excerpt from May 23, R.R. pp. 46-49, 52

Exhibit 5 (hospital records), A.R. vol. III p. 364

Exhibits 6B – 6E, A.R. vol. III pp. 371-74

14. The suddenness and force of the collision caused three of the occupants to be ejected by their momentum. Two landed on the rock island. One landed in the water. The two women who landed on the rock are the victims particularized as suffering bodily harm:

- Dana Bailey suffered a lumbar fracture. She was rescued using a back board. She was transported to Toronto and received emergency orthopaedic surgery the same day. Her rehabilitation was long and difficult.
- Bridget Gore suffered a pelvic fracture. She required extensive physical rehabilitation to walk normally. She lost consciousness and suffered a brain injury that has required accommodation in school.

The other two passengers had minor injuries. The appellant, who was not ejected from the boat, had an injured wrist and a split lip that was repaired with one suture.

Agreed facts, Transcript excerpt from May 23, R.R. pp. 52-55

History & Physical Examination (dictated by Dr. Karasmanis), A.R. vol. III p. 349

15. Expert toxicological evidence – derived from the hospital laboratory report that the appellant seeks to exclude – established that the appellant's blood-alcohol content was between 119 mg/100 ml and 172 mg/100 ml at the time of the collision.

Report of M. Elliot, A.R. vol. III p. 341

Agreed facts, Transcript excerpt from May 23, R.R. pp. 50-51

16. The appellant was charged with two counts of impaired operation of a vessel causing bodily harm, two counts of operating a vessel with excess blood alcohol causing bodily

harm, and two counts of dangerous operation of a vessel causing bodily harm.

Indictment, A.R. vol. I pp. 47 and 50

ii. The appellant declines her right to counsel

P.C. Tunney gives priority to the appellant's medical care at the scene

17. Between 2:07 a.m. and 2:45 a.m., the appellant and her passengers were transported to the staging area at Beaumaris Marina. By all accounts, the scene was "chaotic". The appellant's father described the weather as "about the worst he had ever seen". One of the first officers on scene, P.C. Maki, described a "torrential downpour" and a "commotion, including screaming females, and the arrival of ambulances and police officers".

Ruling of Mulligan J., R.R. pp. 3-5, paras. 7-8, 13

18. P.C. Tunney was a fourth class constable with ten months' experience. He arrived at the marina around 2:46 a.m. He, too, described the scene as "chaos". Around 3:00 a.m., P.C. Tunney stood at the back door of an ambulance, where two ambulance attendants were treating three women: the appellant, her sister, and her cousin. He asked brief, preliminary questions. He smelled alcohol. The appellant admitted to driving and to having consumed alcohol earlier that night. The trial judge and a unanimous Court of Appeal held that the appellant was not detained at this stage, and that these statements were voluntary.

Ruling of Mulligan J., R.R. p. 6, para. 14; p. 11, para. 33; pp. 11-13, paras. 34-40

Decision of the Court of Appeal, A.R. vol. I pp. 26-27, paras.18-21 (majority); p. 37, para. 96 (dissent)

19. At 3:17 a.m., P.C. Tunney arrested the appellant for impaired operation. He did not want to interfere with the medical care that the three women were receiving. He knew that they would be taken to the hospital. He therefore decided to defer informing the appellant of her right to counsel until there was a break in her medical treatment. As the majority found, while P.C. Tunney "may have had innocent – even benevolent – reasons for his delay", this delay constituted a "technical breach" of the informational component of s. 10(b) of the *Charter* – although one from which "nothing of any consequence flows".

Ruling of Mulligan J., R.R. p. 3, para. 7; p. 6, para. 14

Decision of the Court of Appeal, A.R. vol. I p. 25, para. 7

P.C. Tunney informs the appellant of her right to counsel at the hospital

20. Medical staff took the appellant to the hospital by ambulance. She arrived at 3:40 a.m., was triaged by a nurse, and then sent to a curtained-off examining room. P.C. Tunney kept a respectful distance until 3:46 a.m., when the curtain was left open and he observed a break in her medical care. He approached the appellant and informed her of her right to counsel by reading from a police-issued card. He asked if she understood. The appellant said, "*Yes.*" He asked if she wanted to call a lawyer now. She answered, "*No. My parents should be here soon. We have a family lawyer.*" She said she did not know the lawyer's name, and that she would speak with her parents once they arrived at the hospital.

P.C. Tunney, A.R. vol. II p. 227 (prelim); A.R. vol. III pp. 31-33, p. 109 (trial)

21. P.C. Tunney cautioned the appellant about her right to silence at 3:47 a.m. She said she understood. When asked if she wished to say anything in answer to the charges, she replied, "*I'm not drunk.*" At 3:48 a.m., Cst. Tunney read the statutory demand for a sample of the appellant's breath suitable for analysis by an approved instrument. The appellant replied, "*Will I get to blow into one of those machines to prove that I'm not drunk?*"

P.C. Tunney, A.R. vol. II pp. 206-07 (prelim); A.R. vol. III pp. 34-35 (trial)

22. The appellant's parents had been at the scene. At 4:14 a.m., P.C. Tunney tried calling the appellant's father, Victor Culotta, on his cellular phone to get the family lawyer's name. Mr. Culotta was travelling from the scene to the hospital. The connection failed. However, around 4:50 a.m., the appellant's parents arrived at the hospital and spoke with the appellant. Her mother stayed with the appellant's sister. Her father stayed with the appellant. The police did not speak to the appellant again until 5:30 a.m. At no point did the appellant evince any wish to speak to counsel or to use a telephone, either before or after she spoke with her parents.

P.C. Tunney, A.R. vol. III pp. 39-41 (trial)

Ruling of Mulligan J., R.R. p. 7, para. 21

Decision of the Court of Appeal A.R. vol. 1 p. 25, paras. 8-9

The majority finds that the appellant did not invoke her right to counsel

23. The trial judge did not make an explicit finding whether the appellant invoked her

right to counsel after she was informed of that right at 3:46 a.m. To resolve the questions that were before the Court of Appeal for Ontario, the parties invited the panel to make an original factual finding based on the trial record.

24. The majority of the Court of Appeal (Nordheimer and Hourigan JJ.A.) found as fact that the appellant understood the right to counsel communicated to her at 3:46 a.m., and that she did not invoke that right. They considered the totality of the evidence: the appellant said she did not wish to speak with a lawyer, demonstrated awareness of her jeopardy, and expressly declined to speak to a lawyer less than two hours later, when her jeopardy had increased. The dissenting judge (Pardu J.A.) would have found that she did invoke.

Decision of the Court of Appeal, A.R. vol. I pp. 29-30, paras. 36-49 (majority); p. 34, paras. 75-79 (dissent)

iii. The police seal two vials of hospital-drawn blood

P.C. Tunney seeks advice after the breath demand

25. After he made the breath demand, P.C. Tunney became concerned about the appellant's ability to provide a breath sample. He saw that her lip was injured. He was not sure if the appellant, who was responding to his questions as though it was "no big deal", fully understood the seriousness of her situation. This was his first impaired operation investigation involving a bodily injury. He thought the appellant's medical care should take priority over the investigation. At 3:50 a.m. he left the examining room to seek advice. His supervising officer, Sgt. Tennent, advised that if blood was drawn by the hospital for medical reasons, the police could apply for a search warrant to seize it. P.C. Tunney decided not to proceed with the breath tests and instead, as advised by Sgt. Tennent, watched for a chance to seal – but not seize – hospital-drawn blood. If hospital-drawn blood could be sealed, P.C. Tunney intended to then apply for a search warrant to seize it from the hospital.

P.C. Tunney, A.R. vol. II p. 207-08 and 227-228 (prelim); A.R. vol. III pp. 35-38 and pp. 136-37, 139-40 (trial)

Sgt. Tennent, A.R. vol. III pp. 232-34

26. Contrary to the appellant's argument, there is no evidence that the police made a "decision to proceed by way of an unauthorized seizure of blood drawn by hospital staff"

(A.F. para. 13). There is also no evidence that any police officer believed that sealing hospital-drawn blood constituted a seizure, or that they lacked the authority to preserve hospital-drawn blood in that manner. All evidence supports the opposite conclusion. The trial judge found as fact that Sgt. Tennent and P.C. Tunney believed that the lab technician could break the seals and use the samples for medical purposes. Further, the majority found that P.C. Tunney "acted, at all times, with consideration for the appellant's situation and a desire to respect her rights".

Ruling of Mulligan J., R.R. p. 7, para. 21

Decision of the Court of Appeal A.R. vol. 1 p. 25 paras. 8-9

The emergency room physician orders blood tests

27. Dr. Karasmanis was the attending emergency room physician. He examined the appellant at 4:10 a.m., and ordered blood tests, including for alcohol. He saw nothing about the appellant that suggested cognitive impairment or difficulty understanding and answering questions. If the appellant had said that she did not want blood drawn, he would have respected her wishes unless obtaining a blood sample was immediately necessary for her safety. The appellant's blood tests were important but not essential for her medical care. Dr. Karasmanis denied that he would order extraneous tests to assist the police.

G. Karasmanis, A.R. vol. II pp. 252-54 and pp. 259-71

Exhibit 5 (hospital records), A.R. vol. III p. 355 and p. 364

28. Dr. Karasmanis did not decide how much blood should be drawn. The lab technician made that decision. He knew that hospital-drawn blood might sometimes be marked for subsequent seizure by police. He also knew, from his work as a coroner, that hospital-drawn blood might sometimes be subject to a later subpoena. He believed that the hospital's procedures required that blood samples be retained for a period of time after testing, although he was not clear on the specifics.

G. Karasmanis, A.R. vol. II pp. 266-67

The police seal two vials of blood drawn by the lab technician

29. As directed by Dr. Karasmanis, the lab technician, Kim Clark, took blood samples from the appellant at 5:18 a.m. Ms. Clark decided that she needed four vials to carry out

the tests that Dr. Karasmanis identified. She drew those four vials, and then two more vials. As the majority noted, the evidence with respect to the other two vials "is somewhat confused". While Ms. Clark had no specific memory of the appellant's case, she testified that it was her practice "in trauma situations" to draw more vials than she was directed to, "in case the doctor adds tests to them".

K. Clark, A.R. vol. II pp. 275-78 and pp. 281-89 (prelim); A.R. vol. III p. 191-97 and pp. 208-12 (trial)

Decision of the Court of Appeal, A.R. vol. I p. 31, paras. 54-57

30. P.C. Tunney candidly acknowledged that he told Ms. Clark, before she took the blood samples, that he wished to seal some of those samples. He was clear, however, that he did not ask her to take extra blood samples for police purposes.

Ruling of Mulligan J., R.R. pp. 8-9, paras. 23-27; p. 17, para. 53

Decision of the Court of Appeal, A.R. vol. I p. 31, para. 56

31. About one minute after the samples were taken, P.C. Tunney put seals on two vials. He did this in order to maintain continuity of the evidence, and in the hopes that he could later obtain a search warrant to seize them for forensic analysis. The trial judge found as fact that P.C. Tunney and Sgt. Tennant both believed that the hospital would break the seals if the blood was needed for medical reasons. As P.C. Tunney explained, he was

> under the impression ... that those seals were on there to maintain the integrity of the samples of the vial blood and that the hospital had every right and every opportunity to use those, and that the police were not going to be telling the hospital to not use that blood.

Similarly, Sgt. Tennent believed that "[i]f the hospital needs to break the seal and if they need to do further tests on the blood, then that's up to the hospital." Moreover, P.C. Tunney did not believe that he was <u>seizing</u> the blood by <u>sealing</u> it.

P.C. Tunney, A.R. vol. II pp. 229, 231-32 (prelim); A.R. vol. III pp. 138-40. 147 (trial)

Sgt. Tennent, A.R. vol. III p. 234 and p. 240

Ruling of Mulligan J., R.R. p. 8, para. 24

32. Ms. Clark placed the two sealed vials in a refrigerator, on a shelf labelled "Save for

Police". She gave P.C. Tunney a hospital form titled "Identification and Surrender of Patients Blood Sample to the Police Department". The form reads, in part:

> I have requested Kim Clark to place the Centre of Forensic Seal [*sic*] on the blood container labelled Christie Culotta for purposes of identification.
>
> ...
>
> Place the specimen in the Sanyo chemistry fridge in the 'Save for Police' rack.

K. Clark, A.R. vol. II pp. 277-278 (prelim); A.R. vol. III p. 198 (trial)

P.C. Tunney, A.R. vol. II pp. 209-10 and pp. 229-231 (prelim); A.R. vol. III pp. 42-45 and pp. 143-46 (trial)

Exhibit 3, A.R. vol. III p. 350

33. Despite P.C. Tunney and Sgt. Tennent's beliefs that the vials were available for medical use, and despite the hospital's form indicating only that the seal was "for purposes of identification", Ms. Clark testified that she would not use blood once it was sealed and placed on the "Save for Police" shelf. The two sealed vials remained in the hospital's chemistry fridge until three weeks later, when P.C. Tunney returned with a search warrant. There is no challenge before this Court to the validity of that warrant.

K. Clark, A.R. vol. II p. 288 (prelim); A.R. vol. III pp. 200, 209, 212 (trial)

Ruling of Mulligan J., R.R. p. 3, para. 7; p. 8, para. 24

The majority finds that Ms. Clark did not draw blood at the behest of the police

34. Contrary to the appellant's argument (A.F. para. 57), the trial judge did <u>not</u> find that Ms. Clark acted as a state agent when she drew two additional vials of blood. As the majority held, that "assertion does not find a foundation in the reasons, fairly read". What "is clear from reading the reasons in their totality" is that the trial judge found that the almost immediate <u>sealing</u> of the blood constituted a seizure under s. 8 of the *Charter*, which effectively "co-opted" Ms. Clark into taking samples for police purposes. In short, there was no factual finding of problematic state action in respect of the <u>drawing</u> of the blood – only in respect of <u>sealing</u> it.

Ruling of Mulligan J., R.R. pp. 15-19, paras. 46-54, 57-58

Decision of the Court of Appeal, A.R. vol. I pp. 30-31, paras. 50-58

iv. The appellant declines her right to counsel, again

35. At 5:30 a.m., P.C. Tunney told the appellant that she was no longer under arrest but remained under investigation. He asked if she would provide a statement. He re-informed her of her right to counsel for the aggravated offence of impaired operation causing bodily harm. He stressed that she could call a lawyer before deciding whether to give a statement. By this time, the appellant had spoken to her parents; her mother had identified Joseph Virgilio as their family lawyer; and her father was by her side. The trial judge found that the appellant once again "understood her rights and declined to contact a lawyer, even the family lawyer whose name had been provided or duty counsel". The trial judge and a unanimous Court of Appeal held that her subsequent statement was voluntary.

P.C. Tunney, A.R. vol. II pp. 211, 232-33 (prelim); A.R. vol. III pp. 46-51, and pp. 149, 161-62 (trial)

Ruling of Mulligan J., R.R. p. 13, para. 42

Decision of the Court of Appeal, A.R. vol. I p. 27, paras.20-23 (majority); p. 37, para. 96 (dissent)

v. The trial judge grants the *Charter* application in part

36. The trial judge excluded the results of the forensic analysis of the two sealed vials of blood that were later seized by search warrant. He admitted into evidence the hospital laboratory report that contained the results of the medical analysis of the four vials of blood that Ms. Clark drew in direct response to Dr. Karasmanis' order.

Ruling of Mulligan J., R.R. pp. 1-25

37. After the *Charter* ruling, the parties agreed that the *voir dire* evidence should be admitted on the trial proper. A small amount of additional evidence was entered by agreement. The appellant maintained her plea of 'not guilty' but invited the trial judge to find her guilty of the two charges of operating a vessel with excess blood alcohol causing bodily harm. The other four charges were conditionally stayed by the trial judge on consent of the parties.

Transcript excerpt from May 23, R.R. pp. 35-62

Transcript excerpt from May 24, R.R. pp. 63-67

PART II: QUESTIONS IN ISSUE

38. The respondent takes the following positions on the two questions in issue:

a. **Section 10(b) of the *Charter*.** The majority of the Court of Appeal reasonably found that the appellant understood and did not invoke her right to counsel, and correctly held that there was no further violation of the appellant's section 10(b) *Charter* rights after she was properly informed of her right to counsel at 3:46 a.m.

b. **Section 24(2) of the *Charter*.** The majority of the Court of Appeal did not err in declining to exclude the hospital laboratory report. The report established the appellant's blood-alcohol concentration. It was generated from hospital-drawn blood properly obtained at the direction of an emergency room physician for medical purposes, and only later seized by police pursuant to a valid search warrant. P.C. Tunney acted at all times in good faith. On balance, the mitigated seriousness of the *Charter*-infringing conduct, the actual impact of that conduct on the appellant's *Charter*-protected interests, and the significant public interest in the adjudication of this case on the merits tip the balance in favour of admission.

PART III: STATEMENT OF ARGUMENT

A. THE APPELLANT DID NOT INVOKE HER RIGHT TO COUNSEL

39. The respondent rejects the factual premise of the appellant's challenge to the implementational component of s. 10(b) of the *Charter*. Whether the appellant asserted a desire to consult with counsel is a question of fact. The appellant bore the burden of establishing that fact on a balance of probabilities. She failed to do so. Indeed, the majority found that the appellant "affirmatively rejected invoking her rights to counsel". The absence of palpable and overriding error in that factual finding should dispose of this ground of appeal.

R. v. Owens, 2015 ONCA 652 at para. 28, leave ref'd [2015] S.C.C.A. No. 481

R. v. Backhouse, 2005 CanLII 4937 at paras. 77-78 (Ont. C.A.)

R. v. Knoblauch, 2018 SKCA 15 at paras. 41-49

i. The majority's findings are entitled to deference

40. This is an appeal as of right pursuant to s. 691(1)(a) of the *Criminal Code*, restricted to questions of law. It is not open to the appellant to challenge the majority's factual findings that the appellant understood her right to counsel and declined to invoke it. In any event, this Court defers to original factual findings made by an intermediate appellate court, like the majority below, absent palpable and overriding error. There is no such error here. The factual findings are entitled to deference.

R. v. Yumnu, [2012] 3 S.C.R. 777 at para. 17

R. v. Davey, [2012] 3 S.C.R. 828 at para. 64

R. v. W.E.B., [2014] 1 S.C.R. 34 at para. 2

R. v. Clark, [2005] 1 S.C.R. 6 at para. 9

ii. The majority's findings are firmly rooted in the evidence

41. The majority's findings that the appellant understood her right to counsel and declined to exercise it were reasonably made and amply supported by the evidence. There were no "special circumstances" indicating that the appellant did not understand her right to counsel when P.C. Tunney informed her of it around 3:46 a.m. She said that she under-

stood. She gave answers that were directly responsive to his questions and to her situation (*e.g. "I'm not drunk"; "Will I get to blow into one of those machines to prove that I'm not drunk?"*). When Dr. Karasmanis examined the appellant shortly thereafter at 4:10 a.m., he observed nothing that suggested problems in her cognition or ability to communicate. The appellant reiterated her refusal to invoke her right to counsel at 5:30 p.m. This objective evidence overtakes P.C. Tunney's "uncertain note" about the appellant's comprehension, which largely stemmed from what he perceived as her flippant attitude in the face of a serious collision. Further, it is significant that the appellant did not give evidence on the *voir dire* about her understanding of her rights or any desire to exercise them. As the majority held, "the totality of the record evinces no other reasonable conclusion that can be drawn from the evidence" other than that the appellant understood her rights.

G. Karasmanis, A.R. vol. II pp. 259

Decision of the Court of Appeal, A.R. vol. I at pp. 29-30, paras. 36-39, 46-47

R. v Anderson (1984), 10 CCC (3d) 417 at p. 431, 1984 CanLII 2197 (Ont. C.A.)

R. v. MacGregor, 2012 NSCA 1 at paras. 25 and 29

42. In the absence of special circumstances suggesting a lack of understanding, the obligation lay on the appellant to affirmatively communicate, through her conduct and/or speech, that she wished to speak to counsel. P.C. Tunney was neither obliged to inquire further into her understanding or wishes, nor to satisfy himself that she had affirmatively refused to speak to counsel.

Knoblauch, *supra* at para. 49

R. v. Budd, 2009 BCCA 595 at paras. 22 and 29

R. v. Bartle, [1994] 3 S.C.R. 173 at pp. 192-94

R. v. Willier, [2010] 2 S.C.R. 429 at para. 30

43. Further, the appellant provided that affirmative refusal. P.C. Tunney asked, in plain language, whether she wanted to talk to a lawyer now. She replied, "*No. My parents should be here soon. We have a family lawyer.*" In so doing, she expressly declined to invoke – with the caveat that she might invoke at some later point, after speaking with her parents. This response, which is equivalent to "Not, not right now", reasonably bears the everyday mean-

ing of "No, until I tell you otherwise". Her refusal, coupled with the abstract prospect that she might change her mind at some undetermined point in the future, was not an invocation that triggered implementational duties on the part of the police.

Owens, *supra* at para. 5 ("No, not right now")

R. v. Pozniak (1993), 81 C.C.C. (3d) 353 at para. 100, 1993 CanLII 3380 (Ont. C.A.) ("Oh well, when it comes up, I will. Not now")

R. v. Paulin, 2013 NBCA 15 ("not now"; "not right now", "I want to speak with someone later")

MacGregor, *supra* at para. 35 ("not right now, thank you")

R. v. Adamiak, 2013 ABCA 199 ("At this moment no")

R. v. Fuller, 2012 ONCA 565 at para. 32 ("not now")

R. v. C.(J.W.), 2011 ONCA 550 ("Not right now")

R. v. Korol, 2005 ABCA 205, leave ref'd [2005] S.C.C.A. No. 450 ("I prefer to call [my lawyer] in the morning")

R. v. Green, 2003 BCCA 639 ("Can I think about that?")

c.f. *R. v. Spin*, 2014 NSCA 1 at para. 65 ("Not right now, no")

44. The totality of the record provides still more support for the finding that the appellant did not invoke her right to counsel. The appellant spoke with her parents around 4:50 a.m., before blood samples were taken (5:18 a.m.) and before any police officer spoke with her again (5:30 a.m.). Her mother had provided the name of the family lawyer. Her father had stayed by her side. Regardless, when P.C. Tunney re-informed the appellant of her right to counsel – and for an increased level of jeopardy – the appellant "understood her rights and declined to contact a lawyer, even the family lawyer whose name had been provided or duty counsel". Indeed, as the majority noted, she "expressly declined to speak to a lawyer and gave a statement to the officer. It is difficult to reconcile that evidence with the contention that the appellant was earlier invoking her right to counsel, or that she did not understand her rights to counsel".

Ruling of Mulligan J., R.R. p. 13, para. 42

Decision of the Court of Appeal, A.R. vol. I at p. 30, paras. 46-48

iii. The majority's analysis is faithful to the jurisprudence

45. It is important not to lose sight of the analytical distinction between invocation and waiver. Since *Baig*, this Court "has been consistent...in holding that implementation duties 'are not triggered unless and until a detainee indicates a desire to exercise his or her right to counsel'". The majority correctly held that without the appellant's invocation of the right, the implementational duties were not triggered, and P.C. Tunney was not required to hold off from further investigation or take additional steps to facilitate access to counsel.

Owens, *supra* at paras. 15, 23-24

R. v. Baig, [1987] 2 S.C.R. 537 at p. 540

R. v. Sinclair, [2010] 2 S.C.R. 310 at para. 27

R. v. Tremblay, [1987] 2 S.C.R. 435 at pp. 567-569

Decision of the Court of Appeal, A.R. vol. I at pp. 29-30, paras. 36-39, 46-47

46. Accordingly, the appellant's and the intervener's reliance on implementational obligations, and on the principles governing the waiver of those obligations, is misplaced. Informational obligations are triggered by the mere fact of detention or arrest. But *implementational* obligations are only triggered if the accused specifically indicates a desire to speak to counsel. And only when those obligations are triggered, does the Crown's burden to establish informed, voluntary and unequivocal waiver arise. It is therefore incoherent to speak of waiver in the face of the appellant's failure to establish, on a balance of probabilities, that she invoked her right to counsel. Without invocation, there were no correlative obligations owed for her to waive.

Baig, *supra* at p. 540

B. THE POLICE DID NOT SEIZE THE TWO VIALS WHEN THEY SEALED THEM

47. If it is necessary to decide the issue, the respondent disputes the trial judge's conclusion that P.C. Tunney illegally "seized" the two other vials of blood when he sealed them. That holding is contrary to a consistent line of jurisprudence establishing that mere sealing of blood, drawn by hospital staff for medical purposes and remaining in hospital custody in anticipation of a future warranted seizure, complies with s. 8 of the *Charter*. This issue was

not squarely litigated in the Court below. However, even if this Court were to hold itself to the parties' silent acquiescence of seizure in the proceedings below, it would damage the repute of the administration of justice to exclude evidence under s. 24(2) of the *Charter* based on a notional, rather than actual, s. 8 *Charter* breach. The respondent asks this Court to resolve the appellant's case without undermining that prior jurisprudence, and to give the two sealed vials no weight in its s. 24(2) *Charter* analysis.

Ruling of Mulligan J., R.R. p. 17, para. 54

R. v. Roberts, 2018 ONCA 411 at paras. 68-69

The jurisprudence establishes that mere sealing is not seizing

48. In *Dyment*, a case about the seizure of blood, this Court held that the seizure of a physical thing for the purposes of s. 8 of the *Charter* occurs by the "taking of a thing from a person by a public authority without that person's consent", contrary to a reasonable expectation of privacy.

R. v. Dyment, [1988] 2 S.C.R. 417 at p. 431 [quoted]

R. v. Law, [2002] 1 S.C.R. 227 at para. 15

49. Applying *Dyment*, the Court of Appeal for Ontario has consistently held that sealing a blood sample pending an application for a search warrant to seize it, in circumstances where the sample remains under control of the hospital and available for medical purposes, is *not* an unreasonable seizure. Mere sealing, without more, does "not interfere with the appellant's spatial interests, dignity, physical integrity or his interest in controlling the release of information about himself."

R. v. Tessier 1990 CanLII 11015 (Ont. C.A.); aff'd [1991] 3 S.C.R. 687 on other grounds

R. v. Gettins 2003 CanLII 9312 (Ont. C.A.) at paras. 1-20 [quoted]

R. v. O'Brien, 2007 ONCA 138 at para. 8

R. v. LaChappelle, 2007 ONCA 655 at paras. 29, 41; leave ref'd [2007] S.C.C.A. No. 584

50. Sealing a sample of blood that was drawn for medical purposes, without taking possession or control of it, is best understood as a *preparatory* step toward an anticipated seizure, rather than a seizure in itself. Where that preparatory step and the subsequent seizure are separated by the *Charter*-compliant exercise of police power – in the appellant's

case, P.C. Tunney obtaining a valid search warrant – the preparatory step has no *Charter* implications on its own. Even if it was a seizure, it was a reasonable seizure. It was authorized by law and P.C. Tunney's exercise of his warrantless seizure authority was reasonable.

R. v. Stevenson, 2014 ONCA 842 at paras. 58-62

Cr. Code s. 489(2)(c)

R. v. Stillman, [1997] 1 S.C.R. 607 at para. 128

51. The Crown did not rely on the *Tessier* line of authorities in the proceedings below. It was not necessary to do so at the first appeal, as the Crown did not challenge the exclusion of the forensic tests of the two sealed vials. But it is necessary for the respondent to raise the issue at this stage because of the significance that the appellant would have this Court place on P.C. Tunney's decision to seal the two vials and leave them in hospital custody pending the issuance of a valid search warrant. Permitting the respondent to raise the issue now does not occasion unfairness to the appellant. This Court is not bound by an erroneous concession of law. Indeed, an incorrect legal approach to this issue would unjustifiably call into question a consistent and principled line of jurisprudence, and damage the repute of the administration of justice by relying on a notional, rather than actual *Charter* breach in the s. 24(2) analysis.

R. v. Barabash, [2015] 2 S.C.R. 522 at para. 54

P.C. Tunney did not go beyond mere sealing in this case

52. The appellant had a reasonable expectation of privacy in her blood samples, and she did not consent to the taking of blood for police purposes. However, the police took nothing by sealing the two vials. P.C. Tunney put numbered stickers on the vials for continuity and identification purposes. The vials remained in the possession of the hospital and physically available to them for medical use. Ms. Clark's independent, self-imposed and legally incorrect restriction on that use, contrary to the expectations and beliefs of both P.C. Tunney and Sgt. Tennent, and contrary to the language of the hospital's own form, does not transform otherwise lawful police conduct into a constitutional violation. In the alternative, the trial judge's conclusion that sealing the two vials constituted an immediate seizure should be understood as an anomalous finding confined to its unusual facts.

53. The respondent asks this Court to resolve the appellant's case in a manner that preserves the integrity of the line of jurisprudence discussed above, which establishes that mere sealing by police of blood samples remaining in hospital custody and available for medical use, for the purposes of preservation, continuity and identification and pending an anticipated warranted seizure, is *not* an unreasonable seizure.

C. THE HOSPITAL LABORATORY REPORT SHOULD NOT BE EXCLUDED

54. If this Court upholds the majority's reasoning with respect to section 10(b) of the *Charter*, the respondent asks that the appeal be dismissed without the need to revisit the section 24(2) *Charter* analysis. If this Court elects to conduct its own section 24(2) *Charter* inquiry, the respondent submits that the hospital laboratory report was not "obtained in a manner" that violated the *Charter*. The report establishes the appellant's blood-alcohol concentration. The hospital-drawn blood was properly obtained by a laboratory technician and tested at the direction of an emergency room physician for medical purposes. P.C. Tunney obtained that report pursuant to a valid search warrant, about three weeks after the collision. There is no nexus between the report and any of the admitted or alleged *Charter* breaches. In any event, its admission would not bring the administration of justice into disrepute.

i. Exclusion of evidence under the *Charter* requires state conduct

55. The *Charter* applies only to state conduct. The appellant cannot rely on the conduct of the lab technician unless this Court interferes with the majority's factual finding that Ms. Clark did not act at the behest of the police. Voluntary assistance given to police, or conscious co-operation between a private actor and the police, is insufficient to establish state agency. Proof of "but for" causation is required. In other words, the appellant must show that Ms. Clark would not have drawn another two vials of blood but for some conduct on the part of P.C. Tunney and/or Sgt. Tennent.

Canadian Charter of Rights and Freedoms, s. 32(1)

R. v. Broyles, [1991] 3 S.C.R. 595 at p. 608

R. v. M.R.M., [1998] 3 S.C.R. 393 at paras. 28-29

R. v. Buhay, [2003] 1 S.C.R. 631 at paras. 25-31

c.f. R. v. Colarusso, [1994] 1 S.C.R. 20 at p. 57

56. The evidence does not support such a finding. As the majority observed, the evidence is "somewhat confused" on this point. P.C. Tunney, a credible witness whose testimony was accepted by the trial judge and the majority below, candidly acknowledged that he told Ms. Clark that he intended to seal and obtain a search warrant for hospital-drawn blood, but was clear that he did not ask her to draw additional blood for police purposes. Ms. Clark herself testified that it was her practice "in trauma situations" to draw more vials of blood than was strictly necessary to perform the ordered tests, to avoid going back to the patient if "the doctor adds tests".

K. Clark, A.R. vol. II pp. 275-78 and pp. 281-89 (prelim); A.R. vol. III p. 191-97 and pp. 208-12 (trial)

Ruling of Mulligan J., R.R. p. 17, para. 53

Decision of the Court of Appeal, A.R. vol. I p. 31, paras. 54-57

ii. The evidence must have been "obtained in a manner"

57. The laboratory technician's taking of additional blood samples, standing alone, is incapable of constituting a *Charter* violation because it was not state conduct. The appellant must therefore connect those samples to some *Charter*-violating police conduct. This is because section 24(2) permits exclusion of evidence only if it was "obtained in a manner" that infringed or denied the claimant's *Charter* rights.

Canadian Charter of Rights and Freedoms, s. 24(2)

58. To be "obtained in a manner" that violates the *Charter*, there must be a connection between the *Charter* violation and the evidence sought to be excluded. The nature of the connection can be any combination of causal, temporal, and contextual.

R. v. Wittwer, [2008] 2 S.C.R. 235 at para. 21, citing *R. v. Plaha* (2004), 188 C.C.C. (3d) 289 (Ont. C.A.), 2004 CanLII 21043 at para. 45

59. Further, the degree of connection must not be too remote or tenuous. The evidence and the violation should be part of the same transaction or course of conduct. The sufficiency of the degree of connection is a factual question.

R. v. Goldhart, [1996] 2 S.C.R. 463 at para. 40

R. v. Wittwer, [2008] 2 S.C.R. 235 at para. 21

R. v. Mack, [2014] 3 S.C.R. 3 at para. 38-39

***R. v. Taylor* does not address the threshold issue of "obtained in a manner"**

60. This Court's recent decision in *Taylor* does not confront the prior, well-established jurisprudence on the threshold issue of what constitutes evidence "obtained in a manner". Like the appellant, Mr. Taylor was in a hospital when blood samples were drawn. Like the appellant, Mr. Taylor was under arrest and had been informed of his right to consult counsel. Unlike the appellant (and as the trial judge and the majority below identified as central distinguishing features between this case and *Taylor*), Mr. Taylor (i) had clearly invoked his right to counsel before blood was drawn for medical purposes, (ii) was deprived of the opportunity to exercise that right through police negligence, and (iii) was not injured. The Crown in *Taylor* did not rely on the blood samples drawn and seized pursuant to a blood demand. However, this Court excluded the blood samples that were drawn by hospital staff for solely medical reasons. The requisite nexus may be located in the continuing s. 10(b) implementational breach which prevented Mr. Taylor from obtaining legal advice before permitting medical samples to be drawn for precautionary, rather than treatment, purposes.

R. v. Taylor, [2014] 2 S.C.R. 495 at paras. 5-18, 37

Ruling of Mulligan J., R.R. p. 15, para. 49

Decision of the Court of Appeal, A.R. vol. I pp. 29-30, 33, paras. 41-46, 67

The hospital laboratory report was not "obtained in a manner"

61. In this Court, where this aspect of *Taylor* might be clarified or revisited, the respondent disputes the appellant's claim that the hospital laboratory report was "obtained in a manner" (A.F. paras. 42-58). The appellant acknowledges that at "first blush, there does not seem to be a connection" (A.F. para. 56) between P.C. Tunney's sealing of the two vials and the hospital laboratory report. The respondent submits that this disconnect survives a closer and contextual inspection:

- The lab technician was not acting as a state agent when she drew blood from the

appellant. On a fair reading of his reasons, the trial judge did not accept the appellant's submission on state agency. The Court of Appeal majority rejected it too.

Ruling of Mulligan J., R.R. pp. 15-17, paras. 46-54

Decision of the Court of Appeal, A.R. vol. I p. 31, paras. 54-58 (majority)

- There was no causal connection between any *Charter* violation and the four vials of blood drawn for solely medical reasons – let alone between any *Charter* violation and the subsequent, lawful warranted seizure of the hospital laboratory report. In *Taylor*, the concurrent section 10(b) *Charter* breach impacted Mr. Taylor's decision whether to consent to the medical drawing of blood. In the appellant's case, and as the trial judge and majority held, the concurrent section 9 *Charter* breach (arrest without sufficient grounds) had no impact on the course of her stay in the hospital, or on any decision that she made during that stay. Her blood was drawn solely for medical reasons, independent of whether she was under arrest, and at a time when P.C. Tunney had complied with his section 10(b) *Charter* obligations. The inferences available in *Taylor* are not available here. There was simply no evidence, from the appellant or otherwise, that she would have declined medical treatment in the absence of *Charter* non-compliance in this case.

  Ruling of Mulligan J., R.R. pp. 22-23, para. 71

  Decision of the Court of Appeal, A.R. vol. I pp. 30-32, paras. 43, 51-53, 59 (majority)

- There was no temporal connection. Police acquired the hospital laboratory report, by search warrant, three weeks after any *Charter* breach occurred.

- The contextual connection is minimal, and is too remote. The police violated the appellant's *Charter* rights (the arrest without sufficient grounds, and the delay in informing the appellant of her right to counsel), and the hospital performed its laboratory testing, in relation to the same boating collision, around the same time, and in the same place. But the medical treatment and police investigation each followed their own independently motivated and separate trajectories. The ultimate acquisition by police of the hospital laboratory report is far removed from P.C. Tunney's *Charter* missteps three weeks earlier. Any contextual connection is too remote.

62. The hospital lab report is thus *not* susceptible to exclusion under section 24(2), as the evidence was not "obtained in a manner". The *Charter* claim fails at the threshold.

iii. The expansion of "obtained in a manner" should not be adopted

63. The appellant and the intervener ask this Court to adopt the expanded interpretation of "obtained in a manner" set out by the Court of Appeal for Ontario in *Pino*. The proposed expansion would permit courts to exclude evidence that was obtained by the state before any *Charter* violation. This Court should decline that request for two reasons. First, the question in *Pino* – whether "obtained in a manner" can apply to evidence obtained before the *Charter* breach – does not arise here. Second, *Pino* is incorrect.

R. v. Pino, 2016 ONCA 389 at paras. 58-61

The question of temporal sequence does not arise in this case

64. This appeal is not an appropriate case in which to consider the propriety of the expanded, retrospective application of "obtained in a manner" espoused in *Pino*. That expansion would subject evidence obtained *before* the *Charter* breach to exclusion under section 24(2). The impugned evidence in this case was obtained *after* or *during* any *Charter* breach.

65. The police obtained the impugned hospital laboratory report pursuant to a search warrant issued on August 23, 2013, long after any *Charter* breach. Even if this Court accepts the appellant's submission that the report was obtained when it was generated on August 1, 2013, the *Charter* breaches either precede or coincide with the acquisition of that report. The expansion of "obtained in a manner" in *Pino* to eliminate any temporal sequence requirement has no bearing on this case. This Court can and should resolve this appeal without commenting on the correctness of that decision.

Pino's treatment of temporal sequence is incorrect

66. In the alternative, *Pino* should not be adopted by this Court. *Pino* is inconsistent with this Court's long-standing and principled jurisprudence on "obtained in a manner". It invokes policy-based criticisms that are incompatible with the existence of section 24(2), and advances an interpretation that is tantamount to re-drafting constitutional language.

Pino is not consistent with this Court's foundational jurisprudence

67. Since its earliest decisions about section 24(2), this Court has written that a *Charter* breach must precede or coincide with the police obtaining the impugned evidence, in order for that evidence to be potentially excludable under section 24(2).

68. In *Therens*, LeDain J. wrote for a majority of the Court on this issue:

> In my opinion the words "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter", particularly when they are read with the French version, *obtenus dans des conditions qui portent atteinte aux droits et libertés garantis par la présente charte*, do not connote or require a relationship of causation. **It is sufficient if the infringement or denial of the right or freedom has preceded, or occurred in the course of, the obtaining of the evidence**. It is not necessary to establish that the evidence would not have been obtained out for the violation of the *Charter*. …
>
> *R. v. Therens*, [1985] 1 S.C.R. 613 at p. 649 (*per* LeDain J., dissenting in the result but writing for the majority on this point) [emphasis added]

69. Three years later in *Strachan*, Dickson C.J. wrote on behalf of the majority:

> Ordinarily only a few *Charter* rights, ss. 8, 9 and 10, will be relevant to the gathering of evidence and therefore to the remedy of exclusion under s. 24(2). **So long as a violation of one of these rights precedes the discovery of evidence**, for the purposes of the first stage of s. 24(2) it makes little sense to draw distinctions based on the circumstances surrounding the violation or the type of evidence recovered. A better approach, in my view, would be to **consider all evidence gathered following a violation of a *Charter* right**, including the right to counsel, as within the scope of s. 24(2).

Further, despite having disagreed with Le Dain J. about "obtained in a manner" in *Therens,* Lamer J. (as he then was) changed his mind in *Strachan* and endorsed the majority position.

> *R. v. Strachan*, [1988] 2 S.C.R. 980 at p. 1005 (*per* Dickson C.J.), p. 1009 (*per* Lamer J.) [emphasis added]

70. While the statements emphasized above are *obiter dicta*, they were clearly "learned *obiter*" meant to state the law and govern the decisions of lower courts.

R. v. Henry, [2005] 3 S.C.R. 609 at paras. 53-58

71. Since *Therens* and *Strachan,* this Court has never resiled from the settled position that the language of "obtained in a manner" requires that the *Charter* violation must precede or coincide with the acquisition of the evidence, in order for the evidence to be considered for exclusion under section 24(2). Ten years ago in *Wittwer*, this Court unanimously endorsed a "generous" approach to the interpretation of "obtained in a manner," but it did so without addressing temporal sequence or retrospective effect. Nothing in *Wittwer* indicated a reversal of *Therens* and *Strachan.* Indeed, the passage in *Strachan* quoted above was cited with approval in *Wittwer*.

R. v. Wittwer, [2008] 2 S.C.R. 235 at para. 21

72. Contrary to the reasoning in *Pino*, this Court's decision in *Mian* does not support the use of section 24(2) to exclude evidence obtained before the *Charter* violation. In *Mian*, police violated the accused's rights under both sections 10(a) and 10(b) by failing to inform Mr. Mian of the reason for his detention and of his right to counsel. Those violations *preceded* the discovery of the evidence, which was obtained by searching him following his detention. The respondent accepts that the impact of those *Charter* violations continued to be felt after the evidence was seized; however, the violations occurred beforehand, bringing Mr. Mian's situation within the orthodox application of "obtained in a manner" as understood from *Therens* and *Strachan*. *Strachan* was specifically cited in *Mian*, with no suggestion that it should be reversed. In short, *Mian* does not support the reasoning in *Pino*.

Pino, *supra* at paras. 58-61

R. v. Mian, [2014] 2 S.C.R. 689 paras. 11-12, 74, 83

The criticisms of this Court's jurisprudence are not persuasive

73. In *Pino*, the Court of Appeal noted that *Therens* and *Strachan* have been criticized as representing undesirable criminal law policy because the admission of any evidence, whenever obtained, could theoretically bring the administration of justice into disrepute. That criticism is a problematic interpretative aid for two reasons. First, the impugned policy – that evidence must be "obtained in a manner" before it is potentially excludable under section 24(2) – is enacted in the *Charter* itself. With respect, it is not for the courts to change a policy decision that is embodied directly in the text of the constitution.

Pino, *supra* at paras. 69-70

74. Second, these critiques are premised on an incorrect assumption that denying an accused access to section 24(2) means denying an accused any *Charter* remedy. In addition to the statutory and common law rules that permit the exclusion of evidence, an accused can, in appropriate cases, have recourse to section 24(1) of the *Charter*. When evidence *is* "obtained a manner", section 24(2) is the exclusive route to exclusion. However, when evidence *is not* "obtained in a manner", the general remedial power in section 24(1) can avail if the exclusion of evidence is "appropriate and just". For example, this Court has confirmed that exclusion of evidence pursuant to section 24(1) can be granted in respect of evidence that was *not* "obtained in a manner," but which would render the accused's trial unfair if employed against him by the prosecution.

R. v. Strachan, [1988] 2 S.C.R. 980 at p. 1000, 1988 CanLII 25 at para. 36

R. v. Harrer, [1995] 3 S.C.R. 562 at para. 42

R. v. Bjelland, [2009] 2 S.C.R. 651 at para. 19

The criticisms of Pino are persuasive

75. The respondent commends to this Court the cogent and reasoned criticism of *Pino* by the authors of *Drug Offences in Canada*. First, the reliance in *Pino* on the French text of s. 24(2) of the *Charter* is not sustainable:

> The relevant French text is "ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte", which translates as "were obtained in conditions/circumstances that violate the rights or freedoms guaranteed by

this charter". The principles applicable to bilingual and bijural legislation require that, where there is a difference between the English and French versions, the court "must search for the common legislative intent which seeks to reconcile them": [citations omitted]. It seems to us that there is little difference between the French and English versions, and any difference is easily reconciled. **Evidence cannot be obtained "in a manner that infringed" the *Charter*, if it was obtained prior to the infringement, and evidence is not obtained "in conditions/ circumstances that violate" Charter rights, if it is obtained before any Charter infringement arises.**

Bruce A. MacFarlane, Q.C. *et al.*, *Drug Offences in Canada, 4th ed.* (Thompson Reuters Canada, 2015, loose leaf), part VI, chapter 24, §24:140:20 [emphasis added]

76. Second, the criminal law policy justifications provided in *Pino* for expanding the ambit of section 24(2) are essentially "an exercise in judicial redrafting of the *Charter*", and "difficult to reconcile" with the text and its ordinary grammatical meaning.

Drug Offences in Canada, *supra*

77. Third, *Pino* departs dramatically from this Court's jurisprudence which, as discussed earlier, supports that the "reach of s. 24(2) should be confined to situations where a *Charter* breach occurs before, or during, the seizure of the evidence".

Drug Offences in Canada, *supra*

78. Finally, that departure is not necessary to address the alleged mischief, as the s. 24(2) framework already contemplates a meaningful role for breaches that occur after the seizure of the evidence:

We are not saying here that *Charter* infringements that took place after evidence was obtained will never play a role in an application to exclude that evidence. If s. 24(2) is engaged because an infringement arose prior to, or during, the seizure of the evidence, then a pattern of abuse of the accused person's *Charter* rights following the seizure may well feature prominently in the assessment of the seriousness of the initial breach under the *R. v. Grant* analysis we discuss below: [citation omitted]. If proceeding with a trial in the face of an egregious *Charter* breach would amount to judicial condonation of misconduct harming the integrity of the justice sys-

tem, there may be situations where exclusion of evidence would be warranted as a remedy for abuse of process.

Drug Offences in Canada, supra [emphasis added]

iv. The evidence should be admitted

79. In the alternative, if this Court concludes that the hospital laboratory report was obtained in a manner that violated the appellant's *Charter* rights, the respondent submits that a balancing of the *Grant* factors demonstrates that the admission of the report will not bring the administration of justice into disrepute.

R. v. Grant, [2009] 2 S.C.R. 353 at para. 71

80. The respondent acknowledges the following breaches:

- Section 9. P.C. Tunney arrested the appellant without sufficient objective grounds. Subjectively, he believed that he had reasonable grounds to arrest. Objectively, he had very strong reasonable suspicion. The appellant's section 9 *Charter* right was violated from her arrest 3:17 a.m. to 5:30 a.m.
- Section 10(b) (informational). P.C. Tunney did not inform the appellant of her right to counsel without delay. He did not wish to interfere with her medical care and waited for a break in her treatment. The appellant's section 10(b) *Charter* right was violated from 3:17 a.m. to 3:46 a.m.

81. If this Court does not accept the respondent's submissions with respect to the section 10(b) breach (implementational) or the section 8 breach (sealing the two vials), those additional breaches are also relevant to the analysis.

Seriousness of the *Charter*-infringing state conduct

82. The first line of inquiry under *Grant* concerns the seriousness of the *Charter*-infringing state conduct that led to the discovery of the impugned evidence. The accumulation of multiple breaches can – but need not necessarily – aggravate the seriousness of the impugned state conduct. The weight of those breaches is matter for the Court to decide on a case-by-case basis.

R. v. Trieu, 2010 BCCA 540 at paras. 90-98

R. v. Poirier, 2016 ONCA 582 at para. 91

R. v. Fan, 2017 BCCA 99 at paras. 72-73, 78

83. Deference is owed to the trial judge's and the majority's factual findings, which are not tainted by clear and determinative error. The trial judge, in particular, made findings based on his first-hand assessment of the officers' credibility. The record betrays no basis for interfering with their conclusions regarding police conduct. It is therefore not open to the appellant to argue, as she did unsuccessfully below, that there was anything nefarious about their intention to seal and obtain a warrant for hospital-drawn blood (A.F. para. 62), or that their conduct was "symptomatic of institutional indifference" (A.F. para. 66) or formed part of a "pattern" (A.F. para. 87). The majority explicitly found that the violations did "not demonstrate a pattern or attitude of disregard for *Charter* rights, or for the law generally", and that there was "no evidence in this case that the actions of Officer Tunney, in relation to the blood samples, reflect a systemic disregard of individual rights".

R. v. Côté, [2011] 3 S.C.R. 215 at paras. 51-52

Decision of the Court of Appeal, A.R. vol. I pp. 29-30, 33, paras. 41-46, 65, 67

84. The trial judge's and the majority's findings bear witness to an inexperienced and conscientious police officer who, ten months into the job, was confronted with a chaotic situation involving multiple injured parties in the context of his first investigation of this nature. His inexperience was "almost entirely" the cause of his errors. P.C. Tunney "candidly acknowledged the mistakes that he made and volunteered that he would now do things differently with the experience that he has since gained". He treated the appellant "with respect and dignity, and allowed proper medical treatment to be offered to her as needed". He was mindful of the potential impact of the appellant's injuries. He "may have had innocent – even benevolent – reasons" for keeping his distance and waiting almost 30 minutes for a break in medical treatment before informing her of her right to counsel. Both he and Sgt. Tennent intended simply to seal, not seize, the two vials of blood, which they honestly believed would remain available for medical use pending an application for prior judicial authorization. Sealing the vials was reasonable given the well-established line of jurisprudence that permits such preparatory steps.

Ruling of Mulligan J., R.R. p. 8, 11, 22-23, paras. 8, 33, 71

Decision of the Court of Appeal, A.R. vol. I p. 33, para. 67

85. P.C. Tunney's missteps were the kind of "good faith" errors that reduce the need for the Court to disassociate itself from police conduct. His conduct did not stem from ignorance, or negligence, or wilful blindness, or flagrant disregard for *Charter* standards. He simply erred in his considered professional judgment – as even the best and most careful of inexperienced people do. His good faith honest errors place the police conduct on the less serious end of the spectrum.

Grant, supra at para. 75

R. v. Paterson, [2017] 1 S.C.R. 202 at para. 44

Impact on the appellant's *Charter*-protected interests

86. The second line of inquiry concerns the impact of the *Charter*-infringing state conduct on the appellant's *Charter*-protected interests. It requires an evaluation of the extent to which the impugned conduct actually undermined those interests.

Grant, supra at para. 71

87. P.C. Tunney arrested the appellant with insufficient grounds, in breach of section 9 of the *Charter*. However, that breach had minimal actual impact on her liberty interests. P.C. Tunney permitted her medical care to take priority over his investigation. The medical staff – not the police – took her to hospital in an ambulance. She was not physically restrained. She was treated with respect and dignity. She was permitted to speak with her parents, and to have her father remain with her at the hospital. There was no evidence that her movements or actions would have unfolded any differently if she had not been under arrest. Indeed, after P.C. Tunney released her unconditionally at 5:30 a.m., the appellant remained at the hospital with her family while others received treatment. Nor did the arrest yield any evidence that would not otherwise have been obtained – including the two sealed vials which, in any event, were excluded from evidence.

88. P.C. Tunney did not inform the appellant of her right to counsel without delay, in breach of section 10(b) of the *Charter*. However, that 29-minute delay had minimal actual impact on her decisions and conduct at the hospital. P.C. Tunney kept his distance out of

concern for her medical treatment, and took no investigative steps with respect to the appellant during that time. When he properly informed her of her right to counsel, she affirmatively declined to exercise her right at that time, and never evinced any desire to do so at any other point in their interaction.

Society's interests and overall weighing

89. The third line of inquiry concerns society's interest in the adjudication of the case on its merits.

Grant, *supra* at para. 71

90. The hospital laboratory report is real and reliable evidence, and is critical to the Crown's ability to prosecute the two excess blood alcohol offences. The availability of other charges does not mitigate the impact of exclusion on the proof of these serious offences. Further, the hospital laboratory report has a tenuous connection to any *Charter*-infringing state conduct. On the evidence before the Court and in the absence of testimony from the appellant on the *voir dire*, the only available inference is that medical staff would have drawn blood and submitted it for testing independent of any actions the police did or did not take.

91. Finally, as the majority accepted, P.C. Tunney "appears to have acted, at all times, with consideration for the appellant's situation and a desire to respect her rights while, at the same time, conducting his investigation". His errors were made in good faith. The breaches in this case do not represent conduct from which the court must disassociate itself. The remedy sought by the appellant is disproportionate to the wrong, and "would have the effect of permitting the appellant to walk away from very serious offences". Excluding the hospital laboratory report would not enhance the repute of the administration of justice. On balance, the mitigated seriousness of the *Charter*-infringing conduct, the actual impact of that conduct on the appellant's protected interests, and the significant public interest in the adjudication of this case on the merits tip the balance in favour of admission. This Court should affirm the decision of the majority below to admit the hospital laboratory report.

Decision of the Court of Appeal, A.R. vol. I p. 33, para. 69

D. REMEDY IF THE HOSPITAL LABORATORY REPORT IS EXCLUDED

92. The decision of the majority of the Court of Appeal should be affirmed and the appeal should be dismissed. However, if the hospital laboratory report is excluded, then there is no evidence of the appellant's blood-alcohol content. The respondent would invite acquittals on the two excess blood alcohol charges, but submit that a new trial be ordered on the two charges of impaired operation causing bodily harm and two charges of dangerous operation causing bodily harm that were conditionally stayed at trial on agreement of the parties.

Transcript excerpt from May 23, R.R. pp. 61-62

Transcript excerpt from May 24, R.R. pp. 64 and 67

93. Beyond blood-alcohol content, the Crown had evidence that, viewed as a whole, was capable of proving the appellant's ability to operate the vessel was impaired by alcohol and that she was operating the vessel in a manner dangerous to the public. In the absence of factual findings necessary to support the entering of verdicts on those counts, a new trial is required.

i. The Crown can still prove the impaired operation charges

94. The "impaired" element of the offence of impaired operation is made out by proof of "any kind of impairment, even slight", by alcohol or drug, of the operator's ability to operate a vessel.

R. v. Stellato 12 O.R. (3d) 90 (C.A.), aff'd [1994] 2 S.C.R. 478

95. Without evidence of the appellant's blood-alcohol content, the Crown is capable of proving the appellant's ability to operate the vessel was impaired by alcohol:

- P.C. Tunney smelled a strong odour of alcohol inside the ambulance where the appellant, her sister and her cousin were receiving medical treatment after the crash. The appellant also admitted that she had consumed alcohol.

- The appellant's eyes were watery and her speech was slightly slurred when she was observed in the ambulance by P.C. Tunney.

- The appellant's mother told police that she saw the appellant drink one bottle of Heineken beer at around 7:00 p.m., and that the appellant said she would not drive the boat because she had been drinking.

  Info. to Obtain a Search Warrant, A.R. vol. III p. 333 para. 16

- Dana Bailey told police that she had seen the appellant drink two shots of vodka out of the bottle, and at least two beers out of brown bottles. She last saw the appellant holding a beer bottle at 1:30 a.m. Ms. Bailey told police that the appellant seemed "a little tipsy," but that the appellant had claimed she felt "good to drive."

  Info. to Obtain a Search Warrant, A.R. vol. III p. 333 para. 14; p. 337 para. 45

- The appellant perceived herself to be "good to drive" before setting out in the boat just before 2:00 a.m. – despite having multiple drinks over several hours. She reversed the commitment to her mother, made after her first drink, that she would not operate the boat.

- Despite the darkness, extremely heavy rain, and very poor visibility, the appellant operated the boat fast enough that the hull was planing above the water with five occupants aboard, and fast enough that three people were ejected in the crash. The bow of the boat was severely damaged by the collision.

  Agreed facts, Transcript excerpt from May 23, R.R. pp. 48-49, 52
  Exhibit 6E, A.R. vol. III p. 374

- The appellant was boating in familiar waterways, near her family's cottage. She would have known about the presence of the island with which she collided.

  History & Physical Examination (dictated by Dr. Karasmanis), A.R. vol. III p. 349

- The boat did not slow before the collision.

  Agreed facts, Transcript excerpt from May 23, R.R. pp. 48, 62

ii. The Crown can still prove the dangerous operation charges

96. Dangerous operation of a vessel requires proof of conduct that was objectively dangerous to the public, and that reached a marked departure from the standard of care of a reasonable operator in the same circumstances. Evidence of the operator's consumption of alcohol is admissible on a charge of dangerous operation. It goes to whether the conduct was a marked departure. It is relevant to the operator's willingness to assume risks.

R. v. Roy, [2012] 2 S.C.R. 60 at paras. 33-42

R. v. McLennan, 2016 ONCA 732 at paras. 16-27

97. In the present case, the combination of evidence that the appellant:

- consumed a significant amount of alcohol through the night, possibly as late at 1:30 a.m., before deciding to operate the boat at 2:00 a.m.,
- reversed her earlier assurance to her mother that she would not operate the boat,
- operated the boat at significant speed, in darkness and extreme rainfall, and
- navigated the boat directly into an island that she must have known was nearby,

would readily allow a trier of fact to conclude that the appellant was operating the vessel in a manner dangerous to the public and thereby caused bodily harm to two of her passengers.

PART IV: SUBMISSIONS ON COSTS

98. Neither party seeks costs.

PART V: ORDER SOUGHT

99. The respondent requests that the appeal be dismissed.

100. In the alternative, if the appeal is allowed and the hospital laboratory report is excluded, the appellant should be acquitted of the two charges of operating a vessel with excess blood alcohol causing bodily harm (counts 3 and 4), the conditional stay of the other four charges should be lifted, and a new trial should be ordered on two charges of impaired operation of a vessel causing bodily harm (counts 1 and 2) and two charges of dangerous operation of a vessel causing bodily harm (counts 5 and 6).

All of which is respectfully submitted this 14th day of November, 2018, by

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Counsel for the respondent

Matthew Asma
Counsel for the respondent

PART VI: TABLE OF AUTHORITIES

STATUTES