**IN THE COURT OF APPEAL**
**OF NEWFOUNDLAND AND LABRADOR**

**Citation**: *R. v. Villeneuve*, 2023 NLCA 14
**Date**: May 23, 2023
**Docket Number**: 202101H0010

**BETWEEN:**

HIS MAJESTY THE KING — APPELLANT

**AND:**

NICHOLAS VILLENEUVE — RESPONDENT

**Coram:** L.R. Hoegg, F.P. O'Brien and F.J. Knickle JJ.A.

**Court Appealed From:** Provincial Court of Newfoundland and Labrador, Gander
(*R. v. Villeneuve*, 2020 NLPC 0920A00038)

**Appeal Heard:** May 12, 2022
**Judgment Rendered:** May 23, 2023

**Reasons for Judgment by:** Knickle J.A.
**Concurred in by:** Hoegg and O'Brien JJ.A.

**Counsel for the Appellant:** Kathleen O'Reilly
**Counsel for the Respondent:** Rosellen Sullivan K.C.

**Authorities Cited:**

**CASES CITED:** *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Lafrance*, 2022 SCC 32; *R. v. Tessier*, 2022 SCC 35; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. CA); *R. v. Summers*, 2019 NLCA 11, 4 C.A.N.L.R. 156; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v. MacMillan*, 2013 ONCA 109; *R. v. Cartwright*, 2015 NBCA 42; *R. v. Guenter*, 2016 ONCA 572, leave to appeal to SCC refused, 37224 (19 January 2017); *R. v. Borden*, [1994] 3 S.C.R. 145; *R. v. Smith*, [1991] 1 S.C.R. 714; *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Scopel-Cessel*, 2022 ONCA 316; *R. v. LaChappelle*, 2007 ONCA 655, leave to appeal to SCC refused, 32272 (21 February 2008); *R. v. Culotta*, 2018 ONCA 665, aff'd 2018 SCC 57, [2018] 3 S.C.R. 597); *R. v. Goldhart*, [1996] 2 S.C.R. 463; *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235; *R. v. Strachan*, [1988] 2 S.C.R. 980; *R. v. Beaver*, 2022 SCC 54; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. Tim*, 2022 SCC 12; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Dersch*, [1993] 3 S.C.R. 768; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Pohoretsky*, [1987] 1 S.C.R. 945; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Canavan*, 2019 ONCA 567; *R. v. Colbourne* (2001), 157 C.C.C. (3d) 273 (Ont. CA); *R. v. Taylor*, 2013 ABCA 342, aff'd 2014 SCC 50, [2014] 2 S.C.R. 495; *R. v. Al-Amiri*, 2015 NLCA 37, 368 Nfld. & P.E.I.R. 146; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *Zelinski v. Pidkowich*, 2020 SKCA 42; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *R. v. McLean* (1988), 51 Man. R. (2d) 170 (Man. CA); *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609

**STATUTES CONSIDERED:** *Canadian Charter of Rights and Freedoms*, sections 24(2), 10(b), 8; *Criminal Code*, section 676.

**Knickle J.A.:**

## OVERVIEW

[1] This appeal addresses two questions: when an encounter between a police officer and the respondent, Nicholas Villeneuve, became a psychological

detention for the purposes of triggering Mr. Villeneuve's *Charter* rights and whether evidence was properly excluded from trial under section 24(2) of the *Charter*.

[2] The context of the encounter was that 20 year-old Mr. Villeneuve, the sole occupant of his pickup truck, collided head-on with a sedan. Two of the four occupants of the sedan, John and Sandra Lush, were killed. They were declared deceased at the accident scene. The other two occupants, Suzanne Lush and Joshua Whiteway, suffered very serious injuries and were rushed to hospital from the scene. Mr. Villeneuve also suffered serious injuries to his face, which required him to be taken to hospital.

[3] Mr. Villeneuve was charged with eight criminal offences: two counts each of impaired driving causing death, dangerous driving causing death, impaired driving causing bodily harm and dangerous driving causing bodily harm. At trial, he raised two *Charter* applications under sections 10(b) and 8.

[4] In relation to section 10(b), there was no dispute that while at hospital, the police detained Mr. Villeneuve and neglected to inform him of his rights to counsel. The disagreement was when his detention commenced. The extent to which evidence, if any, might be excluded from admission at trial under section 24(2) of the *Charter* turned on the point at which the detention and consequent 10(b) violation commenced.

[5] Mr. Villeneuve argued that he was detained when the officer accompanied him from the accident scene in the ambulance en route to the hospital. He argued that all of the evidence obtained by police after that point should be excluded from trial, including statements made by Mr. Villeneuve to police while at hospital, observations made by the officer during the encounter, all bodily samples seized from Mr. Villeneuve at hospital, as well as the related medical records.

[6] The Crown responded that Mr. Villeneuve was not detained until approximately 45 minutes after arrival at hospital, when the investigating officer made a demand for a blood sample pursuant to the *Criminal Code*. The Crown conceded the blood taken pursuant to the demand was inadmissible, but argued the other evidence should not be excluded as it was not obtained in a manner that violated the *Charter*.

[7] In relation to section 8, Mr. Villeneuve argued that two judicial authorizations obtained by the police to seize blood drawn for medical purposes

and the related medical records, violated his right to be free from unreasonable search and seizure. He argued that the Informations to Obtain (ITOs) relied in part on evidence he sought to have excluded under section 24(2): the observations of the attending officer at the hospital and the statements of Mr. Villeneuve. Mr. Villeneuve argued this evidence should be excised from the ITOs and that its excision was fatal to the judicial authorizations. This would result in a warrantless and presumptively unreasonable seizure of his blood and medical records.

[8] The Crown responded that because Mr. Villeneuve was not detained until the blood demand was given, no evidence prior to the detention was obtained in a manner that violated Mr. Villeneuve's *Charter* rights. There was no need to excise any evidence from the ITOs. If the evidence was excised, the Crown argued that there was ample evidence remaining in the ITOs to support the judicial authorizations.

**The trial judge's decision**

[9] The trial judge concluded that the investigating officer detained Mr. Villeneuve shortly after the arrival at hospital (*R. v. Villeneuve*, 2020 NLPC 0920A00038 ("Decision"). At paragraph 26 of the Decision, the trial judge stated:

> Having considered the forgoing in terms of all the circumstances of Mr. Villeneuve's encounter with Cst. Gillingham, I am satisfied that Mr. Villeneuve was detained after Cst. Gillingham entered the treatment room and began a focused questioning of him about the accident. This would be sometime after they arrived at the hospital and before 443 a.m. In doing so, Cst. Gillingham breached Mr. Villeneuve's 10(b) rights by failing to inform him of his right to counsel at that time.

[10] After concluding that Mr. Villeneuve was detained "before 4:43 a.m.", the trial judge then excluded all of the evidence as sought by Mr. Villeneuve citing *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495.

[11] The trial judge also agreed with Mr. Villeneuve, without analysis, that once the observations of the officer and the statements of Mr. Villeneuve were excised from the ITOs, the judicial authorizations to seize the medical blood and the medical records were no longer viable. The trial judge also concluded that to sustain the judicial authorizations would be to permit the police to circumvent their *Charter* obligations.

[12] Upon being successful on the first *Charter* application, Mr. Villeneuve brought a second *Charter* application seeking to exclude evidence obtained via two further judicial authorizations for searches of Mr. Villeneuve's motor vehicle and cellphone. In light of the trial judge's earlier decision, the Crown conceded the second *Charter* application and that evidence was also excluded.

[13] The Crown called no further evidence and acquittals were entered on all counts. The Crown now seeks to set aside the acquittals on the basis that the trial judge erred in allowing both *Charter* applications and excluding the impugned evidence.

[14] For the reasons that follow, I would conclude that the trial judge erred in allowing the *Charter* applications. In concluding that Mr. Villeneuve was detained prior to the blood demand, the trial judge misapprehended the evidence and misapplied the governing principles as to the circumstances that give rise to a detention. The trial judge further erred in excluding the evidence of the blood or bodily samples taken for medical purposes and related medical records, the observations of the officer at the hospital and the statements of Mr. Villeneuve. This evidence was not obtained in a manner that violated Mr. Villeneuve's *Charter* rights. The trial judge also erred in setting aside the judicial authorizations.

[15] I would allow the appeal, set aside the acquittals and remit the matter to provincial court for trial.

**ISSUES**

[16] The issues are as follows:

1) Did the trial judge err in finding that Mr. Villeneuve was detained prior to the blood demand under the *Criminal Code*?

2) Did the trial judge err in excluding evidence other than the blood taken pursuant to the blood demand under the *Criminal Code*?

3) Did the trial judge err in setting aside the judicial authorizations?

4) Is the trial judge's ruling on the second *Charter* application within the scope of the appeal?

**ISSUE 1: Did the trial judge err in finding that Mr. Villeneuve was detained prior to the blood demand under the *Criminal Code*?**

**The principles governing "detention" and section 10(b) of the *Charter***

[17] Section 10(b) of the *Charter* states:

> Everyone has the right on arrest or detention
>
> …
>
> (b) to retain and instruct counsel without delay and to be informed of that right.

[18] The principles governing whether circumstances will give rise to a detention triggering an individual's right to counsel under section 10(b) are well established: *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, and were recently affirmed by the Court in *R. v. Lafrance*, 2022 SCC 32 and *R. v. Tessier*, 2022 SCC 35. The obligation to comply with the requirements of section 10 arises immediately upon detention, so it is essential to establish the point at which an individual has been detained (*Suberu*, at para. 5).

[19] A detention may arise from physical restraint of the individual or may be "psychological", as is the concern in these circumstances. *Grant* described psychological detention as arising in two situations. The first situation is "where the subject is legally required to comply with a direction or demand". This is why there is no dispute that when the blood demand was given, Mr. Villeneuve was detained.

[20] The second type of psychological detention is where there is no obligation to comply with a restrictive or coercive demand "but a reasonable person in the subject's position would feel so obligated" (*Grant*, at para. 30). The Court explained further, at paragraph 31:

> This second form of psychological detention — where no legal compulsion exists — has proven difficult to define consistently. The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. As held in *Therens*, this must be determined objectively, having regard to all the circumstances of the particular situation, including the conduct of the police.

[21] At paragraph 44, *Grant* described non-exhaustive factors that may be relevant to whether or not the particular circumstances amount to the second type of psychological detention:

> (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual…
>
> (b) The nature of the police conduct…
>
> (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[22] The perceptions of the individual who asserts they were detained may also be relevant. The Court in *Grant* stated at paragraph 32:

> … While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive.

[23] As *Grant* cautioned, this second kind of psychological detention is not always easy to discern. The judge must look at the totality of the circumstances and the focus is on the conduct of the police and how that conduct would be perceived by a reasonable person in the situation as it develops (*Grant*, at para. 31).

[24] But not every encounter between the police and an individual constitutes a detention. In the course of their duties, the police inevitably interact with members of the public. As stated in *Suberu* at paragraph 3:

> … Likewise, not every police encounter, even with a suspect, will trigger an individual's right to counsel under s. 10*(b)*. As Iacobucci J. aptly observed, "[t]he person who is stopped will in all cases be 'detained' in the sense of 'delayed', or 'kept waiting'. But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint" (para. 19).

[25] For this reason, the restraint or interference with an individual's liberty must be significant. It is only encounters that result in a significant restraint on the liberty of the individual that may amount to a detention and trigger one's

rights under section 10 (*Grant*, at paras. 32-34). As stated in *R. v. Therens*, [1985] 1 S.C.R. 613, at page 642:

> … There can be no doubt that there must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action that amounts to a detention within the meaning of s. 10 of the *Charter*. …

**The standard of review**

[26] This Court's review of the trial judge's conclusion as to when the detention arose is a question of law and is assessed on the standard of correctness. His conclusion is owed no deference (*R. v. Lafrance,* at para. 91, *Grant*, at para. 129, and *Le*, at para. 138).

[27] Further, while findings of fact are entitled to deference by this Court, this is not so if the trial judge misapprehended the evidence in a manner that goes to the substance of the trial judge's reasoning. The Supreme Court in *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, applying the decision of *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. CA), per Doherty, J.A, described the threshold at paragraph 2:

> … The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

[28] This Court, in *R. v. Summers*, 2019 NLCA 11, 4 C.A.N.L.R. 156, described a misapprehension of evidence at paragraph 18:

> … A misapprehension of the evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence". As applied to an appeal, the misapprehension of the evidence must be material to the judge's reasoning in the sense that it could have affected the verdict. (See *R. v. A.A.M.*, 2013 NLCA 26, 335 Nfld. & P.E.I.R. 199, at paragraphs 16 to 18.)

**The evidence of the encounter between Constable Gillingham and Mr. Villeneuve**

[29] As stated by the Supreme Court, whether an encounter constitutes a psychological detention requires an assessment of the entirety of the

circumstances. For this reason, the circumstances of the encounter between Constable Gillingham and Mr. Villeneuve are reviewed in detail. All times refer to the a.m.

*At the accident scene*

[30] In the early morning hours of July 7, 2019, Constable Gillingham, a member of the Royal Canadian Mounted Police (RCMP) with four years' experience, and another officer, Constable Cutting, were called to a possible vehicle fire on the Trans Canada Highway outside Gander, NL. Both officers had just completed a full shift of duty. Neither officer was aware that the reported fire they were attending was the result of the car accident.

[31] At 4:19, the officers arrived at the accident scene. It was described as "complete chaos". The weather was "horrible", heavy with rain. Constable Cutting testified that the rain was so heavy, she could not take handwritten notes. There were firetrucks and other emergency personnel present. Despite the heavy rain, one vehicle was engulfed in flames. The officers spoke to the firefighters and were directed to Mr. Villeneuve who was seated in a firetruck. The firefighters advised that Mr. Villeneuve was the driver of one of the vehicles in the accident.

[32] Constable Gillingham spoke to Mr. Villeneuve. He could see that Mr. Villeneuve had suffered serious facial injuries. Mr. Villeneuve's lips were severely swollen, his tongue was split and he was bleeding from his face. Constable Gillingham asked Mr. Villeneuve how he was, and Mr. Villeneuve responded he was okay. At that time, Constable Gillingham observed that Mr. Villeneuve's speech was slow, a little hard to understand, and his eyes were "droopy"; but Mr. Villeneuve was oriented to his location. Constable Gillingham observed that Mr. Villeneuve was wearing a blue bracelet on his wrist. He recognized the bracelet as the kind someone might wear attending an event where admission is required. Constable Gillingham did not smell alcohol from Mr. Villeneuve. Although Constable Gillingham observed signs consistent with impairment from Mr. Villeneuve, he formed no suspicion at that point because the observations may have been due to Mr. Villeneuve's injuries.

[33] After briefly speaking with Mr. Villeneuve, Constable Gillingham then attended to a woman lying on the pavement. She was one of the occupants of the sedan involved in the accident. She told him she felt "her lungs filling up" and was finding it hard to breathe. Shortly thereafter, she was transported to hospital

via ambulance. Constable Gillingham then learned that there were two deceased persons in the burning vehicle.

[34] Constable Gillingham returned to Mr. Villeneuve. He was being attended to by paramedics who intended to transport Mr. Villeneuve to the hospital for treatment. Both Constables Gillingham and Cutting testified that it was typical in such circumstances that one officer would go to the hospital and the other would remain on scene. Constable Gillingham asked one of the paramedics if he could travel with them to the hospital. It was the last ambulance to leave the scene. The paramedic agreed and Constable Gillingham sat in the front of the ambulance, separated from Mr. Villeneuve by the divider between the driver's area and the back of the ambulance. During the transport, he had no interaction with Mr. Villeneuve. Constable Gillingham stated that his purpose for attending the hospital was to investigate the fatal motor vehicle accident. This was his first such investigation.

[35] At 4:38, the ambulance departed for the hospital.

[36] Upon departing the accident scene, Constable Gillingham made notes regarding his observations of Mr. Villeneuve. The paramedic who was driving also told Constable Gillingham that Mr. Villeneuve had earlier possibly attended a music festival, called the "Crossroads". According to the officer, the paramedic advised this was a venue where alcohol was sold.

[37] At 4:43, the ambulance arrived at the hospital.

[38] By the time he arrived at hospital, Constable Gillingham had formed the suspicion that Mr. Villeneuve may have consumed alcohol prior to the accident based on Mr. Villeneuve's slurred speech, his confusion about being a passenger, his drowsy eyes, and the fact that Mr. Villeneuve was wearing the bracelet from an event where, according to the paramedic, alcohol was sold (Transcript, at 13, 60).

*At the hospital*

[39] Like the accident scene, the situation at the hospital was described as chaotic and it is not surprising that the evidence at trial varied among the witnesses, particularly in relation to times. Nothing turns on these variances.

[40] Joshua Whiteway and Suzanne Lush, the surviving occupants from the other vehicle in the accident, had already arrived at the hospital and were

occupying two different trauma rooms. They were in "critical" condition, and at least one of them required a "Massive Transfusion Protocol".

[41] At 4:45, Mr. Villeneuve was transferred from the care of the paramedics to the hospital's care.

[42] At 4:49, Mr. Villeneuve was transferred to a bed in what was described as a "holding room". The room contained two beds with a curtain that could be drawn for privacy. There was also a window that permitted persons outside the room to view inside the room. Constable Gillingham entered the room at this time. Constable Gillingham stated he could not speak with the two passengers from the sedan but spoke with Mr. Villeneuve in between times when Mr. Villeneuve was receiving medical treatment.

[43] Around 5:01, Constable Gillingham made a phone call to Constable Cutting who was still at the scene. She returned the call at 5:06.

[44] Prior to 5:03, Constable Gillingham asked Mr. Villeneuve "What happened?" or "Where were you going?". It is unclear whether the officer asked this first question before or after Mr. Villeneuve was placed in the room. Mr. Villeneuve responded he lived in Gander and was coming from Gander. Constable Gillingham found the response strange because it appeared as if Mr. Villeneuve was confused about the direction in which he was travelling prior to the accident.

[45] Around either 5:00 or 5:05, depending on testimony from the witnesses as well as medical notes, blood was drawn from Mr. Villeneuve for medical purposes as part of the standard protocol in trauma situations. The technician, Chelsey Lewis, testified that Constable Gillingham was present for the procedure, although Constable Gillingham testified that it was around this time that he spoke to Alphonsus Hanlon, an off-duty firefighter who had been at the scene.

[46] Constable Gillingham explained that because he had formed the suspicion that Mr. Villeneuve may have been under the influence of alcohol at the time of the accident, he intended to caution Mr. Villeneuve, but had to step out of the room because medical treatment of Mr. Villeneuve had started. Constable Gillingham stated (Transcript, at 13):

> So prior to that conversation, prior to the conversation with Alphonsus, I had a conversation with Mr. Villeneuve and the totality of the evidence being the bracelet being from an event that was suspected to be serving alcohol and slurred slowed

> speech and he appeared drowsy and it was at that point that I was suspicious that he had alcohol in his body while operating [a] motor vehicle. That's when the other treatment started and that's when I had the conversation with Alphonsus.

[47] While outside the room, Mr. Hanlon indicated to Constable Gillingham that Mr. Villeneuve was the driver of the other vehicle. At 5:03, the officer returned to the room and cautioned Mr. Villeneuve by saying (Transcript, at 16):

> Nicholas, I want you to know that I [am] a police officer and you do not have to talk to me. Anything you say can be used as evidence…

[48] After giving the caution, Constable Gillingham asked Mr. Villeneuve if he understood. Mr. Villeneuve indicated that he did understand. Constable Gillingham then asked Mr. Villeneuve a second question, from where Mr. Villeneuve was coming. Mr. Villeneuve responded he was coming from "the Crossroads" which was the music festival Constable Gillingham had become aware of earlier and was consistent with the blue bracelet worn by Mr. Villeneuve.

[49] It was also during this period that the nurse, Rebecca Taylor, stated she did her initial triage of Mr. Villeneuve. She was not specific as to exactly when she attended to Mr. Villeneuve, but described that this treatment lasted approximately a half hour. Ms. Taylor testified that the officer was present in the room during this period, "a couple of feet back" by the door.

[50] Around 5:14, Constable Gillingham was asked by a nurse (it was unclear who), to contact the next of kin of the other victims and the officer again left Mr. Villeneuve's room. After contacting next of kin, Constable Gillingham returned to Mr. Villeneuve's room and gave Mr. Villeneuve a second caution, which he read from his card (Transcript, at 18):

> You must understand that anything said to you earlier should not influence you or make you feel like you have to say anything at this time. You do not have to repeat anything that you said earlier and you do not have to say anything, but whatever you do say may be given as evidence. Do you understand?

[51] Mr. Villeneuve indicated he understood the second caution. Although Constable Gillingham's notes indicated this second caution was given at 5:20, on cross-examination Constable Gillingham agreed the likely time was 5:28 (Transcript, at 50). Whether the caution was given at 5:20 or 5:28, there was no evidence of interaction between Constable Gillingham and Mr. Villeneuve after the officer left the room at 5:14, until he gave the second caution.

[52] At 5:29, Constable Gillingham then asked Mr. Villeneuve a third question, whether Mr. Villeneuve had consumed alcohol. Mr. Villeneuve replied that he had, and according to the officer, appeared remorseful. At this point Constable Gillingham believed he had the grounds to give a blood demand pursuant to the *Criminal Code* and at 5:30 gave the blood demand. Mr. Villeneuve's response was "yeah, go for it" (Transcript, at 21).

[53] Upon giving the demand, Constable Gillingham did not advise Mr. Villeneuve of his right to counsel under section 10(b) of the *Charter* or provide an opportunity for Mr. Villeneuve to contact and speak with a lawyer. When asked why he did not advise Mr. Villeneuve of his right to counsel, Constable Gillingham stated that his "thought process" was that Mr. Villeneuve was in a situation similar to when drivers are screened at roadside. He stated (Transcript, at 63):

> … It was thought process at that point in time, I was following the protocol of the approved screening device demand when there's no right to counsel triggered or arrest. … I was on the thought process that he was in no way to be in custody and once the blood was detained that he would be staying at the hospital.

[54] When asked what he meant by Mr. Villeneuve being "in no way to be in custody", Constable Gillingham stated Mr. Villeneuve "was in no shape or no – he needed to be at the hospital to be treated by the doctors". Constable Gillingham agreed he did not put his mind to Mr. Villeneuve's *Charter* rights. He stated (Transcript, at page 63):

> No, it was an oversight on my part given the chaotic scene, the time in the morning, and what had just happened.

[55] Either before or after giving the blood demand to Mr. Villeneuve, Constable Gillingham called Constable Cutting to obtain a blood kit from the RCMP station, to facilitate taking samples pursuant to the *Criminal Code* demand.

[56] At 5:45, Constable Gillingham discussed with Dr. Cross, the attending physician, whether Mr. Villeneuve was capable of consenting to the blood demand pursuant to the *Criminal Code*. Dr. Cross confirmed that Mr. Villeneuve was capable and Mr. Villeneuve signed a form providing consent to blood being drawn. During this period Dr. Cross assessed Mr. Villeneuve. Dr. Cross testified that he thought the officer may have left the room while he examined Mr. Villeneuve (Transcript, at 125). An X-ray was also taken of Mr. Villeneuve at 5:47.

[57] The lab technician who drew the blood pursuant to the demand stated she explained the written consent form to Mr. Villeneuve. She stated that although the form referred solely to the blood taken for "legal" purposes, she explained orally to Mr. Villeneuve that blood was going to be drawn for two different purposes, one legal, and the other medical. She testified that Mr. Villeneuve did not object. Nor did he object to any of the medical treatment he received.

[58] Just after 6:00, the blood kit for the *Criminal Code* demand arrived at the hospital. Constable Gillingham learned from the officer who delivered the kit that the vials had "expired". Because of this, Constable Gillingham asked the hospital staff to use vials from the hospital to secure the blood. The hospital staff agreed and obtained the necessary vials. Constable Gillingham remained with Mr. Villeneuve.

[59] At 6:17, the blood taken pursuant to the *Criminal Code* was drawn. At 6:18, the hospital staff then drew blood for medical purposes.

[60] Immediately after the blood was drawn, Mr. Villeneuve was taken for a "CT scan" and was absent from his room for this procedure until 6:55.

[61] Constable Gillingham secured the blood samples taken pursuant to the *Criminal Code*, and left the hospital around 6:20. He had no further contact with Mr. Villeneuve at the hospital.

**ANALYSIS of Issue 1**

[62] At the heart of this appeal is whether the encounter between Constable Gillingham and Mr. Villeneuve gave rise to a detention at a point prior to when the blood demand was given at 5:30. The question is whether the conduct of Constable Gillingham prior to 5:30 would have caused the reasonable person in Mr. Villeneuve's circumstances to conclude they had to comply with the officer's demands and were not free to go.

[63] The encounter between Constable Gillingham and Mr. Villeneuve was not as described by the trial judge at paragraphs 25 and 26 of his Decision. Constable Gillingham did not arrive at hospital at 4:33, and "remain at" Mr. Villeneuve's bedside as his "only companion", or engage in "focused and directed questioning" of Mr. Villeneuve resulting in a detention before 4:43. In so concluding, the trial judge misapprehended the evidence. This misapprehension went to the substance of his reasoning that Mr. Villeneuve was detained prior to the blood demand.

**The erroneous factual findings**

[64] Firstly, the trial judge made erroneous findings of fact. Although the trial judge did not explicitly state his finding of facts, the references in paragraph 25 of his Decision were the findings upon which he based his conclusion as to why the detention occurred prior to 4:43.

*a) The arrival at hospital was not 4:33*

[65] A significant error was the trial judge's finding that the arrival at the hospital was at 4:33 (Decision, at paras. 9, 25 and as implied in 26). It is undisputed the ambulance did not leave the accident scene until 4:38 or that Constable Gillingham did not enter the hospital room until 4:49.

[66] Mr. Villeneuve submitted that the trial judge's references to 4:33 are likely typographical errors and the trial judge meant 4:43. However, the trial judge could not have meant both that the arrival at the hospital was at 4:43 and the detention occurred before 4:43. It is clear the reference to 4:33 is a factual finding by the trial judge based on his misapprehension of the evidence as to when the ambulance arrived at the hospital.

[67] This error goes to the substance of the trial judge's reasoning as to when Mr. Villeneuve was detained. While reference to specific times may be peripheral to when a detention crystalizes, in these circumstances the references were central to the trial judge's conclusion. The detention was framed as having occurred "after" 4:33 and "before" 4:43, the period of time the trial judge identified as when Constable Gillingham engaged in "focused questioning" of Mr. Villeneuve. The trial judge concluded that Constable Gillingham detained and questioned Mr. Villeneuve at a point when the officer was not in the room with Mr. Villeneuve.

*b) Constable Gillingham did not remain at Mr. Villeneuve's bedside and continue to question Mr. Villeneuve until 5:30*

[68] The trial judge also erroneously found that Constable Gillingham "remained bedside" in Mr. Villeneuve's hospital room (Decision, at para. 25), notwithstanding that the officer left the room on two occasions. Prior to 5:03, Constable Gillingham left the room and spoke with the witness, Mr. Hanlon, and at 5:14, the officer left the room again to contact next of kin of the deceased.

[69] At the same time, the trial judge seemed to accept both that the officer remained in the room, and that he left the room when medical treatment occurred. At paragraph 10 of the Decision he stated:

> Cst. Gillingham stated that he stood outside the door of the treatment room. However, he also stated that he tried to speak with Mr. Villeneuve a number of intervening times between when the nurses were speaking with Mr. Villeneuve. He also stated that this occurred when there was a "lull in the action" and he would step out when Mr. Villeneuve was getting medical treatment. This constant presence is consistent with the observations of staff that he was bedside with Mr. Villeneuve except when staff were present.

[70] Further, although the nurse, Ms. Taylor testified that the officer was present the "whole time", this did not support a finding that the officer remained in the room with Mr. Villeneuve. Her reference to Constable Gillingham being in the room the "whole time" could be only those times when her attention was on Mr. Villeneuve, which was not continuous. Her duties required her to assist with the other patients and after initially attending to Mr. Villeneuve, she checked on him only periodically.

[71] Similarly, the trial judge's finding that Constable Gillingham "continued to question" Mr. Villeneuve until 5:03 (Decision, at para. 25), is not supported by the evidence. From their arrival at hospital at 4:43 until 5:03 (a span of 20 minutes), the officer asked Mr. Villeneuve one question: "What happened?" or "Where were you going?" One question in 20 minutes does not support that the officer "continued to question" as found by the trial judge.

[72] In fact, there was no point in the encounter that the officer "continued" questioning as described by the trial judge, much less in the first ten minutes at hospital. Between the time of arrival at hospital and when the blood demand was given at 5:30, a span of approximately 45 minutes, the officer asked at most four questions and was repeatedly interrupted either by Mr. Villeneuve receiving medical treatment, or having to engage in other tasks.

[73] It is also unclear what the trial judge meant by "at bedside". Ms. Taylor had written "at bedside" in her medical notes in reference to the officer, but on cross-examination she clarified that Constable Gillingham was not seated by Mr. Villeneuve, but standing "within a couple of feet of the stretcher just inside the door" of the room. The technician, Ms. Lewis, described Constable Gillingham as "standing back three to four feet" from Mr. Villeneuve's bed, "over by bed B"; the other bed in the room.

[74] The above factual errors were not peripheral details but were findings that were material to the trial judge's reasoning that Mr. Villeneuve was detained prior to 4:43. The trial judge relied on these erroneous findings in reasoning that there was a detention prior to the blood demand.

**The consideration of irrelevant evidence**

[75] The trial judge also misapprehended the evidence by considering factors that, in these circumstances, were irrelevant to determining when Mr. Villeneuve was detained.

*a) Constable Gillingham's suspicion of Mr. Villeneuve*

[76] For example, the trial judge's emphasis on Constable Gillingham's suspicion regarding Mr. Villeneuve was misplaced (Decision, at para. 25). This evidence did not assist the trial judge in determining when Mr. Villeneuve was detained. As explained in *Grant* at paragraph 41:

> … Focussed suspicion, in and of itself, does not turn the encounter [into] a detention. What matters is how the police, based on that suspicion, interacted with the subject.

[77] And as stated in *Le*, at paragraph 37:

> These investigative purposes are important when assessing whether the detention was arbitrary and whether the police were acting in good faith. However, when determining whether a detention has occurred, the circumstances giving rise to the encounter are assessed based on how they would reasonably be perceived. The subjective purposes of the police are less relevant in this analysis because a reasonable person in the shoes of the putative detainee would not have known why these police officers were entering the property.

[78] Police suspicions about an individual may explain why that individual might be detained, but suspicion does not mean the person was detained. Put another way, Constable Gillingham's suspicion may have explained his intentions, but suspicion alone is not "conduct". What mattered was Constable Gillingham's conduct and how that conduct would be viewed by the reasonable person in the shoes of Mr. Villeneuve: *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725. (See also *R. v. MacMillan*, 2013 ONCA 109, at para. 37).

[79] For example, in *R. v. Cartwright*, 2015 NBCA 42, an officer questioned an accused while the accused was being treated in an ambulance. Although the officer had reason to be suspicious of the accused, the questioning was found to be an encounter closer to that end of the spectrum of a general inquiry and the

officer orienting herself to the circumstances rather than a targeted investigation. At the time, the officer knew an odour of alcohol had been detected and was emanating from the accused and that he had been seen in the driver's seat of the vehicle. No detention occurred until the demand under the *Criminal Code* was given (*Cartwright*, at paras. 6, 16). (See also *R. v. Guenter*, 2016 ONCA 572, leave to appeal to SCC refused 37224 (19 January 2017)). The circumstances of the officer's suspicions in *Cartwright* are similar to the circumstances of Constable Gillingham's suspicions.

*b) That Constable Gillingham did not speak to the other accident victims*

[80] Like Constable Gillingham's suspicions, the fact that the officer did not speak to the other victims did not inform the trial judge as to when Mr. Villeneuve was detained (Decision, at para. 25).

[81] An officer who "singles out" an individual for questioning (as per *Grant*), may be exercising control over that person. But in these circumstances, that Constable Gillingham did not speak to the other victims at the hospital did not by implication mean that he had singled out Mr. Villeneuve or detained him. Constable Gillingham testified that the other two victims were "unavailable" to be questioned. The evidence was undisputed that these patients were in critical condition. It is not surprising that he did not speak with these individuals. It was an irrelevant consideration.

*c) That Constable Gillingham did not advise Mr. Villeneuve that two persons had died in the accident*

[82] Although the trial judge referred to the fact that the officer had not told Mr. Villeneuve of the fatalities (Decision, at para. 25), he did not explain how he considered this evidence. There was no evidence that the officer deliberately avoided telling Mr. Villeneuve of the fatalities.

[83] Whether or not Mr. Villeneuve knew there were fatalities was irrelevant to determining at what point he was detained. This evidence did not assist in deciding whether the reasonable person in Mr. Villeneuve's circumstances would have believed they had no choice but to comply with Constable Gillingham's "direction" or "demand" (*Suberu*, at para. 52-53).

[84] If Constable Gillingham's conduct had resulted in a breach of Mr. Villeneuve's section 10(b) rights prior to the blood demand, the officer's failure to advise Mr. Villeneuve of the fatalities may have been relevant to assessing the

seriousness of the section 10(b) violation and the admissibility of evidence under section 24(2) (see for example, *R. v. Borden*, [1994] 3 S.C.R. 145, *R. v. Smith*, [1991] 1 S.C.R. 714, *R. v. Black*, [1989] 2 S.C.R. 138). However, the trial judge made no reference to this evidence in relation to his section 24(2) analysis.

[85] To the extent the trial judge considered this evidence as relevant to determining the point at which Mr. Villeneuve was detained, he was in error.

*d) That Constable Gillingham did not seek permission to be in the treatment room*

[86] Finally, the trial judge's consideration that Constable Gillingham did not seek permission to be in the treatment room was also misplaced (Decision, at para. 25).

[87] If an officer takes control over a location, this is conduct that might support that the officer is exercising control over a person, as occurred in *Grant* and *Le* (see *Lafrance*, at paras. 32, 47). For example in *R. v. Scopel-Cessel*, 2022 ONCA 316, eight uniformed officers executed a search warrant at the accused's home and exercised control over both the location and the accused and his wife for a lengthy period of time. In contrast, in *Tessier*, an encounter between an individual and the officer took place at the police station, a location of which the officer clearly was in control. The accused was not detained, in part, because of the manner in which the officer conducted himself in relation to the accused (*Tessier*, at para. 108).

[88] In these circumstances, that Constable Gillingham did not seek permission to be present in the room was not conduct evidencing that he was controlling either the location or Mr. Villeneuve. The evidence was to the contrary. The officer deferred repeatedly to the medical staff, undermining any notion that he was exercising control over the location or Mr. Villeneuve.

[89] Further, the mere presence of an officer in a location, including a hospital room, does not automatically equate with the officer engaging in conduct that amounts to a detention. For example, in *R. v. LaChappelle*, 2007 ONCA 655 (leave to appeal to SCC refused, 32272 (21 February 2008)), the "mere presence" of the officer in the hospital room, for a lengthy period of over an hour (paras. 28-30), did not constitute a detention.

[90] *LaChappelle* was considered in *R. v. Culotta*, 2018 ONCA 665, aff'd 2018 SCC 57, [2018] 3 S.C.R. 597, where the majority of the Ontario Court of

Appeal again found that a police officer's presence in an ambulance with a suspect, and even questioning the suspect, did not amount to a detention (*Culotta*, at para. 19). While there was a dissent, it was not on this point (see paras. 35, 74).

[91] Constable Gillingham's presence in Mr. Villeneuve's room was less intrusive than the circumstances in *LaChappelle* and *Culotta*. The medical personnel testified that it was usual for a police officer to be present at the hospital. In the circumstances, the officer's mere presence in the room without having sought permission did not support that the officer detained Mr. Villeneuve either prior to 4:43 or any time prior to the blood demand.

**The failure to consider that Constable Gillingham twice cautioned Mr. Villeneuve**

[92] The trial judge further erred by failing to consider that Constable Gillingham twice cautioned Mr. Villeneuve that he did not have to respond to his questions. Although the trial judge mentioned the cautions, he did not assess how the cautions might influence whether the reasonable person in Mr. Villeneuve's shoes would perceive that they were detained. This was an error.

[93] *Grant* explicitly recommends that the police caution an individual where it may be unclear to the individual whether they are detained. *Grant* states at paragraph 32:

> … In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. …

[94] And again at paragraph 39:

> Effective law enforcement is highly dependent on the cooperation of members of the public. The police must be able to act in a manner that fosters this cooperation, not discourage it. However, police investigative powers are not without limits. The notion of psychological detention recognizes the reality that police tactics, even in the absence of exercising actual physical restraint, may be coercive enough to effectively remove the individual's choice to walk away from the police. This creates the risk that the person may reasonably feel compelled to incriminate himself or herself. Where that is the case, the police are no longer entitled simply to expect cooperation from an individual. Unless, as stated earlier, the police inform the person that he or she is under no obligation to answer questions and is free to go, a detention may well

> crystallize and, when it does, the police must provide the subject with his or her s. 10(*b*) rights. …

[95] Mr. Villeneuve submitted that because Constable Gillingham did not advise Mr. Villeneuve that he was "free to go" as recommended in *Grant*, the reasonable person in Mr. Villeneuve's shoes would have still believed that they were detained because they would not have known whether they were at liberty to end the encounter with Constable Gillingham.

[96] Advising an individual they are "free to go" forms an integral part of the advice in *Grant* to officers where it may be unclear whether or not an encounter has crossed the line to a detention. However, in these circumstances, given that Mr. Villeneuve was confined to a hospital bed, telling him that he was free to go would have been unrealistic and artificial.

[97] Taking a realistic appraisal of the situation, what Mr. Villeneuve needed to know was whether or not he had to respond to the officer's questions. The three to four questions were the only inquiries made by the officer. The cautions ameliorated the risk that the questions would be perceived as controlling or coercive conduct. For this reason, the trial judge ought to have considered the evidence of the two cautions that were given by Constable Gillingham.

**Conclusion on Issue 2**

[98] The above errors illustrate that the trial judge misapprehended the evidence. The trial judge made erroneous findings of fact, mischaracterized the encounter between Constable Gillingham and Mr. Villeneuve as a "focused" questioning, relied on considerations that were irrelevant to whether there was a detention, and failed to consider the relevant factor that Constable Gillingham twice cautioned Mr. Villeneuve. This misapprehension of the evidence caused the trial judge to erroneously conclude the point at which Mr. Villeneuve was detained.

[99] Properly applying *Grant*, and considering the circumstances of the encounter, the nature of the police conduct and Mr. Villeneuve's circumstances, Mr. Villeneuve was not detained until he was given the blood demand at 5:30.

[100] From shortly after Constable Gillingham's arrival at hospital at 4:43 to investigate the fatal accident, until the blood demand was given at 5:30, in what was consistently described as a chaotic scene, and in between multiple interruptions, the officer posed a total of three to four questions to Mr. Villeneuve and twice cautioned Mr. Villeneuve that he did not need to respond.

Constable Gillingham was not "bedside" with Mr. Villeneuve but two to four feet from Mr. Villeneuve's bed, near the door. Constable Gillingham did not remain in the room, but left the room twice. He did not "direct" or "focus" questioning of Mr. Villeneuve, but repeatedly deferred to medical personnel when Mr. Villeneuve received treatment, and engaged in other tasks.

[101] Mr. Villeneuve was 20 years of age. He was in a vulnerable position given that he was injured and confined to a hospital bed, but there was no evidence that Constable Gillingham took advantage of Mr. Villeneuve's vulnerability. Nor was there evidence that Mr. Villeneuve believed he had to respond to Constable Gillingham's questions. To the contrary, the evidence was that Mr. Villeneuve understood the cautions given to him by Constable Gillingham, understood he had been in a serious car accident with another vehicle and that he was in hospital because of his injuries. Mr. Villeneuve was communicative and oriented to where he was and what was happening. He understood procedures as they were explained to him, and did not object to any treatment he received including blood being drawn.

[102] As stated in *Therens*, the essence of detention is the interference with liberty or loss of choice of the individual because of the conduct of the police. In these circumstances, there was no interference by the police with Mr. Villeneuve's liberty or loss of choice until the blood demand was given at 5:30, the first exercise of control by the officer over Mr. Villeneuve. The reasonable person in Mr. Villeneuve's shoes would not have believed that they had no choice but to comply with the officer's demands, because until 5:30 there was no conduct that would cause such a belief. The trial judge erred in concluding otherwise.

**ISSUE 2: Did the trial judge err in excluding evidence other than the blood taken pursuant to the demand under the *Criminal Code*?**

[103] Although the trial judge erred as to when Mr. Villeneuve was detained, there is no dispute that Mr. Villeneuve was detained when the blood demand was given at 5:30, and that his *Charter* rights under section 10(b) were violated. Given this, the trial judge had to determine what evidence, if any, ought to be excluded as a result of that violation, as per section 24(2) of the *Charter*. Section 24(2) of the *Charter* states:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all

> the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[104] The trial judge did not properly assess whether the evidence was subject to consideration under section 24(2) but assumed that all of the evidence in question was evidence obtained in violation of Mr. Villeneuve's *Charter* rights. He then moved directly to analyzing the criteria under *Grant* respecting whether the admission of the evidence would bring the administration of justice into disrepute (Decision, at paras. 28-33). In so doing, the trial judge committed a further legal error.

**ANALYSIS of Issue 2**

[105] Evidence obtained in a manner that violates an individual's rights and whose admission at trial would bring the administration of justice into disrepute must be excluded (See *R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 32). But before assessing whether the admission of any of the evidence would bring the administration of justice into disrepute, the trial judge must turn his or her mind to whether evidence sought to be excluded was in fact obtained in a manner that violated an individual's *Charter* rights (*Grant*, at para. 131). As stated by Fish, J. in *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at paragraph 19, citing *R. v. Strachan*, [1988] 2 S.C.R. 980, there are two aspects to section 24(2): 1) whether the evidence is obtained in a manner that violated the individual's rights or freedoms, and 2) whether its admission would bring the administration of justice into disrepute. See also *R. v. Beaver*, 2022 SCC 54, at paragraphs 94-95.

[106] While the meaning of "evidence obtained in a manner" under section 24(2) has been generously interpreted, and there is no need to establish a strictly causal connection between the breach and the impugned evidence (*Wittwer*, at para. 21, and *Goldhart*, at para. 33), one must look at the entire chain of events between the breach and the evidence. If the connection between the breach and the evidence is tenuous or too remote, even a close temporal connection may not establish that the evidence was obtained in a manner that violated the individual's rights (*Goldhart*, at para. 40; see also *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38, and *R. v. Tim*, 2022 SCC 12, at para. 78).

[107] Sometimes the connection between the impugned evidence and the breach will be clear, such as the connection between the blood obtained pursuant to the demand under the *Criminal Code* and the failure of Constable Gillingham to fulfil his constitutional duties under section 10(b) of the *Charter*. The blood seized pursuant to the *Criminal Code* demand was evidence obtained by the

exercise of police authority to detain Mr. Villeneuve under the *Criminal Code*, creating a direct connection between the failure to fulfil the constitutional obligations triggered by that detention and the evidence obtained.

[108] The same cannot be said for the several other pieces of evidence in issue: the blood seized for medical purposes, the medical records, the observations of Mr. Villeneuve by Constable Gillingham at the hospital, and the statements of Mr. Villeneuve.

[109] The trial judge's failure to address whether the evidence was obtained in a manner that violated Mr. Villeneuve's rights under section 24(2) of the *Charter* was an error in principle. As such, no deference is owed to his decision to exclude the impugned evidence (*R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 44, and *Grant*, at para. 86).

**The blood taken for medical purposes**

[110] The blood drawn for medical purposes by the medical personnel was not evidence obtained in a manner that violated Mr. Villeneuve's *Charter* rights.

[111] It is well established that, as a general principle, where blood is taken for medical purposes, the medical personnel responsible are not agents of the state, and their conduct does not come under *Charter* scrutiny (*R. v. Dersch*, [1993] 3 S.C.R. 768, at 776-777, and *R. v. Dyment*, [1988] 2 S.C.R. 417, at 432-435). Courts have consistently held that blood obtained for medical purposes and later obtained by the police through proper judicial authorization may be admissible at trial (*R. v. Pohoretsky*, [1987] 1 S.C.R. 945, *Dyment*, at 437, and *R. v. Colarusso*, [1994] 1 S.C.R. 20, at 74-75. See also *Cartwright*, *R. v. Canavan*, 2019 ONCA 567, *Culotta*, *LaChappelle*, *R. v. Colbourne* (2001), 157 C.C.C. (3d) 273 (Ont. CA)).

[112] What is not permissible, as happened in *Dersch* and *Colarusso*, is for the police to bypass the requirement to obtain the necessary judicial authorization or other legal authority (such as a demand under the *Criminal Code* or informed consent). Nor can the police rely on medical personnel to further a police investigation by seizing evidence on behalf of the police. In those circumstances, the medical personnel may become agents of the police. This was the issue in *Taylor*.

[113] In *Taylor*, after detaining Mr. Taylor, the police knowingly delayed implementing Mr. Taylor's rights under section 10(b) and continued to gather evidence by relying on the medical personnel to draw blood for medical

purposes (*R. v. Taylo*r, 2013 ABCA 342, at paras. 28-29, aff'd 2014 SCC 50, [2014] 2 S.C.R. 495). By using the medical personnel's treatment of Mr. Taylor to gather evidence on their behalf, while knowingly delaying implementation of Mr. Taylor's *Charter* rights, collection of the medical blood was not independent of the conduct of the police, but was the product of such conduct.

[114] In contrast, in these circumstances, there was no evidence that Constable Gillingham "directed" or "relied" on the medical staff to further his investigation, or that the medical staff became agents of the state. The trial judge made no such finding. The evidence was clear that Constable Gillingham intended to obtain blood pursuant to the *Criminal Code*, not through medical treatment by the medical personnel. When the decision was made to pursue the blood taken for medical purposes, the necessary judicial authorizations were obtained.

[115] While the medical blood drawn the second time was close in time to when Mr. Villeneuve was detained, the independence of the medical personnel from the conduct of the police meant there was no causal link with the *Charter* violation (See *Canavan*, at para. 7, *Colbourne*, at para. 58, *Culotta*, at paras. 51, 54, and *LaChappelle*, at para. 40). The medical blood was not drawn because Constable Gillingham had detained Mr. Villeneuve, but because it was an appropriate medical procedure (See evidence of Dr. Cross, Transcript, at 121-123).

[116] For the above reasons, there was no nexus between the failure to give Mr. Villeneuve his rights under section 10(b) and the collection of the blood for medical purposes. This was so regardless of when Mr. Villeneuve was detained. There being no nexus, the trial judge erred in excluding this evidence under section 24(2) of the *Charter*.

**The medical records**

[117] I would make a similar finding regarding the medical records excluded by the trial judge. This was information that existed independently of the conduct of the police and was available through a properly issued judicial authorization. There was no temporal, causal or contextual nexus between this evidence and the manner in which Mr. Villeneuve's *Charter* rights were breached. There is no reason that this evidence should be excluded under section 24(2) because of the unrelated section 10(b) violation (See *Culotta*, at para. 24).

**The observations by Constable Gillingham of Mr. Villeneuve**

[118] Likewise, the trial judge's exclusion of Constable Gillingham's observations of Mr. Villeneuve at hospital was in error. Given that Mr. Villeneuve was not detained until the blood demand, Constable Gillingham's observations prior to that point were not obtained in a manner that violated Mr. Villeneuve's rights. The observations were admissible as direct evidence.

[119] However, one of the observations made by Constable Gillingham, the "blood having been drawn for medical purposes" the second time, was made after the blood was drawn pursuant to the *Criminal Code*. It is unclear if Mr. Villeneuve was still detained at this point. The procedure under the *Criminal Code* was complete. Even if there is a temporal connection, a causal and contextual connection is absent. As stated, this procedure was independent of the police conduct. Observations after the blood was drawn pursuant to the *Criminal Code* were incidental to the detention. Given the location was a hospital room in an emergency ward with a window, the officer may have been able to make the observation whether or not Mr. Villeneuve was detained.

[120] For this reason, Constable Gillingham's observations, including his observation of the blood drawn from Mr. Villeneuve for medical purposes, was not evidence that was obtained in a manner that violated Mr. Villeneuve's *Charter* rights. The trial judge erred in excluding this evidence under section 24(2).

**The statements of Mr. Villeneuve**

[121] As the statements of Mr. Villeneuve were made before he was detained and prior to the *Charter* violation, they have no connection to the *Charter* violation. This evidence should not be excluded under section 24(2). Until Mr. Villeneuve was detained, Constable Gillingham was entitled to question Mr. Villeneuve, as per *Culotta*, *LaChappelle*, and *Cartwright*.

**Conclusion on Issue 2**

[122] The trial judge erred in excluding the above evidence without first assessing whether the evidence fell within the purview of section 24(2).

[123] The only evidence that was obtained in a manner that violated Mr. Villeneuve's *Charter* rights was the blood drawn pursuant to the *Criminal Code*. As the Crown has never sought to introduce this evidence, but conceded its

inadmissibility, there is no need to conduct an analysis using the *Grant* criteria of that evidence.

[124] However, the statements and observations made prior to the *Charter* violation were not caught by section 24(2). Similarly, the blood drawn for medical purposes and the medical records was not evidence obtained by the police, but evidence that existed independently of the *Charter* infringing conduct. None of this evidence should have been excluded under section 24(2).

**ISSUE 3: Did the trial judge err in setting aside the judicial authorizations?**

[125] Having concluded that Mr. Villeneuve was not detained until the blood demand at 5:30, and that the observations by Constable Gillingham of Mr. Villeneuve and the statements made by Mr. Villeneuve were admissible evidence, the trial judge's decision to excise this information from the ITOs in support of the judicial authorizations must also be set aside. There was no basis to excise this information and the judicial authorizations were presumed to be viable (*R. v. Al-Amiri*, 2015 NLCA 37, 368 Nfld. & P.E.I.R. 146, at para. 23).

[126] I would add only that the trial judge erred in failing to assess the adequacy of the ITOs. Even if evidence excluded from trial under section 24(2) of the *Charter* was properly excised from the ITOs (*R. v. Grant*, [1993] 3 S.C.R. 223, at 251-252), the trial judge was then obliged to assess whether the remaining information in the ITOs was adequate such that the judicial authorizations could have been granted (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, *R. v. Garofoli*, [1990] 2 S.C.R. 1421, see also *Colbourne*, at para. 41). This he did not do, and in this regard, also erred.

**ISSUE 4: Is the trial judge's ruling on the second *Charter* application within the scope of the appeal?**

[127] Upon being successful on the first *Charter* application, counsel for Mr. Villeneuve brought the second *Charter* application challenging two subsequent judicial authorizations. The second application incorporated the trial judge's decision from the first application (Transcript, at 345). When asked by the trial judge why this second *Charter* argument was not addressed with the first application, counsel for Mr. Villeneuve stated (Transcript, at 348):

> ... it sort of needed to wait for this decision to do that and, of course, you know, when you're making decisions on applications to file, obviously money is always an issue…

[128] When the parties later appeared to address the second *Charter* application, the Crown advised the court that in light of the trial judge's first decision, including "the findings of fact" and "what has been excluded", the second *Charter* application was conceded (Transcript, at 350). Mr. Villeneuve argues that the Crown should not be able to raise the second *Charter* application on appeal, given it was not raised in their notice of appeal.

[129] The trial judge granted the second application and excluded the evidence identified in the application. The Crown asks this Court to set aside the trial judge's decision to allow the second application. Mr. Villeneuve submits that the trial judge's decision on the second *Charter* application is not properly before this Court.

**ANALYSIS of Issue 4**

[130] The trial judge's ruling on the second *Charter* application is properly before this Court, for several reasons.

[131] An appeal under section 676 of the *Criminal Code* is from the acquittal, not individual rulings, or from the "result" not the "reasons" (See *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 4, and *Zelinski v. Pidkowich*, 2020 SKCA 42, at paras. 27-28). The trial judge's decision on the second application is simply one of the rulings that led to the acquittal of Mr. Villeneuve.

[132] Further, while the ruling on the second *Charter* application was not specifically enumerated as a ground of appeal, the notice of appeal states:

> SUCH FURTHER and other grounds of appeal as counsel shall advise and this Honourable Court may permit.

[133] This commonplace all-inclusive ground of appeal ensures that alleged errors, not initially identified, might be raised with the Court. The ruling by the trial judge on the second *Charter* application is captured by "such further grounds".

[134] Further, contrary to Mr. Villeneuve's assertion that the second *Charter* application was independent from the first application, the two decisions are related. This is not a new issue (See *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689). The trial judge's query as to why the subsequent *Charter* application was not brought with the first application, and defence counsel's response that she had to "wait" for the first decision, demonstrates a link between the judicial

authorizations. When cross-examining Constable Steele, the officer responsible for preparing the ITOs in support of the judicial authorizations, counsel for Mr. Villeneuve suggested to the officer, who agreed, that the ITOs "built" upon each other in a "chronological" way (Transcript, at 193-194, 200-201).

[135] This relationship between the judicial authorizations meant that if the trial judge excised the impugned evidence from the initial ITO, then it was evident that he would excise that evidence from *any* of the ITOs. As the transcript illustrates, the reason the Crown conceded the second *Charter* application was because of the evidence ruled inadmissible in the first *Charter* application.

[136] Further, to set aside the trial judge's ruling with respect to the judicial authorizations in the first *Charter* application, but not the second *Charter* application, would result in contradictory outcomes. The evidence from the ITOs in the second application would remain excised, despite the basis for this excision having been found to be an error.

[137] Finally, Mr. Villeneuve is not prejudiced by the Court's consideration of the second *Charter* application. Both parties addressed the issue at the outset of the hearing of the appeal. For example, in *R. v. McLean* (1988), 51 Man. R. (2d) 170 (Man. CA), the Crown was not precluded from pursuing an appeal notwithstanding that the notice of appeal was "technically deficient". The court concluded that the defence, who had not objected to the notice of appeal, was "under no misapprehension about what the Crown was seeking nor did it suffer any prejudice because of any alleged deficiency in the Crown's notice of appeal." As in *McLean*, Mr. Villeneuve is under no misapprehension as to the remedy the Crown seeks and why.

**Conclusion on Issue 4**

[138] For the above reasons, I am satisfied that the ruling by the trial judge on the second *Charter* application is within the scope of the appeal.

[139] As I have concluded that the impugned evidence should not have been excised, these further judicial authorizations are also presumed viable. I would therefore set aside the trial judge's decision in allowing the second *Charter* application.

**CONCLUSION**

[140] In concluding that Mr. Villeneuve was detained prior to the blood demand, the trial judge misapprehended the evidence. The trial judge made

erroneous factual findings, relied on irrelevant considerations and ignored the relevant consideration that the officer twice cautioned Mr. Villeneuve. This misapprehension caused the trial judge to mischaracterize the encounter between Constable Gillingham and Mr. Villeneuve and wrongly conclude that Mr. Villeneuve was detained at a point when the evidence did not support that there was a detention. I would set aside his decision that Mr. Villeneuve was detained prior to 4:43. Mr. Villeneuve was not detained until the blood demand was given at 5:30.

[141] The trial judge also improperly excluded evidence that had not been obtained in a manner that violated Mr. Villeneuve's *Charter* rights, including: the blood taken for medical purposes, the medical records, the statements of Mr. Villeneuve and the observations of Constable Gillingham. I would set aside his decision to exclude this evidence.

[142] The trial judge also erred in not only excising information from the ITOs and setting aside the authorizations, but in failing to consider the remaining evidence in the ITOs. I would set aside his decisions setting aside the judicial authorizations referenced in both *Charter* applications.

[143] Considering the circumstances of this case, the trial judge's errors had a material bearing on the acquittals. If this evidence had not been excluded, and the judicial authorizations remained viable, the outcome of the trial could reasonably have been expected to have been different (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14). The Crown has met its burden in establishing that the appeal should be allowed.

[144] I would allow the appeal, set aside the acquittals on all charges and remit the matter to provincial court for trial.

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F.J. Knickle J.A.

I Concur:_____

L.R. Hoegg J.A.

I Concur:_____

F.P. O'Brien J.A.