SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Chisholm*, 2014 NSSC 345

Date: 20140612
Docket: CRAT No. 422077
Registry: Antigonish

Between:

Grace Chisholm

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Patrick J. Murray
Heard:	May 12, 2014, in Antigonish, Nova Scotia
Oral Decision:	June 12, 2014
Counsel:	Gerald MacDonald Q.C., for the Appellant Allen Murray, for the Respondent

By the Court:

Introduction:

[1] This is an appeal from a decision on a *voir dire* given by the Honourable Judge Richard MacKinnon on November 12, 2013. After hearing evidence and argument, the learned trial judge ruled that certain evidence, blood samples of the Appellant, Grace Catherine Chisholm, were admissible in evidence against her. Notwithstanding that, he found there had been a breach of her rights under s. 8 of the *Charter*. Judge MacKinnon concluded pursuant to s. 24(2), that admission of the blood samples, would not bring the administration of justice into disrepute.

[2] The Appellant, Ms. Chisholm, now appeals that decision to this Court. In her Notice of Appeal she claims the learned trial judge erred in his decision to admit the evidence. The search warrant issued to obtain the evidence was struck down by the trial judge.

[3] Ms. Chisholm was charged that she did operate a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded 80 milligrams of alcohol in 100 millilitres of blood contrary to Section 253(1)(b) of the **Criminal Code of Canada**, R.S.C., 1985, c. C-46. She was also charged with operating a motor vehicle on a public highway contrary to s. 249(1)(a) of the **Criminal Code of Canada**.

Facts

[4] Ms. Chisholm was driving her vehicle alone, in the Malign Cove area when according to witnesses it swerved, jerked and then flipped, spinning through the air and landing on its roof in the ditch. Nearby residents ran to the scene and found Ms. Chisholm unconscious, near the brush away from the vehicle. She could be heard moaning.

[5] Constable White of the RCMP arrived at the scene, and took statements from three witnesses. These were: Kelli Duggan, who observed Ms. Chisholm's vehicle coming or driving towards her on the same highway. Thomas Madden heard the accident, and witnessed the vehicle spiral through the air. He immediately ran to offer aid and found Ms. Chisholm. Mr. Madden's stepmother, Lavonah Madden also heard a screech and a crash. She called 911 and then went to the scene, where Mr. Madden was with Ms. Chisholm. She stayed with Ms.

Chisholm and talked to her in an effort to keep her calm. She moved hair away from Ms. Chisholm's face.

[6] The accident occurred at approximately 11:22 a.m. In their statements, none of the three witnesses observed any indications of alcohol being involved. While Ms. Duggan stopped at the scene, she did not come into direct contact with Ms. Chisholm.

[7] Ms. Chisholm was later taken (at approximately 12:22 p.m.) by EHS ambulance to St. Martha's Regional Hospital in Antigonish. At the hospital, RCMP Constable Adam Merchant spoke with EHS attendant and paramedic Trevor Cruikshank, who was with Ms. Chisholm when she was transported to hospital. Constable Merchant asked Mr. Cruikshank about alcohol, if he could smell any emanating from Ms. Chisholm. The paramedic's reply was "hmmm" and then stated: "I don't know what good this is to you, but she did tell me she had three bottles."

[8] The RCMP officers took this to mean that "three bottles" referred to an alcoholic substance.

[9] Samples of Ms. Chisholm's blood were taken for medical purposes upon her arrival. The hospital informed the RCMP that it was their practice to retain these samples for 48 hours, after which it would be destroyed.

[10] Subsequent to the sample being taken Constable Merchant asked the attending physician, Dr. Sullivan, if he could speak with Ms. Chisholm. Permission was denied as Ms. Chisholm had been intubated and was not capable of speaking. In addition, she had been given medication and she would be incapable of making a proper decision according to her physician (paragraph 17 of the Information to Obtain).

[11] Constable White then proceeded to prepare the Information to Obtain and obtained the search warrant.

Agreed Statement of Facts and Exhibits

[12] The parties submitted an Agreed Statement of Facts, as trial Exhibit C-1, as well as the transcript from the trial. The search warrant, and in particular the Information to Obtain dated August 18, 2012, was submitted into evidence and forms part of the evidence as Exhibit C-7 and C-6.

[13] As stated, the trial judge found that the Information to Obtain did not reasonably support a conclusion by the Justice of the Peace that the Accused's ability to operate a motor vehicle was impaired by alcohol. Accordingly, the warrant to search was declared invalid with the result that the search and seizure of Grace Chisholm's blood samples was a warrantless search, and thus *prima facie* unreasonable. This resulted in a breach of her s. 8 *Charter* right to be protected from unreasonable search and seizure.

Evidence

[14] In terms of the evidence, there is the transcript – certified by Court Reporter at page 102. The Exhibits which contain the Information to Obtain, the Search Warrant and the Notice of Appeal, were filed as a matter of record.

[15] For the purpose of this Appeal the Crown relies solely on the evidence in the Information to Obtain, that is the "four corners of the Information to Obtain" and search warrant on this issue of admissibility, as that is how the samples in question were obtained.

[16] Neither the Crown nor Defence appealed Judge MacKinnon's ruling, that there had been a breach of Ms. Chisholm's rights under s. 8 of the *Charter*.

Grounds of Appeal

[17] The single ground of appeal as it is stated in the Notice of Appeal is as follows:

> It **(the Decision)** is erroneous in point of law in that the evidence obtained by a search warrant that was struck by the Provincial Court should not have been admitted as against the appellant pursuant to section 24(2) of the Canadian Charter of Rights. **(emphasis for clarification only)**

Issue on Appeal

[18] Did the trial judge err in law when he admitted the blood samples of Ms. Chisholm into evidence, with the result that his decision ought to be overturned by this Court on appeal?

Standard of Review

[19] The sole ground of appeal cited by the Appellant is that the trial judge erred in law in admitting the evidence. The standard of review for questions of law under s. 686(1)(a)(ii) is correctness. **Housen** v. **Nikolaisen**, 2002 SCC 33.

[20] The Standard of Review in summary conviction matters to be appealed by the Summary Conviction Appeal Court judge was described by Justice Saunders in **R.** v. **L(RH)**, 2008 NSCA 100 (NSCA). Referring to **R.** v. **Nickerson**, 1999 WSJ No. 210, in paragraph 21 the learned Justice stated:

> …absent an error of law or a miscarriage of justice the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence…
>
> … the Appeal Court is entitled to review the evidence at trial, re-examine and re-weigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions."
>
> In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[21] In **R.** v. **Farrell**, the Nova Scotia Court of Appeal further set out the Standard of Review and principles applicable to a s. 24(2) analysis as referred to in **R** v. **MacEachern**, 2007 NSCA 69 (NSCA); (referring in turn to the cases in **Buhay** and **Law)** :

[22] Notably, at paragraph 25, the court stated the following as to s. 24(2):

> The findings of the trial judge which are based on an appreciation of the testimony of witnesses will therefore be shown considerable deference.

[23] Specifically, referring to s. 24(2), the Nova Scotia Court of Appeal stated a clear summary of the test in **R.** v. **West**, 2012 NSCA 112, at paragraph 74:

> The decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law. However, because this determination requires the judge to exercise some discretion, 'considerable difference' is owed to the judge's assessment when the appropriate factors have been considered.

[24] Consequently, as stated in **Housen** this question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard on its application, in which case the error may amount to an error in law.

[25] Findings of fact and factual differences therefore must not be interfered with unless there is a palpable or overriding error (**Housen**). As such, the evidentiary foundation which forms the basis of the judge's decision is entitled to more deference, and absent palpable and overriding error, the facts as found by the judge should not be disturbed (**West**).

[26] It is not for this Court to substitute its decision for that of the trial judge. It is not for this Court to re-try the case on the transcript of the evidence.

[27] In short, the trial judge's conclusion under s. 24 (2) should be upheld unless he made an error of law or an unreasonable finding (**Farrell**).

Powers Granted on Appeal under s. 686(i)(ii)

[28] The powers of this Court on Appeal are contained in s. 686 of the **Criminal Code of Canada**.

Analysis

[29] The Appellant's argument on appeal is grounded in the trial judge's finding that the search warrant was not a valid warrant. In turn, the sanctity of a person's body has a higher degree or expectation of privacy then an office or a home. When a person is lying unconscious while samples of their blood are being taken from their person, it raises "a very, very significant level of privacy".

[30] Thus, the Appellant's case in essence is that this is a high possible breach of a *Charter* right or privacy expectation, coupled with an illegitimate search warrant. The Appellant submits that the trial judge erred in allowing evidence of the blood samples taken to be admitted into evidence. In so doing, the Appellant respectfully submits the trial judge made an error in law.

[31] The Appellant, Ms. Chisholm, invites the Court to consider a number of cases including **R.** v. **Harrison**, 2009 SCR 494, decided at or around the same time

as **R** v. **Grant**, [2009] 2 SCR 353. The Appellant's counsel stated he preferred **Harrison,** as the Supreme Court of Canada excluded the evidence pursuant to s. 24(2) of the *Charter*. The Appellant stated that is what should have been done here.

[32] The Appellant argues that **Grant,** decided before **Harrison**, on its facts has very little insight to the present case of Ms. Chisholm.

[33] **Harrison** was a case of unlawful detention. During a traffic stop, police searched the trunk of a vehicle and found a considerable amount of cocaine. The search was based on a mere hunch and suspicion caused by the vehicle having no front plate. When the police realized the car was from a province that did not require a front plate, it continued on with the traffic stop, so as to preserve the integrity of the police, rather than abandoning the stop.

[34] Based on what was then the revised framework set out in **Grant**, the court recognized that the three lines of inquiry relevant to determining whether the admission of the evidence would bring the administration of justice into disrepute are: 1) the seriousness of the *Charter* infringing state conduct; 2) the impact of the breach on the *Charter* protected interest of the accused; and 3) Society's interest in the adjudication of the case on its merits.

[35] In **Harrison**, the conduct of the officers resulting in the *Charter* breaches were found to be flagrant and wilful.

[36] The accused's arrest and detention on mere hunch and suspicion showed a blatant disregard for his *Charter* rights, which was further aggravated by the officers misleading testimony at trial.

[37] The Court held that the seriousness of the offence, while important, did not outweigh the factors pointing to exclusion. The evidence seized was highly reliable, but to condone actions which amounted to significant intrusion of the accused's rights would undermine, in the long term, the administration of justice.

[38] The court held that a s. 24(2) analysis is not a contest between police conduct and the seriousness of the offence. Ultimately, the court found that the trial judge placed undue emphasis on the third line of the inquiry, while neglecting the importance of the other two. The need to disassociate the system from flagrant breaches was key in the **Harrison** case.

[39] In this way the s. 24(2) analysis is centred around the notion that the exclusion provision is there to prevent more damage than is already done by the breach. A flagrant breach has the potential to do more damage.

[40] This is what requires a balancing of the factors and the evidence as it pertains to each line of the inquiry.

[41] The Appellant, Ms. Chisholm, states very clearly, relying on **Harrison**, that the learned trial judge placed undue emphasis on the third line of inquiry by admitting the blood sample and analysis of alcohol content so as to allow the court to adjudicate the case on its merits, and insufficient emphasis on the first two, involving a serious *Charter* breach and an intrusive impact on Ms. Chisholm's *Charter* right to the privacy of her own person.

[42] The inquiry according to **Grant** is objective, that of a reasonable person, fully apprised having regard to all the circumstances. It is also broad and imprecise, aimed at protecting the system as a whole, and not to punish police officers or provide compensation to accused persons. As stated, the court's role is to balance and assess under each line of inquiry. In **R** v. **Timmons**, 2011 NSCA 39, the Nova Scotia Court of Appeal stated achieving this balance is a "delicate" task.

[43] The Appellant argues there was serious police misconduct with the taking of the blood samples from the hospital, without a valid warrant. She submits that any objective reaching of the Information to Obtain could **not** justify the warrant authorizing the seizure of these blood samples.

[44] Although he struck down the warrant, the learned trial judge found on the evidence that the police did what was required of them to ensure that the Accused's rights were protected, in applying for the search warrant.

[45] Under the first line of inquiry in **Grant,** as was affirmed in **Harrison,** he had to consider the seriousness of the *Charter* breach. At paragraph 28 of his decision, Judge MacKinnon found:

> This was not a case where the police acted unilaterally in seizing the evidence. This was a case where the police sought and received judicial authorization.

[46] The learned trial judge further added:

> It is important to note it was a judicial authorization that was granted to the investigator after a judicial officer, who is independent of the government and who is independent of investigative or enforcement authorities, judicially considered the provision of s. 487 and judicially considered the information contained in the Information to Obtain and search warrant and decided there was proper grounds for issuing the search warrant.

[47] The trial judge therefore concluded that there was no serious state misconduct, and that the *Charter* infringing state conduct was (because the warrant applied for and issued) not so serious as to exclude the evidence (paragraph 28 of the decision).

[48] Referring once again to **Harrison**, the Appellant argued in its brief:

> The Court said it is not appropriate to simply try and balance the police conduct with the seriousness of the offence. The higher goal is to disassociate the justice system from flagrant breaches of the judicial system.

[49] The Appellant therefore argues these breaches were flagrant. This goes against the finding made by the trial judge who said they were "not so serious" as to conclude that exclusion of the evidence was appropriate.

[50] The Appellant's argument is based on the Information to Obtain disclosing no direct evidence of alcohol consumption. There was no smell, no empty containers. The reference to three bottles is not persuasive of anything, submits the Appellant. Further, her counsel, Mr. MacDonald, submits the wording of the warrant was defective in that it did not disclose a criminal offence. That given its invasive power, it must be technically correct in every respect.

Position of the Crown

[51] The Crown submits the trial judge did not err in law when he admitted the blood samples of Ms. Chisholm into evidence, and therefore, his decision ought not to be interfered with by this Honourable Court on Appeal.

[52] On this Appeal, the Crown submits:

1. Constable White acted in good faith and his behaviour was not egregious. Constable White believed that an offence had occurred and took the appropriate lawful steps to secure evidence via a judicial authorization to act.
2. Ms. Chisholm was not subjected to any denigration of her bodily integrity or human dignity. While the impact of the *Charter* breach on Chisholm's rights was

significant, it was not at the most serious end of the scale in light of the fact that the Chisholm's blood sample existed independent of any action taken by Constable White.

3. The blood as searched and seized is highly reliable evidence.

4. Ms. Chisholm's blood is a critical piece of evidence to the Crown's case. Should Ms. Chisholm's blood be excluded, to use the words articulated in **Grant**, the Crown's case would be "gutted". Without the admission of Chisholm's blood, the Crown would have no way of proving that Ms. Chisholm was driving with an illegal high blood alcohol level at the time of the collision.

5. "Society… requires and expects protection from drunken drivers, speeding drivers, and dangerous drivers" (**R** v. **Wise**, [1992] 1 S.C.R. 527). The Crown submits that injuries and deaths caused by impaired drivers are totally preventable. The devastating consequences that result from impaired driving are felt far too often by this community. It is the position of the Crown that it is through the prosecution of impaired drivers that the justice system can contribute to the deterrence of this serious and dangerous offence.

Caselaw

[53] The Appellant, in support of its argument, submitted a number of authorities dealing specifically with the inadmissibility of blood samples.

[54] In **R.** v. **Silk**, 1989 O.J. 671, the court excluded blood samples taken because the application for the warrant was defective. It did not contain the pertinent information, and in particular, the crucial facts pertaining to post driving consumption of alcohol. The court found this lack of full disclosure by the officer bordered on wilful blindness. There were also issues around the taking of the blood samples by the hospital technologist. The court concluded that the invasion of the accused's privacy interest was flagrant, and that the admission of the blood test analysis "could" bring the administration of evidence into disrepute.

[55] The Appellant further submits that the case of **R** v. **Dyment**, 2 R.C.S. No. 417, is particularly apt and very appropriate to this appeal. In **Dyment**, a blood sample was taken by a doctor treating the accused following a traffic accident. It was taken for medical purposes without his knowledge or consent. The doctor, after taking the sample, spoke to the police and at the end of the conversation, gave the officer the sample.

[56] The police officer had no knowledge of the accused's drinking and had not requested the sample from the accused or the doctor. There was, in addition, no

search warrant. The sample was analyzed and the accused was subsequently charged and convicted of impaired driving.

[57] The doctor initially thought the accident might have been caused by a medical problem. Shortly after the blood was taken, the accused explained to the doctor that he had consumed some beer and medication. This was before the doctor spoke with the police officer. The court placed great emphasis on personal privacy and expressed concern over the "easy flow" of information from hospitals, and the dignity of a human being when use is made of bodily substances taken for medical purposes, in a manner that does not respect that limitation.

[58] What is particularly relevant about the **Dyment** case is the court's statement as to the procedures to be followed:

> "… there are well known and recognized procedures for obtaining such evidence, when the police have reasonable and probable grounds for believing a crime has been committed."

[59] Each case will, of course, stand on its own facts. For example, unlike **Silk** there was no withholding of crucial information or no finding to that effect in this case. Unlike **Dyment**, where there was no request and no search warrant, the police here did request to speak with the Appellant, Ms. Chisholm, but permission was refused. In addiction, and significantly, the police officers applied for and obtained a search warrant before seizing the blood samples.

[60] The question is whether the evidence at trial, in this case on the *voir dire*, is reasonably capable of supporting the trial judge's conclusions. As stated, such conclusions involve the exercise of some discretion, and is entitled to considerable deference on Appeal.

[61] The Appellant and her counsel rely on additional cases in their factum. In **R.** v. **Dersch**, [1993] 3 S.C.R. No. 768, the accused, Mr. Dersch, was operating a motor vehicle which crossed the centre line and collided head on with another vehicle. The driver of the other vehicle was killed and three others including Mr. Dersch were injured. The accused objected to the blood sample being taken, but he was unconscious when it was taken contrary to his clear instructions. The police requested a medical report from the doctor who prepared one which included the results of the blood alcohol test. On this basis, the police later obtained a search warrant to obtain the blood sample. The Supreme Court of Canada held that the taking of the blood sample was improper in that it was a

violation by the physician of the accused's instructions. The information was obtained without a warrant, rendering it analogous to a search and seizure under s. 8 of the *Charter*. The court held the accused had a reasonable expectation of privacy in respect of the information revealed.

[62] The Appellant argues that the **Dersch** case is pivotal because it affects the confidence in an individual's ability to exchange medical information with a hospital or a physician. The Appellant submits that Ms. Chisholm must have that same ability, and that she had a similar expectation of privacy.

[63] The Appellant argues that this positive right can only be violated by clear rules, and that a legitimate search warrant is one such rule. The Appellant relies on **Dersch** because, as here, the warrant was struck down. It is important to note in **Dersch** however, that at the time the critical information (the blood analysis results) was obtained by police, there was no warrant.

[64] In the present Appeal, the warrant itself caused the blood sample to be obtained for testing by the police. Neither the hospital nor the doctor released information of the results without a warrant. They had already been taken independently by the hospital.

[65] In **R.** v. **Dignum**, [2012] O.J. No. 5074, breath samples were excluded under s. 24 due to an improper demand under the **Criminal Code**. There were no grounds to make a roadside demand as well as a breathalyzer demand. The court found that "conscripted evidence" was still an important consideration and under the second line of inquiry, as in **Grant,** noted its effect on the principle of self-incrimination in our justice system. The arrest was made without a warrant, and the court noted that powers of arrest without a warrant call for strict compliance with the **Criminal Code** provisions.

[66] The Appellant cited **Dignum** to show that breath samples were excluded due to lack of compliance and that breath samples are less intrusive that blood samples; thus highlighting the serious and intrusive nature of the taking of Ms. Chisholm's blood samples.

[67] In **R** v. **Haut**, [2010] A.J. No. 113, the Alberta Provincial Court excluded breath samples because the basis for the officer's demand fell well short of a lawful standard and constitutes a "reckless disregard for the accused's rights".

[68] In **R** v. **Waters**, [2010] A.J. No. 1120, the *indicia* of impairment did not rise to the level needed for a reasonable belief that the accused's ability to drive was impaired by consumption of alcohol. The court made a finding of "careless conduct" regarding *Charter* values.

[69] Once again, the Appellant relies on **Waters** to show that breath samples, which are less intrusive, were excluded where there was no basis for a proper demand. The Appellant submits the evidence of Constable White and other officers did not rise to the level required for a blood sample and, as found by the trial judge, was insufficient for the Justice of the Peace to reasonably conclude that an offence had been committed.

[70] In **R** v. **Wiebe**, [2011] S.J. No. 282, a decision of the Saskatchewan Provincial Court, breath samples were excluded pursuant to s. 24 as the evidence showed minimal signs of impairment by alcohol. Once again, the court discussed that adherence to a minimum standard by the state is expected if the state is going to create an exception to the principle that a person has no duty to incriminate him or herself. On the seriousness of the *Charter* infringing conduct, the officers grounds raised only a suspicion but did not meet the higher standard of reasonable grounds to believe the accused was impaired. The finding of the court was that the officer should have taken more time to investigate the matter. As a result, the officer's conduct "fell toward the more serious end of the continuum".

[71] Counsel for the Appellant states that any objective reading of the Information to Obtain, could not justify the seizure of these blood samples. Because the privacy expectation is high, the police conduct was egregious. He argues very ably that the misconduct was indeed a flagrant violation resulting in the seizure of the blood taken solely for medical reasons, and not for any other police or state reason.

[72] Relying on the **Dyment** case, the Appellant submits the *Charter* must be construed generously, not in a narrow or legalistic fashion. Unless due process is followed, unless there is a proper warrant, individuals must be free from seizure of things with a high level of privacy attached to them. Blood samples are one such thing.

Decision

[73] A review of the principles in **R.** v. **Grant** makes it clear the analysis under section 24(2) is broad and imprecise in determining whether, having regard to all

of the circumstances, admission of the evidence would bring the administration of justice into dispute. The standard of review makes it clear this determination requires the exercise of some discretion and, for that reason, "considerable deference" is owed to the judge's s. 24(2) assessment when the appropriate factors are considered.

[74] The trial judge's approach to the assessment began with the proper authority. He correctly identified **Grant** as the leading authority under s. 24(2) for the purpose of his assessment. The court's role, as identified in **Grant** (at paragraph 71), is to balance the assessments under each of the three lines of inquiry to make its determination whether in all the circumstances, the admission would bring the administration of justice into disrepute. Exclusion is not automatic. Each of the three factors in the three-part test must be articulated.

[75] The trial judge in this case correctly identified the three lines of inquiry and proceeded to discuss each of them on the evidence before him by referring to **Grant** at paragraph 71. He correctly identified that each avenue is rooted in the public interest, that they are viewed in the long term looking forward from a societal perspective. He identified the need to balance the assessments, and identified the courts role. He did this by referring to the appropriate paragraph in **Grant**.

[76] Under the first line of inquiry, the seriousness of the *Charter* infringing conduct, he concluded that the police did what was required of them to ensure Ms. Chisholm's rights were protected. The police sought judicial authority for their actions by obtaining a search warrant. In doing so, he further found there was no bad faith on the part of the Constable when he swore the Information to Obtain, noting this was not a case where the police acted unilaterally in seizing the evidence.

[77] The trial judge, in his reasons, noted the importance that the judicial authorization was independent of government and law enforcement.

[78] It was the Justice of the Peace who considered the **Criminal Code** provisions and decided there were proper grounds, not the police. On that basis, the trial judge concluded there was no serious state misconduct that the admission of the evidence would condone.

[79] Many of the cases cited by the Appellant which excluded the evidence, involved conduct which was either found to be reckless, careless, or even more

serious, such as the intentional withholding of information or the provision of erroneous information by police. The trial judge found here as fact that there was no inaccurate or erroneous information provided. The trial judge's finding that the warrant was unlawful is an independent assessment based on the provision of s. 487.

[80] In **Grant,** the court identified good faith as an important consideration and the *Charter* cases very commonly speak of good faith or the lack thereof under the first line of inquiry. Certainly the conduct of the police is a central element in assessing the seriousness of the breach.

[81] In terms of conduct, the evidence would support a finding that the conduct of the officers here was anything but careless or reckless. **Grant** allows for extenuating circumstances to be considered in assessing the seriousness of police conduct that results in a *Charter* breach. In this regard, the trial judge could have mentioned, but did not, the evidence that the police were facing a deadline for the evidence to be destroyed and that the officer's request to speak with Ms. Chisholm was refused by her physician for medical reasons. In effect, the police were unable to make a demand of the Appellant, irrespective of whether they had proper grounds. On the facts, the police officers alternatives were restricted.

[82] The learned trial judge cannot be faulted for not addressing these as they are factors which would favour admission which is what he concluded on the first factor, at any rate.

[83] From the evidence, the search warrant and the police conduct were the prominent issues in determining the seriousness of the state conduct. The trial judge addressed both of these in assessing the seriousness of the *Charter* breach under the first part of the test.

[84] The Appellant argues that the officers had no basis for seeking the warrant and their conduct in that regard amounted to a flagrant disregard of the Appellant's *Charter* rights. The Appellant argues that taking of blood or bodily fluids gives rise to the highest expectation of privacy. The fact that Ms. Chisholm was lying there unconscious only exacerbates the seriousness of the breach.

[85] The second line of the inquiry deals with the extent to which the accused's rights were undermined. The trial judge considered this aspect under the second line of inquiry and concluded at paragraph 29:

> The blood sample was therefore taken only for the purpose of providing medical treatment. The blood sample only existed absolutely and completely independently of the police of their investigation.

[86] The Appellant submitted the case of **R** v. **Hillgardener**, [2010] A.J. No. 257, a decision of the Alberta Court of Appeal, as authority for three principles which should be considered in evaluating whether a warrantless search was justified:

> 1) Whether there was compelling information predicting the commission of a criminal offence;
>
> 2) Whether any information supplied by a source outside the police originated from a credible source;
>
> 3) Whether the information (from the outside source) was corroborated by police investigation prior to the decision to conduct the search.

[87] The Appellant submits that none of these were present on this appeal. **Hillgardener** was an appeal by the Crown on the issue of whether the trial judge erred in finding a breach under s. 8 of the *Charter*. I note in the present Appeal that the police did receive information from an outside source, that being the EHS paramedic, Trevor Cruikshank. It is apparent Constable White found the source credible as he relied on it in the Information to Obtain. The Crown in **Hillgardener** did not appeal the s. 24(2) analysis. I find this case therefore to be of limited assistance. That said, these three factors can impact on whether the breach was flagrant, as argued here.

[88] In the present Appeal ,the trial judge concluded in paragraph 25 that this search was to be treated as a warrantless search. He therefore concluded there was a breach of the Appellant's s. 8 rights. The considerations under s. 24(2) however, necessarily included a consideration of "all of the circumstances", which includes the fact that the police sought a warrant in these circumstances. He found this to be particularly relevant in reviewing their conduct. This is apparent from his reasoning.

[89] Support for this approach may be found throughout the numerous cases cited by both Crown and Defence. As previously stated, in **Dyment** the court made reference to doctors and medical personnel freely handing over blood taken for medical purposes. The court stated:

> There are well known and recognized procedures for obtaining such evidence when the police have reasonable and probable grounds for believing a crime has been committed.

[90] In **Dersch**, involving blood samples, the information was obtained without a warrant, and in this regard the court stated:

> Nor was there any emergency in the sense of evidence being in danger of being destroyed if time were taken to obtain a warrant.

[91] Clearly the court in **Dersch** felt there was time available to obtain a warrant. I note again, there is evidence in the present appeal that there was a danger of the evidence being destroyed within 48 hours.

[92] In **R** v. **Silk,** as here, the warrant was struck down. The evidence was excluded pursuant to s. 24(2). The lack of conformity to the **Criminal Code** provisions for the warrant was a factor (improper warrant), but also the lack of full and frank disclosure by the officer, and the evidence that someone at the hospital leaked the results. The court therefore found that the officer's conduct bordered on wilful blindness and further found "*quasi collusion*" between the hospital and the police.

[93] These cases illustrate that an unlawful warrant does not end the inquiry under s. 24(2). It begins the inquiry in determining whether the administration of justice would be brought in disrepute. Each case must be heard on all of its own circumstances.

[94] In the circumstances, the trial judge here proceeded to determine under the second line of inquiry the impact of the *Charter* breach on Ms. Chisholm's guaranteed rights. In doing, so he considered that this case was very much distinguishable from those where police seized a bodily substance "without any authority for doing so or without judicial authorization".

[95] He stated it was the hospital, not the police, that determined the necessity of the blood samples for analysis. The trial judge turned his mind to the fact that it was only taken for medical reasons.

[96] In **Grant,** the court stated the "forcible taking of blood to be at one end of the spectrum". The Crown's position is that this evidence existed independent from the breach, so to speak. It was drawn at the behest of the hospital. It was not forceful.

[97] The trial judge here did not go on to discuss what impact the non-forcible taking of blood or the independent taking of blood by the hospital would have had on human dignity or the intrusive nature, given that the police still obtained Ms. Chisholm's blood. While he did not do so expressly, I find he did turn his mind to those situations by referring at paragraph 29 to cases "where the police either seized a bodily substance from an accused person without any authority… or after having received medical authority."

[98] Under this second line of inquiry, the trial judge's conclusion shows, in considering this case, that he considered those other cases as he was focusing on the Appellant's individual rights. While he did not expand on it in great detail, I find he recognized the Appellant's privacy rights when he concluded:

> In these circumstances, I conclude the admission of this evidence… would not send the message that individual rights count for little.

[99] In his conclusion, the trial judge did not use words such as fleeting, technical, profound or intrusive to describe the breach. He did, however, clearly explain his reasons which were supported by the evidence. He properly stated the factors he considered relevant and his conclusion illustrates that he was focused on the impact on the Appellant's charter interests and the message it would send to the public in accordance with **Grant**, and in particular **Grant** at paragraph 76.

[100] The trial judge then proceeded to the third line of inquiry which is society's interest in the adjudication of the case on its merits.

[101] The trial judge's analysis on this third factor is contained in paragraph 30 of his decision. It is apparent the trial judge concluded that the blood sample and analysis were reliable and important to the Crown's case. In fact, he stated they were "very necessary" for the adjudication of the case on its merits.

[102] In his conclusion, he stated society's interest in having the case decided on its merits took priority over "any need to exclude this evidence" because of the improper search warrant. Under this third inquiry, the court must balance the rights of the accused with that of the community. It is clear from the trial judge's conclusion he viewed this inquiry as favouring admission. His assessment was contained in paragraph 30.

[103] The Appellant argues that in balancing the interests, the learned trial judge placed too much emphasis on the third line of the inquiry and an insufficient

amount on the first two lines of inquiry. All three of the trial judge's assessments favoured admission for the reasons he gave.

[104] In addition, the Appellant argued that the trial judge turned the matter into a competition between police conduct and the seriousness of the charge. Having reviewed the record, I find that submission to be without merit. For example, in the third line of the inquiry, the seriousness of the offence, which is one of the four sub-headings, was not mentioned specifically by the trial judge.

[105] It is evident from the record that the trial judge viewed the evidence of the improper warrant in these circumstances as a pivotal point in assessing whether a reasonable person apprised of the circumstances (as well as *Charter* values) would conclude that admission of the impugned evidence would bring the administration of justice into disrepute.

[106] At paragraph 39 of his decision he concluded, that it would not.

[107] The trial judge did not engage in a separate balancing following the assessment under the three lines of inquiry. Considering that all three favoured admission, the value of such an exercise was of questionable merit.

[108] The troubling feature on the appeal is the non-compliance with the **Criminal Code** provisions under s. 487 respecting insufficient grounds for the warrant. But for the warrant, the police would not have seized the samples which had already been taken. It is not, therefore, so-called conscripted evidence in the true sense. That was not argued on appeal. Nor was the trial judge's interpretation of **R.** v. **Taylor**, [2013] A.J. No. 1079, which the learned trial judge distinguished. Having read **Taylor**, it would appear that Judge MacKinnon properly distinguished that case given the findings he made.

[109] While the trial judge did not engage in a separate balancing exercise, he did thoroughly analyze **Taylor** and concluded at paragraph 38 that it was distinguishable once again because the actions of the police in **Taylor** were not relevant here.

[110] The Appellant provided the case of **R.** v. **Wise**, referred to earlier. I have reviewed same and find that it expresses similar sentiments about non-compliance by the state (improper demands of officers under the **Criminal Code** provisions), which result in an accused providing incriminating evidence.

[111] In **R.** v. **Brick**, 19 M.V.R., (2d) 158, the Alberta Court of Appeal admitted blood samples pursuant to s. 24(2) even though the warrant had been struck down. Important provisions of the **Criminal Code of Canada** regarding warrants were not followed. As was the case here, the accused was involved in a motor vehicle accident and taken to hospital. Blood tests were taken for medical purposes. At paragraph 5 of the decision the court stated:

> The trial judge here found, and I am quoting, "that far from anything of unacceptable behaviour, all here made an effort to observe the law and avoid any breaches of the accused's rights." The evidence supports that finding. The sample was recovered under a warrant of search which, when reviewed, was flawed in its completion and the manner in which it was obtained. But nothing flagrant tainted the recovery of this important, real and existing evidence. No other attacks are mounted against the conduct of this case. Accordingly, we would dismiss the appeal from conviction.

[112] In this vein, I refer to two additional cases, those being **R.** v. **Farrell** and **R.** v. **Erickson**, 72 C.C.C. (3d) 75.

[113] The court in **Brick** further stated the employment of s. 24(2) must be determined on a case by case basis.

[114] Having carefully considered the entire record and the very able briefs and submissions by both counsel, I have found no error by the trial judge in his consideration of the evidence and arguments made by the Defence and the Crown on the *voir dire*.

[115] His decision under the *Charter* involved an exercise of discretion and he is to be accorded deference. It is not for this court to substitute its own decision on the evidence for that of the trial judge.

[116] As the decision in **Grant** states the assessment under s. 24(2) is broad and imprecise, which accords with the deference owed to the trial judge as stated in **R.** v. **West**.

[117] I am satisfied there was no error of law. The proper law was cited and applied.

[118] The trial judge's conclusions are reasonably supported by the evidence and there is no palpable and overriding error on the facts.

[119] In conclusion, the judge did not err in when he admitted the blood samples of Ms. Chisholm into evidence and therefore, his decision ought not to be interfered with by this Court on Appeal.

Murray, J.