S.C.C. File No. 38213

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

BETWEEN:

CHRISTIE CULOTTA

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION
and CRIMINAL LAWYERS' ASSOCIATION

Interveners

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND FACTS

1. The Canadian Civil Liberties Association (CCLA) accepts the factual and evidentiary outline in the appellant's statement of facts.

2. As there is some dispute as to the facts, and the interpretation of the evidence, the CCLA will examine the legal framework in the context of the two issues here, namely the right to counsel breach and the remedy under 24(2).

3. The CCLA will make two principal arguments: That the right to counsel of choice upon detention, to be meaningful, requires immediate private access to a phone and the internet (or a criminal counsel list), and holding off by the police until the call.

4. Second the CCLA will argue that 24 (2) exclusion must be remain robust. It cannot excuse police incompetence under the guise of good faith. It cannot countenance cozy relationships between hospitals, medical staff and the police to the detriment of an accused patient. Neither should its scope be diminished in terms of narrowing the meaning of "obtained in a manner".

PART II: QUESTIONS IN ISSUE

3. The issues in this appeal have been stated by the Appellant as follows:

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

Detention issues

4. The initial questioning of Ms. Culotta by the police in the ambulance at 3:03 am, must have arisen in the context of a duty to report the accident, given the nature of the accident, and there could therefore be a statutory compulsion to answer.[1] The admissibility of these statements appears to have been challenged as to their voluntariness at common law and whether they should be excluded because of a *Charter* detention. The appellant argued at trial that there was a detention during the initial interaction with the police and, on appeal, that the judge's reasons on detention where inadequate.[2] The onus is on the accused to prove a *White* breach, but inferences may be drawn given the context. Compelled statements create a detention.[3]

5. Ordinarily, such compelled statements are either excluded completely in the context of statutory compulsion, or, if not so statutorily compelled, then are admissible only to give grounds to the police.[4] The Court of Appeal here noted that the police interrogation in the ambulance did not amount to a detention.

6. Next the appellant told the officer, when asked if she wanted to speak to a lawyer: "No my parents should be here soon."[5]

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[1] *Highway Traffic Act*, RSO 1990 c. H.8; *R v White*, [1999] 2 SCR 417.
[2] *R v Culotta*, 2018 ONCA 665.
[3] *R v Grant*, 2009 SCC 32 at para 39.
[4] *R v Soules*, 2011 ONCA 429; *R v White, supra* note 1; *R v Orbanski; R v Elias*, [2005] 2 SCR 3 citing *R v Milne*, (1996) 107 CCC (3d) 118; Further see: *R v Paterson*, [2017] 1 SCR 202 re: potential correctness of *Soules.*
[5] Trial Testimony of Constable John Tunney, Record of the Appellant, Tab 11 at pp.27-31 of the transcript.

7. If the above interaction and questioning created a detention, then the right to counsel was triggered, and the officer had to hold off questioning, and facilitate access to counsel. The CCLA notes that police do not always understand the duty to hold off.[6]

Right to counsel of choice and access to a phone

8. The CCLA notes that the process of police officers controlling access to the phone and resources to find lawyers, has become an issue in Ontario, where the police make the calls to counsel or family members to find lawyers, out of sight of the detainee.

9. Other provinces provide access to a phone and a legal directory or the internet. Proper facilitation of the right to counsel of choice demands no less. And, this taking control by the police has lead to the phenomenon of "passing off" an accused to duty counsel, and the wording of the standard right to counsel itself may serve to discourage an accused from picking a lawyer of their own.[7]

10. The CCLA submits that in order to facilitate counsel of choice, complete freedom to use the phone in private by a detainee, with access to counsel information such as online resources, must be permitted by the state. The implementational duties under s. 10(b) requires the police to take proactive steps and "provide phone access as soon as practicable" [8] Absent proven barriers to access, there are a number of basic actions that are open to police to facilitate the right to counsel. They include providing an accused with reasonable access to a list of lawyers or an internet

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[6] *See R v Karakostas*, unreported transcript, where the Officer in charge of Toronto drug squad admitted to routinely questioning accused persons during the hold off period to get information to assist search warrant execution etc.

[7] *R v Manuel*, [2018] OJ No 2955 (OCJ) ; *R v Ali*, [2018] OJ No 1662 (OCJ), and cases cited therein.

[8] *R v Taylor*, [2014] 2 SCR 495 at paras. 28 and 33.

connection, a phone, and, where necessary, the accused's personal electronic device for the purpose of retrieving contact information.

11. Here the officer failed in his attempt to contact the father of the appellant. He then interacted with the blood technician to ensure that the appellant's blood would be preserved for a future search warrant.

Right to counsel and hospitals are not Charter-free zones

12. The appellant notes, relying on *Taylor*, that hospitals are not "*Charter*-free" zones. The intervenor would add the following to the medical/hospital/*Charter* dynamic:

a) Hospitals are governed by provincial (and therefore state) legislation. That legislation must be *Charter* compliant, as must the actions of delegated decision makers in applying While emergency doctors in hospitals may be viewed as not being state actors for the purposes of section 32 of the *Charter*, a topic not free from debate, their conduct can attract *Charter* scrutiny.[9]

b) In Ontario, medical practitioners have a statutory duty to obtain informed consent before commencing treatment: *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A. As the Appellant notes, related legislation reinforces that consent is needed for the collection and disclosure of health information. The CCLA notes that a lower court has interpreted the taking of blood as not constituting treatment under this act.[10] The College of Physicians and Surgeons takes the view that anything diagnostic is included

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[9] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624; *R v Dersch*, [1993] 3 SCR 768; *Rasouli v Sunnybrook Health Sciences Centre*, 2011 ONSC 1500; *R v Colarusso*, [1994] 1 SCR 20; *R v Dyment*, [1988] 2 SCR 417; *The Application of the Canadian Charter in the Health Care Context* by Martha Jackman, Volume 9, Number 2 Health Law Review at p. 22 for the argument that private physicians in hospitals come under *Charter* scrutiny.

[10] *R v Lachap*pelle, 2003 CanLII 16205 (ONSC) (appeal not on this pointed 2007 ONCA 655); *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791.

in this definition of treatment and requires consent.[11] Regardless, the taking of blood must be done with informed consent, and that right to bodily integrity of the person and choice is protected by section 7 of the *Charter* in the context of informed consent as a guiding principle of care, and section 8 in the context of seizure of blood.[12]

c) The obtaining of blood samples from a patient requires the consent of that patient both from a legal, and naturally, from a medical ethics point of view. Consent may be implied by the treatment itself, but, when there is an overlay of police involvement, hospital staff and doctors must obtain an informed consent that includes explaining what is necessary and is not for treatment and must get express permission for the use and handling of bodily substances. This consent should be both discussed and documented. Failure to obtain informed consent could be an assault.[13]

d) The intervenor notes that the evidence of the doctor in this case was to the effect that testing for alcohol was not essential for treatment here.[14] In the absence of informed consent, the taking of blood for unnecessary testing could violate the appellant's *Charter* rights.

Detention and reasons for it: 10(a)

13. Under section 10 (a) of the *Charter*, the reasons for detention must be given. Cases have noted that in the context of an accident involving statutory reporting, 10 (a) is important because

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[11] College of Physicians and Surgeons, Policy #3-15: Consent to Treatment https://www.cpso.on.ca/Policies-Publications/Policy/Consent-to-Medical-Treatment#Endnote2.
[12] *Carter v Canada (Attorney General)*, [2015] 1 SCR 331 at para 67 approving of *Fleming v Reid*, 1991 CanLII 2728 (ONCA). R. v. Dyment, [1988] 2 S.C.R. 417
[13] Consent A Guide for Canadian Physicians : https://www.cmpa-acpm.ca/en/advice-publications/handbooks/consent-a-guide-for-canadian-physicians;
CMPA Physicians interactions with police https://www.cmpa-acpm.ca/en/advice-publications/browse-articles/2011/physician-interactions-with-police.
[14] Appellant's Record of the Case, Vol II page 269

it lets the detainee know whether to engage the right to counsel, whether to speak to police or not and what advice to get from counsel.[15]

14. The CCLA would next note that the "co-opting" of the technician to take extra blood (per the dissent) OR the speaking to the technician about the police sealing some of the blood vials for police use (per the majority) does engage *Charter* values *vis a vis* the conduct of the hospital, the doctor, the appellant and the police. With respect to hospitals, those statutory duties, while they may not strictly operate upon an emergency physician, emphasize the value and importance of informed consent in the operation of medical treatment and procedures, and re-enforce the privacy of the relationship.

Right to counsel, again, due to change in circumstance with the taking or preserving of blood-

15. With respect to the police, we submit that when the officer then advises the appellant about her rights to counsel, he ought to have told her that it was his intention to seize samples of her blood on a future occasion, that he had asked the technician to set aside and seal such blood for that purpose only. In that way, the decision on whether to contact counsel would be fully informed. Also, the Appellant could have made an informed choice about whether the blood should be drawn, or if she should withdraw her consent to the use or preservation of the blood. The doctor said his practice was to advise a patient that blood work would be done but not much more.[16] Police conduct in circumstances such as this might also implicate section 8 of the *Charter*,.[17]

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[15] See: *R v Mueller,* [2018] O.J. No. 2284, (ONSC) Justice Schreck helpfully reviews the case law on the need for police to say something re 10 (a) and why it is constitutionally important.

[16] Appellant's record of the case p 270

[17] *R v Evans*, [1991] 1 SCR 869; *R v Willier* 2010 SCC 37 on the change in circumstances warranting another counsel caution. *R v Dyment*, [1988] 2 SCR 417 re: Section 8 privacy in blood and conduct of police and doctors.

16. The failure of the police officer to advise the appellant of his intention to take a new step or investigative procedure called for disclosure of that step and a further right to counsel caution. That caution and right to counsel advice would be independent and in addition to the "*Prosper*" warning if it is determined that there was a change of mind about counsel.[18]

Right to counsel – no need to prove advice has value or would not make a difference

17. The CCLA is concerned that the majority comments about hypothetical advice, effectively imposes a requirement on the accused to prove that, if the right to counsel had been fulfilled, the accused would have made different choices that would have materially impacted the course of an investigation or the manner in which the evidence was obtained. [19] These comments may have been in response to a submission by appellate counsel which served to emphasize the value in protecting the clients rights in this situation, but they undermine the purposes of the right to counsel. Proper legal advice can be very useful in this context, and much more so than regrettably appears to be given in standard duty counsel calls in Ontario.[20] However, this court has made it clear that the potential advice counsel gives serves many purposes, and ought not to be diminished as irrelevant at all.[21]

18. Next the court below affirmed that the arrest of the appellant was without grounds [22]and as such violated section 9 of the *Charter*. The failure to inform the appellant of her right to counsel without delay then (we say may have further) violated her 10 (b) rights, and the seizure of extra blood violated her section 8 rights.

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[18] *R v Fountain*, 2015 ONCA 354. *R. v. Prosper* [1994] 3 SCR 236
[19] *R v Culotta*, *supra* note 2, at para 53.
[20] See M. Lacy, " Advising the Detainee During a Drinking and Driving Investigation" October 29, 2018, Ontario Bar Association https://www.oba.org/Sections/Criminal-Justice/Articles/Articles-2018/October-2018/Advising-the-detainee-during-a-drinking-and-drivin
[21] *R v Willier*, *supra* note 14.
[22] *R v Culotta supra* note 2 para 64

Blood samples and hospital records – Section 24 (2) issues

19. The following 24 (2) issues are noted and summarized by the CCLA:

i. There are unique interests that arise when police search and seizure powers are exercised within a hospital, as has been described. Police interactions with medical personnel and seizures of bodily substances not only engage core personal privacy rights, but also imperil an individual's ability to freely access necessary medical care;

ii. The characterization of certain police actions as "good faith" and therefore "less serious" is a problematic standard adumbrated by the majority below. Rather, the appropriate focus should be on whether the *Charter* breach was intentional or negligent; and

iii. Evidence obtained prior to a breach of the *Charter* may be excluded where appropriate. The connection between the breach and the obtaining of the evidence may be temporal, contextual, casual, or a combination of the three.

24 (2) and the medical overlay-too cozy?

20. The complex network of legal issues surrounding police, medical interaction and seizure of bodily substances has been described above in the context of the declared state policy, as expressed in legislation and regulation, as being highly supportive of individual rights and protection of privacy in the collection, storage and dissemination of information. The CCLA submits that the framework heightens the seriousness of any breaches here.

21. The CCLA repeats the concern of the dissent below that is critical of the overly cozy arrangements between police and medical staff, and adds that *Charter* breaches relating to a blurring of the lines of informed consent, access to counsel in a hospital setting, that arise due to an institutional malaise are serious indeed and must be treated as such in the *Grant* matrix.

Good faith is not a personality trait- 24(2) and ignorance of the law is no excuse

22. The CCLA respectfully disagrees with the majority characterization of good faith as including honest errors due to lack of experience of the police officer. [23] The CCLA has supported the *Buhay* approach, renewed by this Court in *Grant* and *Harrison* that, ignorance of *Charter*

[23] *R v Culotta*, *supra* note 2 at para 67.

standards must not be regarded or encouraged and negligence or wilful blindness cannot be equated with good faith."[24]

23. As put by Professor Stuart, in reviewing provincial appellate jurisprudence post *Grant*, the courts, "have made it crystal clear that the import of the *Grant* and *Harrison* approach to s. 24(2) is that any hint of police deliberate, negligent or ignorant disrespect of *Charter* standards cannot amount to police good faith to mitigate the key factor of seriousness of the breach for s 24 (2) purposes and must tilt the balance towards exclusion. This approach applies however serious the offence."[25] Indeed, in *R v Morelli, infra* this court held that careless conduct by police that was misleading, without being deliberate, was sufficient to cause the exclusion of evidence. [26]

24 (2) and "obtained in a manner"

24. The CCLA supports the broad interpretation of "obtained in a manner that infringed or denied any rights…" as permitting exclusion where the connection between the evidence and the breach may be causal, temporal, or contextual or any combination of the three connections, or where part of the same transaction or chain of events.[27]

25. The CCLA submits that this court's decision in *R. v. Therens* is instructive as to why the broad interpretation of 24 (2) is appropriate and should remain. The court noted:

> 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. Such a view gives adequate recognition to the intrinsic harm that is caused by a violation of a Charter right or freedom, apart from its bearing on the obtaining of evidence.[28]

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[24] *R v Grant*, *supra* note 3 at para 75 citing *R v Buhay*, 2003 SCC 30.
[25] Charter Justice in Canadian Criminal Law, 7th edition, Don Stuart, Thompson Reuters, 2018.
[26] *R v Morelli*, [2010] 1 SCR 253.
[27] *R v Pino*, 2016 ONCA 389.
[28] *R v Therens* [1985] 1 SCR 613 at para 66; See also Professor Stuart's support for a broad interpretation of 24(2) based on *Therens* and the French version of 24 (2) at p. 680-686 of his text, Charter Justice in Canadian Criminal Law *supra.*

PART IV: COSTS

26. The CCLA respectfully requests that there be no order as to costs, and is not seeking costs.

PART V: ORDER REQUESTED

27. The CCLA takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of November, 2018.

FOR Anthony Moustacalis
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PART VI: TABLE OF AUTHORITIES