

# In the Court of Appeal of Alberta

**Citation: R v Kiene, 2015 ABCA 326**

**Date: 20151028**  
**Docket: 1303-0261-A**  
**Registry: Edmonton**

2015 ABCA 326 (CanLII)

**Between:**

**Her Majesty the Queen**

Respondent

- and -

**Charles Andrew Kiene**

Appellant

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**The Court:**

**The Honourable Madam Justice Ellen Picard**  
**The Honourable Madam Justice Patricia Rowbotham**  
**The Honourable Mr. Justice Brian O’Ferrall**

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**Memorandum of Judgment of the Honourable Madam Justice Picard  
and the Honourable Madam Justice Rowbotham**

**Dissenting Memorandum of Judgment of the Honourable Mr. Justice O’Ferrall**

Appeal from the Conviction by  
The Honourable Mr. Justice M. D. Gates  
Dated the 27th day of September, 2013  
(2013 ABQB 592, Docket: 110055134Q1)

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## Memorandum of Judgment

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### The Majority:

#### I. Introduction

[1] The appellant appeals his convictions for impaired driving and driving with blood alcohol over .08, contrary to sections 253(1)(a) and 253(1)(b) of the *Criminal Code*. The convictions were based almost entirely on the appellant's hospital medical records ("records"), which revealed that his blood alcohol exceeded the legal limit when his blood was taken upon admission. Police obtained the records with the appellant's consent while the appellant was hospitalized and being treated for serious injuries caused by another driver's actions, for the purpose of charging the other driver.

[2] At trial, the appellant asserted that his sections 8 and 10(b) *Charter* rights had been violated. The Crown conceded the section 8 breach. The trial judge concluded that the appellant was not detained when he consented to the release of his records and therefore his section 10(b) *Charter* rights had not been engaged. As regards the section 8 *Charter* breach, the trial judge concluded that the admission of the records would not bring the administration of justice into disrepute: *R v Kiene*, 2013 ABQB 592, 570 AR 249.

[3] The appellant argues that the trial judge erred in finding that his section 10(b) *Charter* rights were not breached, erred in not excluding the evidence under section 24(2) *Charter*, and rendered an unreasonable verdict. The appellant's Charter Notice did not allege a breach of section 7 (the right against self-incrimination). On appeal the bulk of the appellant's oral submissions were directed to an alleged section 7 breach, an issue upon which the trial judge made no determination, nor was he asked to. However, as we note in our discussion of section 24(2), we agree that the court can look at all of the state's conduct in considering whether to exclude the evidence.

[4] For the reasons that follow, we dismiss the appeal.

#### II. Facts

[5] The appellant's motorcycle collided with an oncoming vehicle making an improper left turn. The other driver (later charged with impaired driving causing bodily harm), witnesses on the scene and the responding police officers observed no signs of impairment on the appellant's part. Emergency Medical Services took the appellant to the hospital.

[6] The appellant was seriously injured. He suffered numerous fractures that required surgery and a prolonged hospital stay. He was medicated with Oxycontin, Morphine, Demerol, Ketemine, Hydromorphone, and Gravol.

[7] As part of his investigation into the other driver's impairment, the investigating police officer (Investigating Officer) went to the hospital twice to obtain the legislatively mandated collision statement from the appellant. The Investigating Officer testified that although he had been a police officer for eight years, this was his first motor vehicle investigation involving a serious collision. It was also the first time he had sought consent to the release of medical records and he was not aware that they would contain blood alcohol levels. In cross-examination, the Investigating Officer indicated that the appellant's blood alcohol level at the time of the accident never crossed his mind.

[8] The first time the Investigating Officer attended, the appellant was groggy and could not focus. The Investigating Officer left at the appellant's request. The Investigating Officer returned to the hospital a few days later. The appellant asked if his girlfriend could remain in the room. The Investigating Officer agreed to his request. The appellant completed the one page collision statement as required by section 71 of the *Traffic Safety Act*, RSA 2000, c T-6. The Investigating Officer then asked the appellant questions about the collision and recorded the questions and answers on the same collision statement form as the mandated statement. The Investigating Officer's third of nine questions asked if the appellant had had anything to drink that night. The appellant stated: "I remember having 2 beer". The Investigating Officer asked no further questions about alcohol consumption. After completing the questioning, the appellant and the Investigating Officer signed and dated the forms. At the end of their conversation, the Investigating Officer asked the appellant to complete and sign a form consenting to release of his hospital records, and the appellant did so.

[9] The Investigating Officer did not inquire about the appellant's medication or mental state during their conversation. He was not aware that the appellant had undergone surgery two days earlier and received psychiatric counseling the day of the interview. The Investigating Officer testified that he perceived the appellant to be alert and attentive, comparable to his state when he attended the appellant's residence five months later to charge him with the offences.

[10] The Investigating Officer testified that he not perceive a power imbalance between himself and the appellant, nor did he conclude that the appellant felt compelled to answer any questions. The Investigating Officer testified that, at the time, he had no suspicions of any criminal conduct on the part of the appellant. He did, however, inform the appellant during the second visit that it was early in the investigation and if there were additional charges, those might be laid later.

[11] During the entirety of the conversation, the appellant lay in his hospital bed. The appellant described the interaction with the Investigating Officer as a "normal conversation". He agreed that the Investigating Officer's demeanour was pleasant and friendly. He testified that he felt compelled to give him a statement and that signing the form consenting to the release of the records "was part of the investigation and was mandatory". However, in cross-examination, the appellant acknowledged that he wanted to provide a statement to aid in

the investigation of the other driver in order to prevent the other driver from getting “off the hook”. He testified that he felt he had a “moral duty” to provide his statement and to cooperate in the investigation. The appellant also stated that he felt detained because the Investigating Officer did not inform him of his rights and because the Investigating Officer could stay as long as he wanted, while the appellant was confined to a hospital bed.

[12] When the Investigating Officer reviewed the approximately 1500 pages that comprised the records a few weeks later, he discovered that the attending EMS members had smelled alcohol on the appellant and he had admitted to consuming alcohol. A blood sample taken at the hospital just over one hour after the accident was found to contain 47 millimoles of alcohol in one litre of blood. This amounted to a blood alcohol reading of 216 milligrams of alcohol in 100 millilitres of blood, well over the legal limit.

[13] The Investigating Officer subsequently obtained a Production Order for the hospital records because he had not informed the appellant of his rights. At the time, he believed the appellant was the victim in the accident and he had no suspicion and no grounds to charge him with anything. The Investigating Officer reasoned, however, that the appellant may not have appreciated the jeopardy that he placed himself in by consenting to the release of his records. During cross-examination, the appellant confirmed that he did not understand his jeopardy and that the Investigating Officer did not explain that he could face criminal charges based on the information contained in his records.

[14] A *voir dire* to determine the admissibility of the records was held at the start of trial.

### III. Court of Queen’s Bench Decision

[15] The trial judge accepted the Crown’s admission that the appellant’s section 8 *Charter* right to unreasonable search and seizure had been violated.

[16] With respect to the alleged breach of the appellant’s section 10(b) right to counsel, the trial judge determined that the appellant had not been detained at the hospital and therefore, the right to counsel was not engaged. Referring to the definition of psychological detention from *R v Therens*, [1985] 1 SCR 613, 18 DLR (4th) 655, and *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353, and adopting the reasoning in *R v White*, [1999] 2 SCR 417, 174 DLR (4th) 111 (relating to section 7 interests and compelled statements), the trial judge concluded that, in the absence of criminal liability for failing to comply with a statute, a person is not detained unless there is a reasonable belief that he is required to comply. At that point, the right to counsel is engaged. The trial judge determined that the appellant did not feel compelled to provide the information, nor did the requirement to provide an accident collision statement under the legislation impose any serious criminal liability sufficient to trigger a detention. The appellant gave his statement because he felt it was his “moral duty” and because he wanted to assist the investigation. The

trial judge found that the Investigating Officer did not put any weight on the appellant's comment that he had "2 beer" before the accident.

[17] Turning to section 24(2) of the *Charter* and applying the *Grant* analysis, the trial judge concluded that the Investigating Officer unintentionally breached the appellant's section 8 *Charter* rights in obtaining a release of his records but the Investigating Officer's actions in breaching the appellant's rights were not serious. He found that the Investigating Officer was acting in good faith in conducting an investigation of another suspect: he did not obtain the appellant's records in the hopes or contemplation of obtaining evidence of any possible offence which the appellant might have committed. Although concluding that the impact of the breach on the appellant's privacy rights was serious and weighed in favour of exclusion, having regard to the seriousness of impaired driving, the importance of the evidence to the Crown's case and to the court's truth seeking function, the trial judge concluded that the administration of justice would not be brought into disrepute by admitting the records into evidence.

[18] As a result, the evidence on the *voir dire* was admitted to the trial proper. The Crown's blood alcohol expert opined that, at the time of the accident, the appellant's blood alcohol level was between .184 and .219. A person having the weight and height of the appellant would have consumed a large amount of alcohol to have those levels.

[19] The trial judge rejected the appellant's assertion that he had only two beers before the accident. The appellant testified that he had bought a box of at least 12 beer (and possibly more) earlier that day. The appellant's brother went to the appellant's house after the accident and noticed only three unopened beers in the fridge. The brother's evidence also convinced the trial judge that the appellant was an experienced drinker and that drinking all day was not uncommon for him.

[20] The trial judge did not specifically address the alleged section 7 *Charter* breach, nor was he asked to. The section 7 argument was raised in the appellant's factum and pursued in oral submissions to the panel. Crown counsel advised that the *Charter* notice given by the appellant prior to trial did not allege a section 7 breach but that he was prepared to address the argument for the purpose of assisting the panel in analyzing the section 24 (2) argument. We are not in position to address what is a new ground of appeal and accordingly we do not separately address the alleged section 7 breach. However, given the overlap among the sections 7, 10(b) and 8 of the *Charter*, we consider it in the context of our discussion of section 24(2).

#### **IV. Grounds of Appeal and Standard of Review**

[21] The appellant argues that the trial judge erred in law and fact by:

- (a) finding that the appellant's right to counsel was not breached;

- (b) failing to find that the appellant’s right against self-incrimination was also breached, along with his right to be informed of his right to counsel;
- (c) finding that the medical records were admissible; and
- (d) rendering a verdict that is unreasonable and unsupported by the evidence.

[22] A trial judge’s underlying factual findings must be respected, absent palpable and overriding error: *Grant* at para 129. The existence of a detention is grounded in the factual findings of the trial judge, but whether the facts as found by the trial judge amount at law to a section 10(b) *Charter* breach is a question of law. The Supreme Court has “repeatedly affirmed that the application of a legal standard to the facts of [a *Charter*] case is a question of law ... and the trial judge’s ultimate ruling is subject to review for correctness”: *R v Shepherd*, [2009] 2 SCR 527, 2009 SCC 35 at para 20.

[23] A trial judge’s decision to admit or exclude evidence under section 24(2) of the *Charter* generally attracts deference: *R v Cole*, 2012 SCC 53 at para 82, [2012] 3 SCR 34; *R v Côté*, 2011 SCC 46 at para 44, [2011] 3 SCR 215. A decision to admit evidence should not be interfered absent an “unreasonable finding” or some “apparent error as to the applicable principles or rules of law”: *R v Law*, 2002 SCC 10 at para 32, [2002] 1 SCR 227.

## V. Discussion

### *Section 10(b) - Right to Counsel*

[24] Section 10(b) *Charter* mandates that a person “has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right; and ...”. The right does not crystallize until arrest or detention. In addition to its more obvious meanings, detention can include circumstances, objectively determined, “when police conduct would cause a reasonable person to conclude that he or she no longer had the freedom to choose whether or not to cooperate with the police”: *R v Suberu*, 2009 SCC 33 at para 32, [2009] 2 SCR 460. But not:

every interaction with the police will amount to a detention for the purposes of the *Charter*, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police. This Court’s conclusion in *Mann* that there was an “investigative detention” does not mean that a detention is necessarily grounded the moment the police engage an individual for investigative purposes.

*ibid* at para 33

[25] The Supreme Court recently canvassed the issue of the right to counsel when a person is in the hospital after a motor vehicle accident: *R v Taylor*, 2014 SCC 50, [2014] 2 SCR 495. The

Court noted that a person “who enters a hospital to receive medical treatment is not in a *Charter-free zone*”: at para 34. Moreover, the “burden is on the Crown to show that a given delay was reasonable in the circumstances”. However, there is a key difference: in *Taylor* the issue was not detention, since Taylor was detained, it was the failure to give Taylor the opportunity to exercise that right.

[26] Other cases have said that before a person can be said to have waived the right to counsel the trial judge must be satisfied that in all the circumstances revealed by the evidence the accused generally understood the jeopardy in which he found himself and appreciated the consequences of his decision to dispense with counsel: *R v Smith*, [1991] 1 SCR 714, 4 CR (4th) 125. Further, he or she must be possessed of sufficient information to allow him or her to make an informed choice as regards exercising the right see e.g., *R v Bartle*, [1994] 3 SCR 173, 118 DLR (4th) 83. However, here there was no waiver of the right to counsel, the appellant consented to the release of his records.

[27] The appellant challenges the trial judge’s conclusion that he was not psychologically detained while being interviewed at the hospital on June 15, 2010. The appellant felt compelled to give a statement because: the Investigating Officer arrived the second time in uniform (not plain clothes like the first visit); he was unable to leave the hospital; and the Investigating Officer clearly signaled that the information sought was part of the larger investigation and that other charges could be brought. He argues that the Investigating Officer must have considered the potential jeopardy of the appellant since he admitted as much in the Information To Obtain the Production Order. He says that an Investigating Officer with eight years’ experience must have known that the appellant’s admission of having “2 beer” was an admission against his interests which would change the nature of the investigation.

[28] Psychological detention can occur where an individual has a legal obligation to comply with a request, or a reasonable person would conclude by reason of the State conduct that he or she had no choice but to comply: *Grant* at para 44. When there is no physical restraint or legal obligation, in order to determine whether a reasonable person in the individual’s circumstances would conclude a deprivation of liberty, the court may consider a number of factors including whether the police were making general inquiries regarding a particular occurrence as opposed to singling out an individual for a focussed investigation. Among other factors are the nature of the police conduct and the place where the interaction occurred: *Grant* at para 44.

[29] There was no legal obligation to provide the consent to release medical information. The only legally mandated information was the first page of the collision statement. The Investigating Officer told the appellant he was required to complete the collision statement. However, he testified that he did not tell the appellant that he had to sign the consent form. He merely asked him to sign it. The appellant had no questions about the form. The appellant now says that the consent was tainted because he felt compelled to do so under the guise of the

mandatory collision statement. However, he testified that he wanted to assist the police and felt a moral duty to assist in the investigation of the other driver.

[30] As regards the other relevant *Grant* factors, this was not a singling out of the appellant for a focussed investigation. The Investigating Officer was unaware that the medical information would reveal the blood alcohol content and at the time of obtaining the consent, the police had no suspicion regarding the appellant's impairment. The medical consent was obtained in the context of a general investigation into the other driver.

[31] The trial judge considered all of the evidence. The appellant asks us to reweigh the evidence to reach the conclusion that the appellant was detained. That is not our role. The trial judge after listening to the evidence of the Investigating Officer was satisfied that the officer did not know that the medical records would contain information about alcohol levels. This was so in spite of the fact that this was not a rookie police officer but rather an eight year veteran, albeit one who had not completed this type of investigation before. Another court might reach a different conclusion on the facts, but it was open to the trial judge to make this determination and he made no palpable and overriding error in reaching his conclusion.

[32] The trial judge was not satisfied that the appellant provided the statement because he felt compelled by the Investigating Officer or the law to do so. He concluded that, "at best [the appellant's] evidence was equivocal." The trial judge observed that while the appellant assumed that everything given to him was part of the investigation and was mandatory, the appellant strongly affirmed "he complied because he felt a moral duty to provide information and did not want the other driver to get 'off the hook'". The trial judge's conclusion as to the appellant's motivation for signing the consent form is entitled to deference. The appellant testified that he wanted to assist the police in the prosecution of the other driver. The lack of compulsion or coercion was also consistent with the appellant's testimony about the friendly, non-adversarial demeanour of the Investigating Officer, and with the fact that the appellant knew that he could ask the officer to leave, because he had done so several days earlier.

[33] In sum, the determination of whether there had been "detention" by the police is a question of fact, reviewable for palpable and overriding error. None has been demonstrated. This ground of appeal is dismissed.

### ***Section 24(2)***

[34] The *Grant* test for exclusion of evidence asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute: para 68. Exclusion of the evidence is not a punishment of those involved; the goal is to preserve public confidence in the rule of law and its processes: para 73. The court must balance the seriousness of the *Charter*-infringing conduct, the impact of the breach upon the appellant, and society's interest in the adjudication of the case on the merits.

### *Seriousness of the Charter Breach*

[35] The trial judge found that the breach was serious. The disclosure of one's medical records in the absence of consent is a serious invasion of privacy.

### *Seriousness of the State's Conduct*

[36] As regards the seriousness of the state's conduct, the trial judge concluded that this factor favoured the admission of the evidence. He found that the Investigating Officer did not intentionally breach the appellant's section 8 rights; that he acted in good faith and that he did not obtain the medical records in the hopes, or even the contemplation of, obtaining evidence of any possible offence that the appellant might have committed. The appellant contends that the trial judge erred in accepting that this eight year veteran officer did not know that the records would contain the results of a blood alcohol test. Good faith cannot be claimed if a *Charter* violation is committed on the basis of a police officer's unreasonable error or ignorance: *R v Buhay*, [2003] 1 SCR 631 at para 59, 2003 SCC 30.

[37] The appellant also says that his right against self-incrimination ought to have been considered, given that the consent form was signed along with the mandated collision statement. Although the trial judge made no finding of a section 7 *Charter* breach, in our view the court can look at all of the State's conduct in determining whether evidence ought to be excluded.

[38] In examining the role of the State, it is the conduct of the Investigating Officer at the time of obtaining the consent form that is relevant. His evidence was that at that time he was interested only in prosecuting the other driver. His questions to the appellant about speed and alcohol were also made in that context. When the time came to obtain the consent, the Investigating Officer viewed the appellant as the victim. The two were not in an adversarial relationship and the Investigating Officer had no grounds to believe that the appellant had committed an offence. There was no coercion. The officer asked the appellant to sign the consent. The Investigating Officer did not abuse his authority or use his position of power.

[39] The appellant must demonstrate an error in legal principle or a clearly unreasonable finding. The most persuasive of the appellant's arguments relates to the Investigating Officer's failure to appreciate that the appellant's medical records might contain blood alcohol readings. But the trial judge accepted this evidence, and while another court might not be inclined to make this finding, we cannot say that this is clearly unreasonable. The trial judge accepted the officer's evidence as he was entitled to do.

[40] The trial judge's finding that this factor favoured admission of the evidence is entitled to appellate deference.

*Society's Interest in the Adjudication of the Case on the Merits*

[41] The appellant asserts that the trial judge erred in “failing to consider the lack of outside supporting evidence of guilt”. We agree with the trial judge that the hospital records were “highly reliable” and collected independently of the state. We also agree with his observation of the pressing social problem of drunk driving. This factor favours admission of the evidence.

*Balancing the Factors*

[42] The requirements of section 24(2) and *Grant* require the court to look at the repute of justice over the long term, keeping in mind the overarching goal of trial fairness. The seriousness of the admitted section 8 breach rendered the balancing a very delicate one. Although this was not the taking of a bodily sample without consent as in *R v Dymont*, [1988] 2 SCR 417, 55 DLR (4th) 503, access to one's medical records is highly invasive: see generally *R v Taylor*. The trial judge recognized that this factor favoured exclusion of the records. However, section 24(2) is about balancing the factors and no one factor can necessarily outweigh the others. There is no legal error in the trial judge's analysis. Accordingly, the appellant must demonstrate that the trial judge's decision to admit the evidence is clearly unreasonable. We are not persuaded that his decision is clearly unreasonable. The standard of appellate review does not permit us to interfere.

*Unreasonable Verdict*

[43] The appellant was convicted of driving with a blood alcohol level greater than .08 and impaired driving. The trial judge entered a conditional stay with respect to the impaired driving conviction. The appellant contends that the impaired driving verdict is unreasonable, given the lack of indicia of impairment prior to the collision and the appellant's own evidence that he had consumed two beers.

[44] The evidence of impairment came from the expert witness who relied upon the blood alcohol readings in the medical records and opined on the appellant's blood alcohol level at the time of the accident. She opined using admitted facts about the appellant's height and weight. The expert also testified to the physical effects of increased consumption, including slow motor reflexes, delayed perception and decision making. The trial judge disbelieved the appellant's evidence of the amount of alcohol he had consumed prior to the collision. The appellant's own evidence and that of his brother, led the trial judge to infer that the appellant was an experienced drinker and there would be less indicia of impairment.

[45] A verdict is unreasonable if it is one that a properly instructed jury acting judicially could not reasonably have rendered. We cannot say that the verdict is unreasonable based upon the evidence which the trial judge accepted.

**VI. Conclusion**

[46] The appeal is dismissed.

Appeal heard on April 1, 2015

Memorandum filed at Edmonton, Alberta  
this 28th day of October, 2015

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As authorized by: Picard J.A.

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Rowbotham J.A.

**O’Ferrall J.A. (dissenting):****I. Introduction**

[47] The issue I wish to address is whether the results of the analysis of the appellant’s blood taken from him by the University Hospital upon admission for treatment following a motorcycle accident, discovered as a result of what was conceded to be an unreasonable search and seizure, should have been admitted in evidence against the appellant at trial. In other words, the issue is whether the blood analysis evidence, which was admittedly obtained in a manner which infringed the appellant’s *Charter* rights, should have been excluded on the basis that to admit it would bring the administration of justice into disrepute. In making this decision I believe the trial judge erred in his analysis of the seriousness of the state’s *Charter*-infringing conduct.

[48] The trial judge concluded that the appellant’s section 8 *Charter* right to be secure against unreasonable search and seizure was breached because the appellant’s consent to the release of his medical records to the police was not valid. The consent was held not to be valid because the appellant was not aware of the potential consequences of providing that consent. The Crown conceded as much and the trial judge also concluded that there had been an unreasonable seizure of the accused’s medical records. However, the trial judge declined to exclude the evidence obtained as a result of the breach because he did not believe its admission would bring the administration of justice into disrepute.

[49] The trial judge quite properly applied the *Grant* framework to decide whether the evidence obtained in breach of the *Charter* should be excluded: *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353. With respect to the second branch of the test, he quite rightly found the impact on the appellant’s *Charter*-protected rights to be serious and that the breach favoured exclusion. He held that the seizure and search of the appellant’s hospital emergency treatment records without the appellant’s informed consent was a serious invasion of privacy. It violated the appellant’s security of person and his right to be secure against unreasonable search and seizure and was therefore serious.

[50] With respect to the third branch of the *Grant* framework for analysis, the trial judge also quite rightly found that society’s interest in adjudicating the merits of the allegation that the appellant had been driving while impaired was high and favoured admission of the evidence. He also found that the evidence obtained in breach of the *Charter* (the analysis of the alcohol content of the appellant’s blood) was likely to be highly reliable and that society’s interest in deterring drunk driving was great. No issue can be taken with that finding.

[51] While a trial judge’s section 24(2) analysis is entitled to deference absent apparent error as to the applicable principles, I believe the trial judge in this case erred in his finding with respect to the first branch of the *Grant* test. That is, his finding the seriousness of the *Charter*-infringing state conduct was not great and therefore favoured admission of the

evidence was based on an incomplete analysis. Where the trial judge erred, in assessing the seriousness of the state's Charter-infringing conduct, was in having regard only to the fact that the investigating officer did not act unreasonably and did not intend to breach the appellant's section 8 *Charter* rights. (The officer had obtained the appellant's medical records for the purpose of potentially charging the *other* motorist involved in the accident.)

[52] In my view, the trial judge placed too much emphasis on the investigating officer's polite and even-handed manner in eliciting the impugned evidence. His analysis should have taken a broader view of the state's conduct in this case.

[53] The seriousness of the *Charter*-infringing state conduct ought to have been assessed having regard to regulatory regimes which reflect the seriousness with which society views the inappropriate use of medical records and accident reports. In determining whether the admission into evidence of medical information obtained in a manner which infringed an appellant's *Charter* rights would bring the administration of justice into disrepute, the trial judge ought to have had regard for what other laws were potentially being broken.

[54] In my view, the *Charter*-infringing conduct in this case undermined the objectives, duties, and safeguards found in our accident-reporting legislation, as well as our health information legislation. Relying upon evidence seized in breach of at least two, and possibly three, provincial statutes in order to convict an accused risks bringing the administration of justice into disrepute. Therefore, the state's *Charter*-infringing conduct in this case ought to have been considered very serious, favouring exclusion of the evidence.

[55] I now propose to describe in general terms the statutory regimes which, in my view, demonstrate the seriousness of the state's *Charter*-infringing conduct in this case.

## **II. The Medical Information Breach**

[56] Section 24(1) of the *Hospitals Act*, RSA 2000, c H-12, provides that hospitals shall cause attending physicians and other persons providing diagnostic or treatment services to keep a record of the diagnostic and treatment services provided in respect of each patient. The *Hospitals Act* states that these records are to be kept in order to assist in providing a higher standard of medical care. In other words, the Legislature has prescribed the purpose for which these medical records are to be kept and that stated purpose is to assist in providing better medical care.

[57] Section 24(1.1) of the *Hospitals Act* goes on to state that hospital staff and physicians may disclose health information obtained from hospital records only in accordance with the *Health Information Act*, RSA 2000, c H-5. There are a number of exceptions to this restriction on disclosure set forth in the *Hospitals Act*, but none of those exceptions would have permitted the provision of the appellant's entire hospital medical file.

[58] Section 31 of the *Health Information Act* prohibits hospitals, as custodians of health information, from disclosing health information (defined to include diagnostic, treatment and care information) except in accordance with the *Act*.

[59] The *Health Information Act* provides that a custodian of the health information, such as a hospital, may disclose individual-identifying health information if the individual has consented to the disclosure. However, the consent must contain the following information:

- (a) an authorization for the custodian to disclose the health information specified in the consent,
- (b) the purpose for which the health information may be disclosed,
- (c) the identity of the person to whom the health information may be disclosed,
- (d) an acknowledgment that the individual providing the consent has been made aware of the reasons why the health information is needed and the risks and benefits to the individual of consenting or refusing to consent,
- (e) the date the consent is effective and the date, if any, on which the consent expires, and
- (f) a statement that the consent may be revoked at any time by the individual providing it.

#### Section 34 of the *Health Information Act*

[60] The “Consent for Release of Medical Information” which the appellant signed did not contain all of the statutorily-required information which such a consent must contain. Nor was the ultimate disclosure made in accordance with the terms of the consent.

[61] The *Health Information Act* provides that once an appropriate consent is given, disclosure of the health information must be carried out strictly in accordance with the terms of the consent: section 34(3) of the *Act*. In this case, the disclosure was not carried out in accordance with the terms of the consent. The investigating police officer communicated to the appellant that the reason for requesting his medical information was to prove that he (the appellant) was seriously injured in the accident for the purpose of charging the driver of the car with causing bodily harm. Perhaps for this reason the Consent for Release of Medical Information contained an express limitation on the amount and kind of medical information the appellant consented to have released. The terms of the Consent for Release of Medical Information was limited to the release of medical information proving the appellant’s injuries,

not his entire medical file and certainly not the analysis done of his blood, which analysis was done for treatment purposes. Disclosure of 1500 pages of the appellant's medical information was not contemplated by either party. The investigating police officer admitted as much in his evidence.

[62] There is certain personal health information which the custodian of health information may disclose to police without the patient's consent if the custodian reasonably believes that the information relates to the possible commission of an offence and the disclosure will protect the health and safety of Albertans (section 37.3(1)). However, the information which may be disclosed to police without the patient's consent is expressly limited to the following:

- (a) the name of an individual;
- (b) the date of birth of an individual;
- (c) the nature of any injury or illness of an individual;
- (d) the date on which a health service was sought or received by an individual;
- (e) the location where an individual sought or received a health service;
- (f) whether any samples of bodily substances were taken from an individual;
- (g) information specified in section 1(1)(i)(ii) about a health services provider who provided a health service to an individual referred to in subsection (1).

Section 37.3(2) of the *Health Information Act*

The information released with respect to the appellant was not so limited.

[63] The point of providing this very general overview of the legislative scheme governing the release of medical information is merely to demonstrate the seriousness which society places on protecting the confidentiality of personal health information. The importance of confidentiality in the doctor-patient relationship is well-recognized: *R v Dymont*, [1988] 2 SCR 417, 55 DLR (4th) 503. The confidentiality is based upon, among other things, society's interest in encouraging the treatment of injured persons. And, although the privilege is far from absolute, the *Hospitals Act* and the *Health Information Act* do confer a limited, case-by-case privilege with respect to medical information extracted as a result of diagnosis and treatment of injured persons in hospitals. The Legislature has clearly limited the disclosure of medical

information to the police to certain types of information. Those limits were exceeded in this case.

[64] So, the *Charter*-infringing conduct was not merely that of the investigating officer unintentionally breaching the appellant's section 8 rights in obtaining the release of his medical records. It was also the conduct of a police service which created a consent form for the express purpose of collecting information "for evidentiary and/or court purposes" which did not comply with legislation governing the release of a patient's medical information. The *Charter*-infringing conduct was also comprised of the conduct of another government agency (the hospital) releasing more medical information than even the flawed consent form called for. For the state to use such information to obtain a Production Order and to prosecute the appellant is exponentially more serious. The error here is that in examining the role of the state, the conduct of the investigating officer is not the only relevant consideration.

### III. The Significance of the Medical Information Breach

[65] The significance of the medical information breach was that the appellant received insufficient protection against self-incrimination. This was not simply a case of a breach of the appellant's right to privacy or security of the person.

[66] The appellant argued that the trial judge erred in failing to find that his protection against self-incrimination was breached. The Crown argued that the appellant's section 7 *Charter* rights were not engaged because the appellant did not act out of compulsion. The majority appears to suggest that the trial judge was not asked to make a determination with respect to the alleged breach of section 7. With respect, the appellant's written *voir dire* submissions suggest otherwise; but whatever the case, the trial judge's reasons do not reflect an appreciation of the fact that it was the appellant's unwitting self-incrimination which made the unauthorized seizure and search of his medical records unreasonable. Had the trial judge appreciated that, he might have found the state's *Charter*-infringing conduct more serious.

[67] The unreasonable search and seizure in this case was the seizure of all of the appellant's medical records which he clearly did not authorize and the subsequent search of the records he did not consent to release. The Crown conceded that the records were obtained in violation of section 8 of the *Charter* because the appellant's consent to the release of his medical records was "vitiating" (made invalid or ineffectual) by the fact that he was not aware of the potential consequences of giving consent, as required by the jurisprudence. *Charter* jurisprudence puts limits on the consensual relinquishment of *Charter* rights. See: *R v Wills* (1992), 7 OR (3d) 337, 70 CCC (3d) 529 (ONCA) cited with approval in *R v Borden*, [1994] 3 SCR 145, 119 DLR (4th) 74.

[68] In conceding the section 8 *Charter* breach, the Crown stated that it was relying on *Wills*. In *Wills*, the Ontario Court of Appeal held that a consent to relinquish *Charter* rights must not only be voluntary, it must also be an informed consent and the onus is on the Crown to

demonstrate that the accused decided to relinquish his or her constitutional right with full knowledge of the existence of the right and an appreciation of the consequences of waiving that right. In *Wills*, the accused waived his right to refuse to provide a breath sample in circumstances where the police had no basis to demand one. Nevertheless, Mr. Wills voluntarily agreed to provide one. The Ontario Court of Appeal held that the Crown had not proven that Mr. Wills' consent was an informed one.

[69] In the case before us, the Crown's concession was that the appellant's consent to release his medical records was vitiated on the basis that his consent was given without full knowledge of his right not to consent and without an appreciation of the consequences. One of the consequences of his vitiated consent was that the appellant unwittingly incriminated himself. The suggestion that section 7 Charter protection against self-incrimination was not engaged is untenable. One simply has to ask oneself, why did the Crown concede that the seizure of the medical records contravened section 8 of the *Charter*? The answer in this case is that in consenting to the release of those medical records the appellant incriminated himself. It might be argued, although it wasn't, that the Crown's concession was based simply on a generalized breach of the appellant's privacy interests. But that is the problem with such concessions. Their rationale is unclear and the section 24(2) analysis suffers as a consequence.

[70] Suffice it to say that the investigating officer appeared to realize that the appellant's protection against self-incrimination may have been infringed when he testified that the appellant may not have appreciated the "jeopardy" in which he had placed himself when he consented to the release of his records. The jeopardy to which the investigating officer referred, of course, was the jeopardy of self-incrimination.

[71] In the *Wills* case, upon which the Crown relied in conceding the breach of the appellant's section 8 right to be secure against unreasonable search and seizure, the Ontario Court of Appeal emphasized that self-incrimination was necessarily involved in the search to which the accused gave a voluntary, but not an informed consent:

It is true that the evidence of the analysis of the breathalyzer results would not have existed but for the *Charter* violation and that in this sense Mr. Wills was conscripted against himself and his privilege against self-incrimination was violated.

[72] For the Crown to argue that the appellant's right against self-incrimination was not engaged is to misunderstand the consequences of the concession it made in the Agreed Statement of Facts that the appellant's medical records were obtained in violation of section 8 of the *Charter* and I quote:

In particular: the original consent to release the Medical Records is vitiated by the Accused's failure to understand the jeopardy which could result from releasing the Medical Records.

#### **IV. Breach of the Use Immunity Afforded Accident Reports**

[73] A review of the *Traffic Safety Act*, RSA 2000, c T-6, and the legal regime governing the use of statements made for accident reports also sheds light on the seriousness of the *Charter* breach in this case.

[74] The provincial Legislature has mandated that evidence which the driver of a motor vehicle involved in an accident is compelled to give pursuant to the *Traffic Safety Act* is not admissible in a legal proceeding for any purpose. There are a number of public policy reasons for the restrictions which the *Traffic Safety Act* imposes on the use of accident reports and collision statements. They include both operator and highway safety considerations, as well as facilitating the expeditious settlement of motor vehicle accident claims. Although the provincial restrictions on admissibility cannot affect the admission of evidence in criminal prosecutions, the Supreme Court of Canada and other appellate courts have also consistently held that such evidence is inadmissible in criminal proceedings: *R v White*, [1999] 2 SCR 417, 174 DLR (4th) 111; *R v Powers*, 2006 BCCA 454, 213 CCC (3d) 351, leave to appeal to SCC refused, 31728 (19 April 2007) and *R v Soules*, 2011 ONCA 429, 105 OR (3d) 561. In his reasons, the trial judge stated that Alberta had yet to adopt this reasoning and he declined to consider whether to apply it in this case. In my view, the Supreme Court's decision in *White* required him to do so.

[75] At the Supreme Court of Canada, Iacobucci J for the majority held at paragraph 30 in *White* that “[s]tatements made under compulsion of section 61 of the *Motor Vehicle Act* are inadmissible in criminal proceedings against the declarant because their admission would violate the principle against self-incrimination”.

[76] However, the unique issue in this case is whether or not the Consent for Release of Medical Information was a report or statement made or furnished under compulsion of section 71 of the Alberta *Traffic Safety Act* or information voluntarily given separate and apart from the statute's accident reporting regime. Facts which are not in dispute, and which are discussed below, suggest that the Consent for Release of Medical Information may have formed part of the appellant's report of the accident to the police.

##### **A. Peace Officer's Statutory Duty to Provide an Accident Report**

[77] After questioning the appellant, the investigating officer, in discharging his duty to provide the Registrar of Motor Vehicle Services with a report about the accident, filled out a “Collision Report Form” prescribed for that purpose by the Registrar: section 70 of the *Traffic Safety Act*. The Collision Report gave basic information about the location, date, and time of the

accident; the names and addresses of the drivers; vehicle registration information; points of impact; and a brief description of the accident which involved a collision between a left-hand turning vehicle and an on-coming vehicle. Some of the information contained in the Collision Report was provided by the appellant and recorded by the investigating officer as he interviewed the appellant in hospital.

[78] It is significant that at the bottom of the Collision Report Form prescribed by the Registrar of Motor Vehicle Services there is the following statement:

This Information is collected under the authority of the *Traffic Safety Act (TSA)* for the purpose of reporting and investigating a motor vehicle accident and compiling statistics. The information is disclosed in accordance with the *TSA*.

Section 11 of the *Traffic Safety Act*, discussed below, contains strict limits on the disclosure and use of such information.

[79] As discussed in paragraphs 81 to 83, a separate accident report, in the form of a Collision Statement, must also be provided to police by a driver involved in an accident: section 71 of the *Traffic Safety Act*. The police are then required to provide the information to the Registrar of Motor Vehicle Services pursuant to section 70. It is an offence not to provide this information to the Registrar. Such reports are provided for the purposes of monitoring drivers and the safe operation of commercial and motor vehicles: section 11(2) of the *Traffic Safety Act*. Subsection 11(2.1) of the *Traffic Safety Act* provides that information contained in such reports may be released, but only (1) to an insurer or to a person who may be liable to pay or who might be entitled to recover damages as a result of the accident; (2) to a road authority for the purposes of improving the management of roadways; or (3) to the Alberta Transportation Safety Board for the purposes of driver conduct reviews and appeals from suspensions, disqualifications, demerit points, etc.

[80] Subject to these exceptions, section 11(3) of the *Traffic Safety Act* provides that a report or statement made or furnished under the *Traffic Safety Act* is not admissible in evidence for any purpose in a legal proceeding arising out of the accident except to prove the identity of the drivers involved in the accident (and a couple of other exceptions which are not germane to this appeal). But in addition to the *Traffic Safety Act* use restrictions which, as previously indicated, cannot affect evidentiary rules for federal criminal prosecutions, the Supreme Court in *White* has also held that statements made under this sort of statutory compulsion are subject to use immunity in criminal proceedings.

#### **B. Driver's Statutory Duty to Provide a Collision Statement**

[81] Having filled out the Collision Report on the basis of information provided by the appellant, the investigating officer then tendered the appellant another prescribed form which the driver of a motor vehicle involved in an accident is required to complete if he or she is able

(section 71 of the *Traffic Safety Act*). This form assists the driver in providing his or her report of the accident and is known as a “Collision Statement”. In this case, the appellant’s explanation of events leading up to the collision and the accident itself were provided in the Collision Statement. The Collision Statement was prepared and signed by the appellant. In this case there was a second, third and fourth page of the Collision Statement in which the investigating officer posed written questions to the appellant which the appellant answered in his handwriting. The questions related to direction of travel, traffic conditions, speed, alcohol, how long the appellant had held a Class 6 (motorcycle) licence and what he remembered about the accident. All four pages were signed by the appellant in the appropriate spot on the Collision Statement forms.

[82] The driver’s Collision Statement, like the Collision Report by police, also contains a statement about disclosure:

This information is being collected for the purpose of collecting additional or supplemental information from persons who have knowledge of an accident. The information is collected and is disclosed in accordance with and under the authority of the *Traffic Safety Act (TSA)*, *Operator and Vehicle Licencing Control Regulation* and the *Freedom of Information and Protection of Privacy Act*.

[83] Once again, release of information in the Collision Statement taken under compulsion of section 71 of the *Traffic Safety Act* is limited to a person who has paid or may be liable to pay damages or who has recovered or may be entitled to recover damages as a result of the accident (or that person’s lawyer or insurance company), or to a road authority for the purpose of improving the management of roadways or to the Alberta Transportation Safety Board for the purpose of driver conduct reviews. But the information is not admissible in evidence in any legal proceeding arising out of the accident except to prove the identity of the drivers of the vehicles involved in the accident or to prove compliance with the statute.

### **C. The Medical Information**

[84] As he lay in his hospital bed, the appellant was tendered yet another form by the investigating officer entitled, “Consent for Release of Medical Information”. The form had on it the coat of arms of the Edmonton Police Service. It was addressed to the University of Alberta Hospital. In it the appellant consented to the disclosure to the Edmonton Police Service of “any information concerning my medical condition and any health care services received by myself...for numerous fractures to hips, legs, arm as a result of a Motor Vehicle Collision”. The underlined words were written in by the investigating officer. The other quoted words formed part of the form. The document was signed by the appellant. As previously indicated, the consent form did not contain all the information which the *Health Information Act* required it to contain.

[85] The Consent for Release of Medical Information also had a statement, which the appellant was asked to sign, stating, “I understand that the above information is being collected by the Edmonton Police Service for evidentiary and/or court purposes”. It was not disputed that the investigating officer told the appellant that the information was being collected to prove bodily harm in a contemplated prosecution of the driver of the vehicle which collided with the appellant and his motorcycle. What was not made clear to the appellant, because it was not contemplated by the investigating officer, was that information beyond what the appellant consented to release would be released and that it would be ultimately used against him in court proceedings.

#### **D. Analysis**

[86] At the hearing of this appeal, counsel for the appellant characterized what transpired at the hospital in a way I found persuasive. She painted an image of the investigating officer and the appellant passing a clipboard back and forth. The clipboard contained the two-page Alberta Collision Report Form, several Alberta Collision Statement forms and an Edmonton Police Service Consent for Release of Medical Information. The investigating officer would pass the clipboard to the appellant in his hospital bed and as each form was filled out and signed, the appellant would hand it back as part of the accident investigation and reporting process. There was no evidence that the investigating officer advised the appellant that the tendering of the medical consent form was not still part of that accident investigation and reporting process.

[87] The appellant’s evidence was that he thought he was as compelled to sign the Consent for Release of Medical Information as he was to sign the Collision Statements. However, the trial judge found that the appellant’s evidence with respect to compulsion was equivocal. The trial judge found that the consent to the release of the appellant’s medical information was voluntary (“I find that he cooperated out of a sense of moral duty.”). Yet it is uncontroverted that the appellant’s consent was “vitiating” because he was not aware of the consequences of giving it. I fail to see how a vitiating consent could be voluntary in the legal sense. But regardless, in the circumstances of this case, the Consent for Release of Medical Information formed part of the appellant’s report of the accident which, under the authority of the *Traffic Safety Act* and *White*, is compulsory and use-restricted. “I had assumed that everything given to me was part of the investigation and was mandatory,” the appellant testified with respect to the Consent to Release Medical Information. The Crown expressly stated that it was not seeking to tender the appellant’s Collision Statement as it was conceded to have been given under compulsion. The only issue was the appellant’s Consent to Release Medical Information.

[88] In characterizing the appellant’s medical information as having been released under compulsion of statute, I would adopt the reasoning of His Honour Judge Fradsham of the Provincial Court of Alberta in *R v Velandia*, 2012 ABPC 347, [2012] AJ No 1346 (QL) at para 46, where he characterized statements made by the accused during the course of a statutorily-compelled investigation as being evidence which potentially enjoyed use immunity

(I say “potentially” because, having found the statements breached the accused’s right to silence, Judge Fradsham invited submissions on admission or exclusion of the evidence pursuant to section 24(2) of the *Charter*). But it is Judge Fradsham’s reluctance to make fine distinctions between statutorily-compelled information and other information provided in the context of an accident report which I found compelling:

With great respect to Justice Duncan's contrary view in *R. v. Parol, supra*, I find that the rationale in *R. v. White, supra*, applies to Ms. Velandia's oral statements to Constable Frank. If I might add, it does seem to me that to hold otherwise (i.e., to hold that the *White* protection only applies if the statements are made in the specific form referred to in the legislation) would effectively neutralize the protection against self-incrimination in situations where provincial legislation compels a driver to give certain information to the police, but the police simply ask for the information in a form other than that set out by the legislation. A driver who is involved in an accident, and who knows that he or she is statutorily compelled to give certain information to the police, should not have to determine whether the police officer's request for information falls within or outside the compulsory provisions of the legislative scheme based upon how the request is made. Such a situation would simply afford to the police too much scope to thwart the driver's section 7 *Charter* rights.

[89] In assessing the seriousness of the state’s *Charter*-infringing conduct for the purposes of section 24(2) analysis, the Consent for the Release of Medical Information ought also to have been considered part of the information or statement provided under compulsion of statute and therefore inadmissible on the authority of *White* where Supreme Court held that statements made under this type of statutory compulsion are subject to use immunity in criminal proceedings. Also, on the authority of *White*, the obtaining of this medical information ought to have been considered serious *Charter*-infringing conduct by the state.

## V. Conclusion

[90] As a consequence, in balancing the factors for either inclusion or exclusion of the evidence obtained in a manner that infringed the *Charter*, the trial judge underestimated the seriousness of the state’s *Charter*-infringing conduct by concentrating primarily on the conduct of the investigating officer. Had he not, he might well have concluded that the admission of this evidence, in breach of at least two provincial statutes, would bring the administration of justice into disrepute. Without the impugned evidence, there could be no conviction. I would therefore have quashed the conviction and directed a verdict of acquittal pursuant to section 686(2)(a) of the *Criminal Code*. The Crown argued that the evidence (the analysis of the blood-alcohol content of the appellant’s blood) could have been obtained by other means. The Crown suggests it could have obtained a production order requiring the production of the appellant’s medical records if it had applied for a production order in the context of the prosecution of the driver of

the car which collided with the appellant's motorcycle (i.e., in order to prove bodily harm). I have no doubt that a proper production order might have compelled the production of medical records of the appellant proving his injuries. But in light of the provisions of the *Hospital Act* and the *Health Information Act* discussed above, I doubt whether a proper production order could have compelled the production of the analysis of his blood. That doubt is founded in all sorts of privacy reasons which would have nothing to do with the blood-alcohol content shown by that analysis. In short, I reject the Crown's arguments that the analysis of the appellant's blood could have been discovered in any event. As indicated, I would have allowed the appeal.

Appeal heard on April 1, 2015

Memorandum filed at Edmonton, Alberta  
this 28th day of October, 2015

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O'Ferrall J.A.

**Appearances:**

K.A. Joyce  
for the Respondent

E.A. Maynes  
for the Appellant