



SUPREME COURT OF CANADA

CITATION: R. v. Taylor, 2014 SCC 50

DATE: 20140718

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BETWEEN:

Her Majesty The Queen

Appellant

and

Jamie Kenneth Taylor

Respondent

- and -

Director of Public Prosecutions of Canada,

Attorney General of Ontario and Canadian Civil Liberties Association

Interveners

CORAM: Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 43)

Abella J. (Rothstein, Moldaver, Karakatsanis and Wagner
JJ. concurring)

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R. v. TAYLOR

Her Majesty The Queen

Appellant

v.

Jamie Kenneth Taylor

Respondent

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**Director of Public Prosecutions of Canada,
Attorney General of Ontario and
Canadian Civil Liberties Association**

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Indexed as: R. v. Taylor

2014 SCC 50

File No.: 35609.

2014: April 23; 2014: July 18.

Present: Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Right to counsel — Accused informed by police of his right to counsel — Accused informing police that he wished to speak to counsel — Police failing to facilitate contact with counsel at scene of accident and hospital — Blood drawn from accused at hospital without accused being able to consult counsel and used as basis for conviction — Whether police's failure to implement or facilitate access to counsel was in breach of accused's right to retain and instruct counsel without delay — If so, whether evidence should be excluded — Canadian Charter of Rights and Freedoms, ss. 10(b) and 24(2).

The accused was arrested for impaired driving causing bodily harm when he lost control of his vehicle injuring three of his passengers. At the time of his arrest, he was informed of his *Charter* rights, including his right to counsel, and was asked whether he wanted to call a lawyer. The accused responded that he wanted to speak both to his father and to his lawyer. At no time was the accused given access to a phone while at the scene of the accident. As a precaution and in accordance with normal practice, the accused was taken by ambulance to the hospital for examination. At the hospital, a nurse took five vials of blood from the accused. The police later demanded and obtained a second set of samples of the accused's blood for investigative purposes. At no point during the accused's time in hospital did the police attempt to provide him with an opportunity to speak to his lawyer or determine whether such an opportunity was even logistically or medically feasible. The police successfully applied for a warrant to seize the first vials of blood the hospital took from the accused. The trial judge agreed with the Crown that the second set of blood

samples were taken in violation of the accused's s. 10(b) rights, but found that there was no breach of the accused's s. 10(b) rights prior to the first samples being taken. This was based on the trial judge's assumption that where an accused is awaiting or receiving medical treatment, there is no reasonable opportunity to provide private access to the accused to a telephone to implement his right to instruct counsel. The first set of blood samples were admitted at trial. On the basis of this evidence, the accused was convicted of three counts of impaired driving causing bodily harm. A majority in the Court of Appeal allowed the appeal, finding that the trial judge erred when he concluded that there was no reasonable opportunity to facilitate access to a lawyer prior to the taking of these blood samples. The evidence was excluded, the conviction set aside, and an acquittal entered.

Held: The appeal should be dismissed.

Section 10(b) of the *Charter* provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right. The purpose of the s. 10(b) *Charter* right is to allow an arrested or detained individual not only to be informed of his other rights and obligations under the law but also to obtain advice as to how to exercise those rights. Access to legal advice ensures that an individual who is under control of the state and in a situation of legal jeopardy is able to make a free and informed choice whether to cooperate with the police. The duty to inform a detained person of his or her right to counsel arises immediately upon arrest or detention and the duty to facilitate access to a lawyer, in

turn, arises immediately upon the detainee's request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. Until the requested access to counsel is provided, it is uncontroversial that there is an obligation on the police to refrain from taking further investigative steps to elicit evidence.

While the police are under no legal duty to provide their own cell phone to an arrested or detained individual, they nonetheless have a duty both to provide phone access at the first reasonable opportunity to avoid self-incrimination and to refrain from eliciting evidence from the individual before access to counsel has been facilitated. While s. 10(b) of the *Charter* does not create a right to use a specific phone, it does guarantee that the individual will have access to a phone to exercise his right to counsel. The burden is on the Crown to show that a given delay was reasonable in the circumstances.

An individual who enters a hospital to receive medical treatment is not in a *Charter*-free zone. Where the individual has requested access to counsel and is in custody at the hospital, the police have an obligation under s. 10(b) to take steps to ascertain whether private access to a phone is in fact available. In this case, one of the police officers admitted that at the hospital, he made a mistake and that he would have and could have given the accused the requested access if he had remembered to do so. Once at the hospital, it was 20 to 30 minutes before the hospital took any blood from the accused, more than enough time for the police to make inquiries as to

whether a phone was available or a phone call medically feasible. At no point did the police even turn their minds to the obligation to provide access.

This is a case not so much about delay in facilitating access, but about its complete denial. This ongoing failure cannot be characterized as reasonable. Constitutional rights cannot be displaced by assumptions of impracticality. Barriers to access must be proven, not assumed, and proactive steps are required to turn the *right* to counsel into *access* to counsel. The accused's s. 10(b) rights were clearly violated. The seriousness of the *Charter* breach and the impact of the police conduct on the accused's interests warrant the exclusion of the evidence.

Cases Cited

Referred to: *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310; *R. v. Bartle*, [1994] 3 S.C.R. 173; *R. v. Evans*, [1991] 1 S.C.R. 869; *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Luong*, 2000 ABCA 301, 271 A.R. 368; *Brownridge v. The Queen*, [1972] S.C.R. 926; *R. v. Ross*, [1989] 1 S.C.R. 3; *R. v. Prosper*, [1994] 3 S.C.R. 236; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Spencer*, 2014 SCC 43.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 10, 24(2).

APPEAL from a judgment of the Alberta Court of Appeal (Berger, O'Brien and Slatter JJ.A.), 2013 ABCA 342, 87 Alta. L.R. (5th) 114, 561 A.R. 103, 594 W.A.C. 103, [2014] 1 W.W.R. 352, 302 C.C.C. (3d) 181, 7 C.R. (7th) 165, 293 C.R.R. (2d) 69, 54 M.V.R. (6th) 190, [2013] A.J. No. 1079 (QL), 2013 CarswellAlta 1933, setting aside the accused's convictions for impaired driving causing bodily harm. Appeal dismissed.

Jason R. Russell, for the appellant.

Patrick C. Fagan, Q.C., and *Kaysi Fagan*, for the respondent.

Nick Devlin and *Jennifer Conroy*, for the intervener the Director of Public Prosecutions of Canada.

Frank Au, for the intervener the Attorney General of Ontario.

David S. Rose, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

ABELLA J. —

[1] This is a case about the police informing an individual about his right to counsel as soon as he was arrested, then promptly forgetting to implement it throughout his detention, including during his stay in a hospital. While he was at the hospital, blood samples were taken which were used as evidence at trial to convict him of impaired driving causing bodily harm.

[2] Section 10(b) of the *Canadian Charter of Rights and Freedoms* guarantees that detained or arrested individuals have the right to retain and instruct counsel without delay. In *R. v. Manninen*, [1987] 1 S.C.R. 1233, this Court recognized that this imposes a corresponding duty on the police to ensure that individuals are given a reasonable opportunity to exercise the right. This appeal is about the scope of that duty when a detained individual is receiving medical treatment. The question before us is whether the police's failure to take any steps to implement or facilitate access to counsel is a breach of s. 10(b) in the circumstances. In my view, it is and the evidence should be excluded.

Background

[3] On April 13, 2008, Jamie Kenneth Taylor was driving a four-door pickup truck in the early hours of the morning with four passengers after attending a social event in Cochrane, Alberta. He was driving at high speed. Shortly before 1:25 a.m., he lost control while attempting a right turn. The truck hit a street lamp and rolled over several times. Three of his passengers were injured.

[4] Constable Douglas MacGillivray arrived at the scene of the accident at 1:31 a.m. Emergency medical personnel were there when he arrived, along with several bystanders. One bystander identified Mr. Taylor as the driver of the vehicle. While speaking to Mr. Taylor, Cst. MacGillivray noted that he showed some signs of impairment. Because he had been told that one of the passengers had not survived the accident, Cst. MacGillivray arrested Mr. Taylor at 1:41 a.m. for impaired driving causing death. Soon afterwards, he learned that there were in fact no fatalities so the charge was modified to impaired driving causing bodily harm.

[5] After arresting Mr. Taylor, Cst. MacGillivray put him in the back of his police cruiser. At 1:43 a.m., he informed him of his *Charter* rights, including his right to counsel, and asked whether he wanted to call a lawyer. Mr. Taylor said he wanted to speak to both his father and to his lawyer, Patrick Fagan.

[6] Mr. Taylor was then assessed by a paramedic in the back of the police car. He was taken into an ambulance for further examination at 2:13 a.m. At first, he was unwilling to cooperate with the paramedic, but when the paramedic explained that the interview and physical examination were for the purpose of patient care, Mr. Taylor became cooperative and forthcoming, telling the paramedic that he had been drinking that night.

[7] The paramedic concluded that there was nothing wrong with Mr. Taylor's physical condition, but as a precaution and in accordance with normal practice, he persuaded Mr. Taylor to be taken by ambulance to the hospital for examination by a

physician. The ambulance left the accident scene at 2:19 a.m. and arrived at the hospital at 2:43 a.m.

[8] At no time was Mr. Taylor given access to a phone while at the scene of the accident. Cst. MacGillivray testified that he did not think about giving Mr. Taylor access to a phone there, and that “it was a fault that I made in that it didn’t happen” at the scene of the accident. He also said that providing access to a telephone in the back of a police car was “not a practice we normally do. . . . [T]he practice that we normally do, we transport to the detachment. They sit in a room where they have the room to themselves and a list of phone numbers. . . . And so, with the practice of not allowing an accused to use a phone in a police car, that’s what I was going with.” Constable Elizabeth-Anne MacNamara, who was at the scene of the accident, gave similar evidence about police practices at roadside.

[9] After the ambulance left, Cst. MacGillivray made a note to remind himself to give Mr. Taylor the opportunity to speak to his lawyer at the hospital.

[10] After being admitted, Mr. Taylor waited on a stretcher in a hallway of the hospital until shortly after 3 a.m., when he was moved to a bed in a curtained area and examined by a nurse and doctor. Cst. MacGillivray was present during his medical examination. Cst. MacNamara was also present and taking notes. She was there to observe and maintain continuity of any blood samples that were taken.

[11] A nurse took five vials of blood from Mr. Taylor between 3:05 a.m. and 3:12 a.m. Mr. Taylor's name and a patient number were recorded on each of the vials. Both Cst. MacGillivray and Cst. MacNamara observed the procedure, and Cst. MacNamara tracked the blood until it was delivered to the hospital lab for analysis.

[12] Immediately after the blood was taken, Cst. MacGillivray asked the nurse whether Mr. Taylor would be able to leave the hospital in order to give a breath sample at the police station. When he learned from the nurse at 3:13 a.m. that she did not know when Mr. Taylor would be released, Cst. MacGillivray decided to issue a blood demand to Mr. Taylor. The blood samples were taken by a doctor at 4:53 a.m. Cst. MacGillivray left the hospital at 5:36 a.m. with this second set of blood samples.

[13] At no point during Mr. Taylor's time in the hospital did Constables MacGillivray or MacNamara attempt to provide Mr. Taylor with an opportunity to speak to his lawyer or determine whether such an opportunity was even logistically or medically feasible. Cst. MacNamara testified that since her only purpose at the hospital was to assist in the tracking of the blood, she took no steps to inquire whether Mr. Taylor's s. 10(b) rights had been complied with.

[14] Cst. MacGillivray gave the following explanation for why Mr. Taylor was not provided access to a lawyer at the hospital:

A . . . I didn't think of it. At the time we were in a hospital hallway. I was just watching him. And I didn't think to put a phone to his ear. That's all I can say. It was a - - it was a rookie mistake I guess. . . .

...

Q And, just so we are clear, at no time did you undertake any effort to bring a phone to him?

A No, I did not.

...

Q Why didn't you let him use your cell phone when he was laying there on the stretcher at the hospital to call a lawyer?

A I have no explanation. I just didn't.

...

Q I take it if you had to do it all over again, you would have done it differently?

A Oh, yes.

Q You would have given Mr. Taylor an opportunity to consult with a lawyer before those five vials of blood were taken from him, at approximately 3:10 a.m., right?

A I obviously would have, yes.

He said he did not realize his mistake until days later.

[15] The next day, April 14, Cst. MacGillivray applied for a warrant to seize the first five vials of blood the hospital took from Mr. Taylor. A warrant issued on April 17. On April 18, Cst. MacGillivray took this blood from the hospital. The analysis of both sets of blood samples indicated that at the time of the accident, Mr. Taylor had more alcohol in his blood than was lawfully permitted.

[16] The Crown conceded at trial that there was a breach of s. 10(b) with respect to the second set of blood samples taken at 4:53 a.m. because the police had failed to give Mr. Taylor an opportunity to speak with his lawyer prior to making the

demand. The Crown relied instead on the analysis of the first set of blood samples which were taken by the hospital 20 to 30 minutes after Mr. Taylor had arrived at the hospital.

[17] The trial judge made a number of unequivocal findings confirming that the police did not at any time provide access to a phone at the hospital despite Mr. Taylor's stable condition:

- "The Accused 'was well ambulatory with no neural deficits'. [His] speech was fine, he was alert, there was no slurring or impediments to his speech and he answered questions appropriately".
- . . .
- ". . . at no time during the detainment was the request of the detainee [for counsel] honoured by the [police]."
- "[Taylor] was not provided an opportunity to exercise his right to counsel at any point during the course of his detention. . . ."
- ". . . no telephone was provided to the Accused at the scene of the accident."
- "At no time while the Accused was at the hospital did either of the police officers take any steps towards affording the Accused the opportunity to speak to counsel."
- Cst. MacGillivray acknowledged that he "made a mistake", that "there was a lot going on at the hospital", and that he "did not think to put his cell phone to the Accused's ear, or obtain a phone number for him".
- Since Mr. Taylor "was not [Cst. MacNamara's] responsibility . . . she did not direct her mind" towards his right to counsel. She did not take "any steps to facilitate a telephone call for the accused".

[18] The trial judge agreed with the Crown that there was a s. 10(b) breach when Cst. MacGillivray made a demand for the second set of blood samples without “implement[ing] [Mr. Taylor’s] right to counsel”, but concluded that there was no breach of Mr. Taylor’s s. 10(b) rights prior to the first set of blood samples being taken. He also found that no phone needed to be provided at the accident scene. As for the hospital, he assumed that where an accused “is awaiting or receiving emergency medical treatment, there is no reasonable opportunity to provide private access to the accused to a telephone to implement his right to instruct counsel”. The first set of blood samples were accordingly admitted into evidence. On the basis of this evidence, Mr. Taylor was convicted of three counts of impaired driving causing bodily harm.

[19] A majority in the Court of Appeal allowed the appeal, finding that the trial judge erred when he concluded that there was no reasonable opportunity to facilitate access to a lawyer prior to the taking of the first set of blood samples. In its view, Mr. Taylor’s s. 10(b) rights were violated, and this resulted in Mr. Taylor’s “inability to exercise a meaningful and informed choice as to whether he should or should not consent” to the taking of blood samples by the hospital. The evidence was excluded, the conviction set aside, and an acquittal entered. I agree with the majority of the Court of Appeal’s conclusion.

Analysis

[20] Section 10 of the *Charter* states:

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefore;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

This appeal engages s. 10(b). The issue is whether the police complied with the duty to facilitate Mr. Taylor's request to speak to counsel "without delay".

[21] The purpose of the s. 10(b) right is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights": *Manninen*, at pp. 1242-43. The right to retain and instruct counsel is also "meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination": *R. v. Suberu*, [2009] 2 S.C.R. 460, at para. 40. Access to legal advice ensures that an individual who is under control of the state and in a situation of legal jeopardy "is able to make a choice to speak to the police investigators that is both free and informed": *R. v. Sinclair*, [2010] 2 S.C.R. 310, at para. 25.

[22] In *R. v. Bartle*, [1994] 3 S.C.R. 173, Lamer C.J. explained why the right to counsel must be facilitated "without delay":

This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of

liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is “detained” within the meaning of s. 10 of the *Charter* is in *immediate need of legal advice* in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty Under s. 10(b), a detainee is entitled as of right to seek such legal advice “without delay” and upon request. . . . [T]he right to counsel protected by s. 10(b) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process. [Emphasis added; p. 191.]

[23] He also confirmed the three corresponding duties set out in *Manninen* which are imposed on police who arrest or detain an individual:

(1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;

(2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and

(3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

(*Bartle*, at p. 192, citing *Manninen*, at pp. 1241-42; *R. v. Evans*, [1991] 1 S.C.R. 869, at p. 890; and *R. v. Brydges*, [1990] 1 S.C.R. 190, at pp. 203-4.)

[24] The duty to inform a detained person of his or her right to counsel arises “immediately” upon arrest or detention (*Suberu*, at paras. 41-42), and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee’s request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable

in the circumstances (*R. v. Luong* (2000), 271 A.R. 368, at para. 12 (C.A.)). Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.

[25] This means that to give effect to the right to counsel, the police must inform detainees of their s. 10(b) rights *and* facilitate access to those rights where requested, both without delay. This includes “allowing [the detainee] upon his request to use the telephone for that purpose if one is available” (*Manninen*, at p. 1242). And all this because the detainee is in the control of the police and cannot exercise his right to counsel unless the police give him a reasonable opportunity to do so (see *Brownridge v. The Queen*, [1972] S.C.R. 926, at pp. 952-53).

[26] Until the requested access to counsel is provided, it is uncontroversial that there is an obligation on the police to refrain from taking further investigative steps to elicit evidence (*R. v. Ross*, [1989] 1 S.C.R. 3, at p. 12; *R. v. Prosper*, [1994] 3 S.C.R. 236, at p. 269).

[27] The majority in the Court of Appeal was of the view that in light of Cst. MacGillivray’s acknowledgement that he could have provided his own cell phone, the “mistake” in failing to provide it” gave rise to a breach of s. 10(b). The Crown takes issue with this finding, and I agree that in light of privacy and safety issues, the police are under no legal duty to provide their own cell phone to a detained individual.

[28] But the police nonetheless have both a duty to provide phone access as soon as practicable to reduce the possibility of accidental self-incrimination and to

refrain from eliciting evidence from the individual before access to counsel has been facilitated. While s. 10(b) does not create a “right” to use a specific phone, it *does* guarantee that the individual will have access to a phone to exercise his right to counsel at the *first* reasonable opportunity.

[29] As the trial judge found, Cst. MacGillivray admitted that at the hospital, he made a “mistake” and that he would have — *and could have* — given Mr. Taylor the requested access if he had remembered to do so. In other words, Mr. Taylor could have been given the opportunity to speak to counsel at the hospital if Cst. MacGillivray had remembered to do so. He made no mention of any practical obstacles to access, such as a medical emergency, the absence of a phone, or even problems in providing sufficient privacy to Mr. Taylor.

[30] There is, in fact, virtually no evidence about what logistical or medical barriers stood between Mr. Taylor and a phone call to his lawyer. It is true that Cst. MacNamara testified that at the hospital “[t]here was absolutely no way [Mr. Taylor] could have contacted counsel and had any privacy in the setting that we were in”, but this retrospective imputation of impracticability is of limited relevance given her acknowledgement that she was only there to track the blood samples and whether such access was possible was not part of her duties there. As a result, she too made no inquiries of the hospital staff.

[31] There may well be circumstances when it will not be possible to facilitate private access to a lawyer for a detained person receiving emergency medical

treatment. As this Court noted in *Bartle*, a police officer's implementational duties under s. 10(b) are necessarily limited in urgent or dangerous circumstances. But those attenuating circumstances are not engaged in this case. As the trial judge found, the paramedic "did not feel there was anything wrong with the Accused", but took Mr. Taylor to the hospital only "out of an abundance of caution, and in accordance with normal practice". And once at the hospital, it was 20 to 30 minutes before the hospital took any blood from Mr. Taylor, more than enough time for the police to make inquiries as to whether a phone was available or a phone call medically feasible.

[32] The duty of the police is to provide access to counsel at the earliest practical opportunity. To suggest, as the trial judge did, that it is presumptively reasonable to delay the implementation of the right to counsel for the entire duration of an accused's time waiting for and receiving medical treatment in a hospital emergency ward, without any evidence of the particular circumstances, undermines the constitutional requirement of access to counsel "without delay".

[33] Not everything that happens in an emergency ward is necessarily a medical emergency of such proportions that communication between a lawyer and an accused is not reasonably possible. Constitutional rights cannot be displaced by *assumptions* of impracticality. Barriers to access must be proven, not assumed, and proactive steps are required to turn the *right* to counsel into *access* to counsel.

[34] An individual who enters a hospital to receive medical treatment is not in a *Charter*-free zone. Where the individual has requested access to counsel and is in custody at the hospital, the police have an obligation under s. 10(*b*) to take steps to ascertain whether private access to a phone is in fact available, given the circumstances. Since most hospitals have phones, it is not a question simply of whether the individual is in the emergency room, it is whether the Crown has demonstrated that the circumstances are such that a private phone conversation is not reasonably feasible.

[35] The result of the officers' failure to even turn their minds that night to the obligation to provide this access, meant that there was virtually no evidence about whether a private phone call would have been possible, and therefore no basis for assessing the reasonableness of the failure to facilitate access. In fact, this is a case not so much about delay in facilitating access, but about its complete denial. It is difficult to see how this ongoing failure can be characterized as reasonable. Mr. Taylor's s. 10(*b*) rights were clearly violated. With respect, the trial judge erred in concluding otherwise.

[36] In light of the conclusion that Mr. Taylor's s. 10(*b*) rights were violated by the failure on the part of the police to take *any* steps to facilitate Mr. Taylor's requested access to counsel before the first set of blood samples were taken, it is unnecessary to decide whether his s. 8 *Charter* right against unreasonable search and seizure was breached. I would note only that the police should not be able to

circumvent the duty to implement an arrested individual's s. 10(b) rights by attempting to cure any tainted evidence with a warrant authorizing its seizure.

[37] Having concluded that there was a breach of Mr. Taylor's right to counsel under s. 10(b) prior to the taking of the first set of blood samples, the remaining issue is whether to exclude the evidence under s. 24(2) of the *Charter*. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on the public's confidence in the justice system, having regard to "the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits": *R. v. Grant*, [2009] 2 S.C.R. 353, at para. 85.

[38] It goes without saying that the public has an interest in an adjudication of the merits of a case where, as here, the evidence sought to be excluded is reliable and key to the case. But as this Court has consistently said, most recently in *R. v. Spencer*, 2014 SCC 43, at para. 80, the public also has an interest "in ensuring that the justice system remains above reproach in its treatment of those charged with these serious offences".

[39] This brings us to the seriousness of the *Charter*-infringing state conduct. The record indicates that the s. 10(b) breach was not the result of a wilful disregard for Mr. Taylor's rights. Nevertheless, Cst. MacGillivray's failure to facilitate Mr. Taylor's s. 10(b) rights constituted a significant departure from the standard of conduct expected of police officers and cannot be condoned. In short, at no point did

the police do anything to facilitate Mr. Taylor's access to counsel at the hospital, either before the initial hospital samples were taken or when they demanded a blood sample. This branch of the *Grant* test therefore leans in favour of exclusion.

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

[41] There is no need to speculate about the advice Mr. Taylor might have received had he been given access to counsel as he requested, such as whether he would have refused to consent to the taking of any blood samples for medical purposes. It is clear that the denial of the requested access had the effect of depriving him of the opportunity to make an informed decision about whether to consent to the routine medical treatment that had the potential to create — and in fact ultimately did create — incriminating evidence that would be used against him at trial. The impact of the breach on Mr. Taylor's s. 10(b) rights was exacerbated when Mr. Taylor was placed in the unnecessarily vulnerable position of having to choose between his medical interests and his constitutional ones, without the benefit of the requested

advice from counsel. Mr. Taylor's blood samples, taken in direct violation of his right to counsel under s. 10(b), significantly compromised his autonomy, dignity, and bodily integrity. This supports the exclusion of this evidence. As this Court said in *Grant*, "it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's . . . bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability" (para. 111).

[42] After weighing all the relevant considerations, in my view the seriousness of the *Charter* breach and the impact of the police conduct on Mr. Taylor's interests are such that the admission of the evidence would so impair public confidence in the administration of justice as to warrant the exclusion of the evidence.

[43] I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: Attorney General of Alberta, Edmonton.

Solicitors for the respondent: Fagan & McKay, Calgary.

*Solicitor for the intervener the Director of Public Prosecutions of
Canada: Public Prosecution Service of Canada, Toronto.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney
General of Ontario, Toronto.*

*Solicitors for the intervener the Canadian Civil Liberties
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