

Indexed as:

R. v. Colarusso

Nicola Colarusso, Appellant;

v.

**Her Majesty The Queen, Respondent, and
The Attorney General of Canada, the Attorney General of
Quebec and the Attorney General for New Brunswick,
Interveners.**

[1994] 1 S.C.R. 20

[1994] S.C.J. No. 2

File No.: 22433.

Supreme Court of Canada

1993: March 30 / 1994: January 26.

**Present: Lamer C.J. and La Forest, L'Heureux-Dubé,
Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law -- Charter of Rights -- Unreasonable search and seizure -- Coroners Act permitting warrantless seizures by coroners -- Whether provision violates s. 8 of Canadian Charter of Rights and Freedoms -- Coroners Act, R.S.O. 1980, c. 93, s. 16(2)(a) -- Canadian Charter of Rights and Freedoms, s. 8.

Constitutional law -- Validity of legislation -- Whether investigatory provisions of Coroners Act intra vires province -- Coroners Act, R.S.O. 1980, c. 93, s. 16(2)(a) -- Constitution Act, 1867, s. 91(27).

Appellant was an impaired driver involved in two serious accidents within the course of a few minutes. He first struck a pick-up truck from behind sending it out of control, stopped briefly and drove on. Both occupants of the truck received significant injuries. Minutes later, appellant's vehicle crossed the centre line of the highway and was involved in a head-on collision killing the innocent driver. Appellant had been driving without headlights at the time of the second accident -- 1:30 a.m. The police arrived shortly after the second accident. Appellant had been knocked unconscious, was disoriented on regaining consciousness and his breath smelled of alcohol. Formal demand was made

for a breath sample, but no sample was taken. The police arrested appellant and took him to hospital where medical staff took blood and, assisted by a police officer, urine samples as part of a standard "Trauma Protocol Procedure". Although appellant was initially uncooperative, he ultimately consented to the samples being taken for medical purposes only.

A lab technician gave samples of the blood and urine to the coroner at the coroner's request pursuant to s. 16(2) of the Coroners Act but only after the coroner wrote a signed note explaining why he wanted the samples. The coroner then turned the samples over to a police officer at the hospital with instructions that they be properly stored and be taken for analysis.

Appellant was convicted. At trial, the analyst's testimony as to appellant's blood alcohol level, as determined by the tests done on the samples, formed an important part of appellant's convictions as the police had not obtained any independent bodily fluid or breathalyser sample from the appellant. The Court of Appeal upheld appellant's convictions. Here, the constitutional questions queried: (1) whether s. 16(2) of the Coroners Act infringed the Charter guarantee against unreasonable search and seizure (s. 8); (2) and if so, whether it was saved by s. 1; and (3) whether s. 16(2) was ultra vires the province because it encroached on the federal criminal law power.

Held: The appeal should be dismissed.

Per La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Iacobucci JJ.: Where a bodily sample is seized by a party other than the police but is ultimately used against the individual in a criminal prosecution, the court must go beyond the initial non-police seizure and determine whether the actions of the police constitute a seizure by the state or make the initially valid seizure by the coroner unreasonable.

Absent evidence to the contrary, the finding that the police officer who helped appellant urinate into a bottle at the hospital was acting as agent of the hospital and not as a police officer should stand. The presence of the officer, however, was unwise as the hospital staff could have obtained the sample themselves.

The activities of the police after the arrival of the coroner at the hospital could be viewed in two different ways: (1) as amounting to a seizure by the police independent of the prior seizure by the coroner, and (2) as making the originally valid seizure by the coroner unreasonable because that seizure was not confined to the limited statutory purpose but the evidence seized was ultimately used for law enforcement purposes. The seizure, however viewed, violated the guarantee against unreasonable search and seizure in s. 8 of the Charter.

The protection of s. 8 of the Charter can be invoked not only if the bodily fluid sample is taken directly from the person whose rights are affected (and from whom the sample originated) but also from the medical staff who extracted the sample. This protection of s. 8 necessarily extends to a state seizure where the "taking" is from the immediate possession of another person who is lawfully in possession of the bodily sample.

Here, the criminal investigation was already under way when the coroner gave the samples to the police. The evidence, prior to the taking of the blood and urine samples, was insufficient to sustain a conviction for the impaired driving offences. The police knew that further evidence of intoxication was required and consequently made a formal demand for a breathalyser sample at the accident scene. After the coroner gave the blood and urine samples to the police officers for the purpose of

transporting it to the laboratory, no further attempt was made to obtain a breathalyser sample or a warrant for a blood sample. The police must have known that they could use the results of the analysis as evidence against the appellant and may have regarded the blood sample as the best available evidence. Given the effective control by the police over the samples held by another agent of the state, the police seized the blood sample from the appellant independently of the coroner's seizure (although the police seizure was obviously facilitated by the actions of the coroner).

The actions of the police violated appellant's right to be secure against unreasonable seizures. The reasonable expectation of privacy in one's own bodily fluids guaranteed by s. 8 of the Charter is not diminished merely because a coroner chooses to exercise his or her power to seize evidence under s. 16(2) of the Coroners Act. The coroner's intervention accordingly did not alter the fact that the police must comply with the requirement in *Hunter v. Southam Inc.* that prior judicial authorization be obtained before seizing a bodily sample. The note written by the coroner to obtain the release of the samples from the hospital staff failed to meet the standards of a seizure for criminal investigation purposes because the coroner is not an independent judicial officer and the standard with which the coroner must comply is only the good faith belief that the evidence is necessary for the purposes of his or her non-criminal investigation. The subpoena obtained to bring the analyst to trial too was inadequate because it was not obtained until after the seizure by the police occurred and the evidence obtained by means of the subpoena was therefore the fruit of the invalid procedure.

The seizure, when the evidence was being used by the coroner for valid non-criminal purposes within the scope of the Coroners Act, was reasonable and did not violate s. 8 of the Charter. A lower standard than the *Hunter* requirement of prior judicial authorization may be acceptable in such circumstances. However, once the evidence or the information derived from it is appropriated by the state's criminal law enforcement arm for use against the person from whom it was seized, the seizure will become unreasonable and run afoul of s. 8 of the Charter. The state's criminal law enforcement arm cannot "piggy back" the coroner's investigation to circumvent the guarantees of *Hunter*.

It was not necessary to decide the constitutional questions, either as regards the alleged breach of the Charter or as regards the constitutional powers of the province relating to s. 16(2) of the Coroners Act under the Constitution Act, 1867 because the search, even assuming validity, was unreasonable.

While provincial legislation governing the conduct of inquests does not generally constitute an improper intrusion into the federal criminal law power, all the investigative powers granted to coroners are not necessarily within the legislative competence of the provinces. Even though an inquest is only held in the absence of any criminal charges, the coroner's investigation may overlap with an existing police investigation after charges have been laid or where charges may be pending. The potential for unacceptable infringement on the federal criminal law power is therefore greater at the investigative stage than during the inquest itself. The coroner's dependency on the police during the investigative stage mandated under s. 16(4) and s. 16(5) of the Coroners Act brings these provisions dangerously close to the boundary of legislation in the sphere of the federal criminal law power.

The coroner cannot be allowed to be in the position of assisting the criminal investigation through his or her compliance with the mandatory elements of s. 16(5) of the Coroners Act. The coroner can seize without complying with the *Hunter* standards because he or she does so for a purpose that is unrelated to a criminal investigation. Section 16(5) of the Coroners Act cannot be interpreted to permit the coroner to convert this exemption from these standards into an exemption for the police

in the conduct of a criminal investigation. The application of s. 16(5) of the Coroners Act must be restricted to situations in which it can clearly be determined that the police officers are acting merely as the agents of the coroner. Any other interpretation would imperil its constitutional validity. The police officers here were not acting as the agents of the coroner at the material times; rather, they were acting in furtherance of their criminal investigation.

Section 16(4), which provides that a coroner may authorize a police officer or a medical practitioner to exercise all the investigative powers granted to the coroner in s. 16(2), is equally troubling. This provision allows a coroner to delegate certain powers in emergency situations where he or she is unable to attend at the scene immediately. The danger is that the distinction between the coroner's investigation and the criminal investigation will be obliterated and the two investigations amalgamated into one. As well, by delegating s. 16(2) powers to the police, a coroner is giving the police investigatory powers beyond that which they normally possess given the reduced procedural requirements with which the investigator must comply under s. 16.

In determining whether evidence should be rejected under s. 24(2) of the Charter as bringing the administration of justice into disrepute, three factors should be considered: (1) the effect of admission of the evidence on the fairness of the trial process; (2) the seriousness of the Charter violation; and (3) the effect of exclusion on the reputation of the administration of justice.

The evidence of the forensic analyst at trial as to the alcohol content of the blood sample should not be excluded under s. 24(2) of the Charter: its admission would not bring the administration of justice into disrepute. The independent and prior existence of the sample, completely apart from any s. 8 infringement by the state, is an important consideration weighing on the side of allowing the introduction of the evidence. So too was the fact that all parties to the gathering of the samples -- the medical staff, the coroner and the police -- acted in good faith and believed that they were acting within the areas of their authority. The critical evidence would almost certainly have been discovered absent the violation and would have been obtained under a warrant. The Charter infringement accordingly had only a minimal effect on the outcome of the trial. Finally, the offence occurred in such aggravating circumstances that the repute of the administration of justice would be negatively affected if the evidence were to be excluded.

Per Lamer C.J. and Cory, McLachlin and Major JJ.: Appellate interference with the finding that the samples were taken with appellant's consent solely for medical purposes was unwarranted because the evidence supported this finding. The act of obtaining these samples did not constitute a seizure within the meaning of s. 8 of the Charter. The coroner's taking the samples from the hospital staff was conceded to constitute a seizure for the purposes of s. 8 of the Charter; the hospital held them solely for medical reasons. The tendering of the coroner's samples and analysis into evidence at criminal proceedings did not constitute a further seizure.

The police did not need to obtain a warrant to obtain blood from the accused or pursue their demand for a breath sample because the samples existed and were analysed. An important distinction exists between obtaining samples in breach of the accused's right to refuse treatment and the use in court of evidence obtained pursuant to statutory authority. The only seizure attracting s. 8 scrutiny was that by the coroner under s. 16(2) of the Coroners Act.

The coroner's seizure was reasonable because it was authorized by the Coroners Act which was both valid and reasonable and it was effected in a reasonable manner. The coroner was entitled, and perhaps required by law, to continue his investigation notwithstanding the simultaneous police investi-

gation. Section 27 of the Coroners Act does not bar investigation by a coroner when a person has been (or is likely to be) charged with an offence under the Criminal Code in respect of the death in question.

Assuming the constitutionality of the rest of s. 16, which is not challenged, the powers conferred under s. 16(2) of the Coroners Act are *intra vires* the province. These powers are incidental to the duties assigned to coroners, notably to investigate a death to determine if an inquest is necessary. This power, when used to seize samples of bodily substances of an accused, does not constitute an intrusion by provincial action of the sanctity of the right to remain silent and therefore does not violate the federal criminal law power.

The seizure was reasonable and accordingly did not violate s. 8 of the Charter notwithstanding the absence of prior judicial authorization. The reasonableness of the power granted must be analysed in light of the particular context in which it operates. Here, the coroner has both investigative and quasi-judicial duties. The criterion in *Hunter v. Southam Inc.* that there be reasonable and probable cause to believe that a specific offence has been committed was inapplicable in this context because the coroner's role was not to investigate crime or to reach any conclusions about whether a crime has been committed. Given this irrelevancy, the applicability of the other *Hunter v. Southam Inc.* criteria was doubtful.

No police seizure occurred here. The court must focus on how the public authority (the police) obtained the samples. Here, the coroner obtained the samples pursuant to s. 16(2) of the Coroners Act and turned them over to the police for safekeeping pursuant to s. 16(5). Assuming the constitutionality of s. 16(2), no taking by the police of the samples occurred without the person's consent apart from the actions which are consequent upon the coroner's seizure. No complaint was made as to the discovery of the evidence (implicating the law of search) or as to the steps taken to preserve it (implicating the law of seizure). The police knew of the evidence and were not concerned to preserve it apart from fulfilling their duties with respect to the Coroner's Act.

There was no improper cooperation among the coroner, the police and medical personnel so as to cause the police actions to constitute a seizure. The presence of the police officer in the emergency department was quite proper given that the accused was under arrest. The hospital lab technician was initially reluctant to turn over the samples to the coroner and only did so after speaking to the attending physician and obtaining a written note from the coroner. The police were required to take charge of the samples by virtue of s. 16(5) of the Coroners Act. (The constitutionality of this provision was not challenged here.)

It was not necessary to decide if calling the analyst to testify as to the significance of the samples constituted a seizure by the Crown within the meaning of s. 8 of the Charter. Even if this is characterized as a seizure within the meaning of s. 8, it is reasonable. The Thomson criteria for prior authorization were met as far as the introduction of the evidence at trial was concerned. Given these circumstances, the interest of the state in taking and using the information took precedence over the accused's privacy interest. His rights under s. 8 were not violated by the production of the evidence against him at trial.

Cases Cited

By La Forest J.

Considered: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Dymont*, [1988] 2 S.C.R. 417; referred to: *R. v. Pohoretsky*, [1987] 1 S.C.R. 945; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *Faber v. The Queen*, [1976] 2 S.C.R. 9; *Starr v. Houlden*, [1990] 1 S.C.R. 1366; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Mellenthin*, [1992] 3 S.C.R. 615; *R. v. Dersch*, [1993] 3 S.C.R. 768; *R. v. Erickson* (1992), 72 C.C.C. (3d) 75, *aff'd* [1993] 2 S.C.R. 649; *R. v. Therens*, [1985] 1 S.C.R. 613.

By Lamer C.J. and Cory, McLachlin and Major JJ.

Considered: *R. v. Dymont*, [1988] 2 S.C.R. 417; *R. v. Pohoretsky*, [1987] 1 S.C.R. 945; *R. v. Dersch*, [1993] 3 S.C.R. 768; referred to: *Starr v. Houlden*, [1990] 1 S.C.R. 1366; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 8, 24(1), (2).
 Constitution Act, 1867, s. 91(27).
 Coroners Act, R.S.O. 1980, c. 93 (now R.S.O. 1990, c. C-37), ss. 15, 16(2), (4), (5), 27, 31(1), (2).
 Criminal Code, R.S.C. 1970, c. C-34, s. 238(3) [am. S.C. 1985, c. 19, s. 36].

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Fairburn, Michal. "Case Comment: *R. v. Colarusso*" (1992), 4 J.M.V.L. 34.
 Granger, Christopher. *Canadian Coroner Law*. Toronto: Carswell, 1984.
 Marshall, T. David. *Canadian Law of Inquests: a Handbook for Coroners, Medical Examiners, Counsel and the Police*, 2nd ed. Scarborough, Ont.: Thomson Professional Pub. Canada, 1991.

APPEAL from a judgment of the Ontario Court of Appeal (1991), 44 O.A.C. 241, 28 M.V.R. (2d) 7, affirming the accused's conviction by Speyer Dist. Ct. J. on two counts of impaired driving causing bodily harm, one count of failing to stop at the scene of an accident and one count of criminal negligence causing death. Appeal dismissed.

Clayton C. Ruby and Julian N. Falconer, for the appellant.
 Ken Campbell and Renee M. Pomerance, for the respondent.
 Michael R. Dambrot, Q.C., and Chantal Proulx, for the intervener the Attorney General of Canada.
 Monique Rousseau and Gilles Laporte, for the intervener the Attorney General of Quebec.
 Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.

Solicitors for the appellant: Ruby & Edwardh, Toronto.
 Solicitor for the respondent: The Attorney General for Ontario, Toronto.
 Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.
 Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.
 Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

The reasons of Lamer C.J. and Cory, McLachlin and Major JJ. were delivered by

1 LAMER C.J. and CORY, McLACHLIN and MAJOR JJ.:-- The appellant was convicted at trial by judge alone on two counts of impaired driving causing bodily harm, one count of failing to stop at the scene of an accident, and one count of criminal negligence causing death. An appeal to the Ontario Court of Appeal was dismissed.

2 The issues raised by this appeal centre around the seizing of blood and urine samples by a coroner, and the subsequent use of analysis of those samples as evidence at the appellant's trial.

I. Facts

3 Shortly after 1:00 a.m. on November 15, 1986, two motor vehicle collisions occurred within minutes of each other about 1.6 kilometres apart on Highway 10 near Caledon, Ontario.

4 In the first collision, the appellant's vehicle rear-ended a pick-up truck. The truck had turned onto Highway 10 about 450 metres north of the site of the accident, and had accelerated to about 80 kilometres per hour by the time of the collision.

5 An off-duty police officer witnessed the first collision. He testified at the appellant's trial that he saw a Toyota pick-up truck being closely followed by a dark car, now known to be driven by the appellant. As he passed the two vehicles he heard a loud bang, which was caused by the appellant's car colliding with the rear of the pick-up truck. The truck flipped over, landing in a ditch, and its occupants were seriously injured. The appellant's car was seen by the witness to stop briefly at the side of the road and then to leave.

6 In the second collision, the appellant's car collided head-on with a Hyundai Pony. The second collision was witnessed by the driver of a car following a short distance behind the Hyundai. The appellant's car was driving without headlights southbound in a northbound lane of Highway 10. It then collided with the Hyundai. As a result of the second collision, the occupant of the Hyundai, Carol Connors, was killed and the appellant was injured.

7 The appellant was arrested at the scene of the second accident by attending police officers who observed signs of impairment. He was advised of his Charter rights, and a demand was made for a sample of his breath. However, before that could occur, the appellant was driven by the police to hospital in Orangeville for treatment of injuries he had sustained. No breathalyser test was given. Nor did the police make a demand for a blood sample.

8 The trial judge found as a fact that while the appellant was detained by the police at the hospital, he consented to blood and urine samples being taken for medical purposes. These tests were requested by the hospital as part of its standard "Trauma Protocol Procedure" for accident victims.

9 The urine sample was supplied by the appellant to, and in the presence of, a police officer. The sample was taken in a container provided for that purpose, free of contaminants. The sample was not retained by the police but was given by the police officer to hospital staff.

10 The urine sample was tested for the presence of blood. This test was conducted by an emergency department nurse. After she was finished, some of the urine was put in a container for the hospital lab.

11 The blood sample was taken by a nurse and was given to the hospital lab. The lab technician put blood from the test syringe into five separate test tubes.

12 The coroner, Dr. Warren Allin, had been called to the scene of the second accident, and then went to the hospital for the purposes of investigating Ms. Connors' death. He needed samples of the appellant's blood and urine to assist in that investigation. Dr. Allin testified he wanted these samples to determine if the appellant had been impaired.

13 The coroner, accompanied by a police officer, went to the hospital lab. He gave written directions to the lab technician that a portion of the blood and urine samples be turned over to him. The coroner then gave the samples to the police officer, requesting that they be taken to the Centre for Forensic Sciences and properly stored.

14 The Crown called as a witness, a forensic toxicologist, who had analyzed the samples at the request of the coroner for his own purposes under the Coroners Act. The forensic toxicologist testified that at the time of the accidents the appellant had a blood alcohol level between 144 and 165 mg per 100 ml of blood.

II. Relevant Constitutional and Statutory Provisions

15 Section 91(27) of the Constitution Act, 1867 confers upon the Parliament of Canada exclusive legislative authority over "The Criminal Law...." Sections 1, 8 and 24 of the Canadian Charter of Rights and Freedoms ("the Charter") provide:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

8. Everyone has the right to be secure against unreasonable search or seizure.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) 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.

16 Section 16(2)(c) and (5) of the Coroners Act, R.S.O. 1980, c. 93 (now R.S.O. 1990, c. C-37), reads:

16. ...

(2) A coroner may, where he believes on reasonable and probable grounds that to do so is necessary for the purposes of the investigation,

...

(c) seize anything that the coroner has reasonable grounds to believe is material to the purposes of the investigation.

(5) Where a coroner seizes anything under clause (2) (c), he shall place it in the custody of a police officer for safekeeping and shall return it to the person from whom it was seized as soon as is practicable after the conclusion of the investigation or, where there is an inquest, of the inquest, unless he is authorized or required by law to dispose of it otherwise.

III. Judgments in the Courts Below

District Court of Ontario

17 The trial judge held that the seizure of the blood and urine samples by the coroner was lawful pursuant to s. 16(2)(c) the Coroners Act, and did not offend s. 8 of the Charter. He distinguished *R. v. Dyment*, [1988] 2 S.C.R. 417, on the basis of the seizure here being authorized by law, stating:

I wish to emphasize, the seizure was made not to assist Constable Dambrowskas as part of his criminal investigation as to whether or not the accused was impaired at the time he was driving. Rather the samples were seized as part of a totally different investigation undertaken by the Coroner into the death of Carol Connors and the cause thereof. Accordingly, I find the seizures were made lawfully and do not offend the rights of the accused guaranteed by S. 8 of the Charter.

Court of Appeal for Ontario (1991), 44 O.A.C. 241

18 Finlayson J.A., who gave the reasons for judgment of the Court, noted that the seizure of the blood and urine samples was not made by police, but by the coroner, exercising his powers under s. 16(2)(c) of the Coroners Act. The seizure made by the coroner "was fully within his authority" and was legal.

19 Finlayson J.A. did not consider it necessary to rule on the constitutional validity of s. 16(2) of the Coroners Act, stating at p. 243:

Even assuming that s. 16(2) of the Coroners Act is unconstitutional and that the coroner's obtaining of the samples was unlawful, the evidence would nevertheless be admissible under s. 24(2) of the Charter. The coroner's seizure was made in the good faith belief that he was acting lawfully. If the samples had not been obtained under s. 16(2) of the Coroners Act they could have been obtained by the police under a search warrant which, on the facts of this case, would most certainly have been obtained.

It is clear then that the admission of the evidence of the analyst in these circumstances would not bring the administration of justice into disrepute.

IV. Issues

20 On August 17, 1992, the Chief Justice stated the following constitutional questions:

1. Is s. 16(2) of the Coroners Act, R.S.O. 1980, c. 93, as amended, inconsistent with s. 8 of the Canadian Charter of Rights and Freedoms?
2. If s. 16(2) of the Coroners Act, R.S.O. 1980, c. 93, as amended, is inconsistent with s. 8 of the Canadian Charter of Rights and Freedoms, does this provision operate as a reasonable limit, prescribed by law, which is demonstrably justified in a free and democratic society, pursuant to s. 1 of the Canadian Charter of Rights and Freedoms?
3. Does s. 16(2) of the Coroners Act, R.S.O. 1980, c. 93, as amended, encroach upon the federal criminal law power, and, if so, is the provision ultra vires provincial legislative jurisdiction?

21 The appellant has also raised several additional issues:

1. Did the Court of Appeal err in affirming the trial judge's findings that the appellant consented to the obtaining of blood and urine samples?
2. Did the Court of Appeal err in affirming the trial judge's finding that the seizure of the appellant's blood and urine samples did not constitute an infringement of his rights under s. 8 of the Charter?
3. Did the Court of Appeal err in failing to exclude the evidence arising from the blood and urine samples pursuant to s. 24(2) of the Charter?

V. Analysis

The Trial Judge's Finding of Consent

22 The appellant submits that the trial judge erred in finding that he consented to the blood and urine samples being taken for medical purposes. He also takes the position that the samples were taken for both medical and police investigative purposes. These arguments cannot succeed. The finding of fact made by the trial judge that the samples were taken with the consent of the appellant and solely for medical purposes is supported by the evidence and there is no basis for appellate interference with that.

Section 8 of the Charter

The Seizure

23 To fall within s. 8 of the Charter, there must first be a search or seizure. In this case, the appellant submits that there were in fact three searches or seizures for the purposes of the s. 8 analysis.

- i) The obtaining of blood and urine samples from the appellant by hospital staff

24 As pointed out above, the appellant has failed to show that this constituted a search or seizure on the facts of this case. The findings of the trial judge were that the blood and urine samples were taken for medical purposes and with the consent of the accused. These findings were not disturbed in the Court of Appeal and there is no proper basis upon which we should interfere with them. The samples were held by the hospital for medical purposes and no others.

- ii) The coroner seized the samples from hospital staff after they had been taken from the accused

25 It is conceded by the respondent Crown that the actions of the coroner in taking possession of the samples of the appellant's blood and urine constituted a seizure for the purposes of s. 8 of the Charter.

26 The questions which must be addressed concerning this seizure are, first, whether it was authorized by law; second, whether the law itself was reasonable; and third, whether the way the seizure was carried out was reasonable. We say at once that if the provisions of the Coroners Act under which the seizure was effected are valid, then the manner in which the seizure was carried out was reasonable. There is no suggestion that the coroner meddled in the rendering of medical assistance or did anything other than exercise his statutory powers in a straightforward way. The appellant submits that it was unreasonable for the coroner to seize samples in the fashion that he did during an ongoing criminal investigation. We disagree. The coroner had his duty to do and the samples provided evidence relevant to his investigation. He and the police were interested in some of the same material, but for different purposes. The appellant's submission is, in essence, that the coroner must stop his investigation if charges are pending. We say instead that the coroner is entitled to conduct his investigation provided, as here, that he does so for proper purposes and in a reasonable fashion.

Authorized by Law

27 There is no doubt that the seizure is authorized by the Coroners Act. Contrary to the assertions of the appellant, s. 27 of the Coroners Act does not have the effect of barring investigation by a coroner when a person has been (or is likely to be) charged with an offence under the Criminal Code in respect of the death in question. The coroner was entitled, and perhaps required, by law to continue his investigation notwithstanding the simultaneous police investigation and the prospect of the appellant's being charged with a criminal offence. The appellant submits, however, that s. 16(2) is ultra vires the province or, alternatively, violates s. 8.

- (a) Division of Powers

28 With respect to the division of powers point, the appellant's challenge is very narrowly focused. While the constitutional questions refer to s. 16(2), the appellant's factum challenges only s. 16(2)(c). We therefore must begin the analysis on the assumption (but of course without finally deciding) that the other provisions of the Act are constitutional.

29 The powers conferred under s. 16(2) are incidental to the duties assigned to coroners, notably to investigate a death to determine if an inquest is necessary. The appellant submits that the powers conferred in s. 16(2), when used to seize samples of bodily substances of an accused, are

tantamount to the invasion by provincial action of the sanctity of the right to remain silent and therefore intrudes upon the federal criminal law power.

30 Assuming, as we must for the purposes of this appeal, that the Coroners Act in general is valid provincial legislation, and finding as we do that the coroner's powers were exercised in good faith and for the purposes of an investigation which he was required by law to make, we reject the argument that there was any unconstitutional provincial intrusion upon the federal criminal law power. As Lamer J. (as he then was) said on behalf of the majority in *Starr v. Houlden*, [1990] 1 S.C.R. 1366, at pp. 1390-91:

... this Court has consistently upheld the constitutionality of provincial commissions of inquiry and has sanctioned the granting of fairly broad powers of investigation which may incidentally have an impact upon the federal criminal law and criminal procedure powers.

31 In our view, the powers conferred in s. 16(2) are properly incidental to the valid provincial purposes served by the Coroners Act.

(b) Section 8 of the Charter

32 We now turn to the challenge to s. 16(2) of the Act based on s. 8 of the Charter. The appellant argues that the seizure authorized by s. 16(2) is unreasonable because there is no requirement for prior authorization by a judicial officer based upon evidence on oath.

33 At the outset, we note that the requirements established in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, are not inflexible requirements applicable to all legislative contexts. For example, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, La Forest J. in considering the power to require production of documents under the Combines Investigation Act, found that while constituting a seizure within the meaning of s. 8 of the Charter, it need not meet the *Hunter v. Southam Inc.* requirements. La Forest J. pointed out at p. 506:

Since the adoption of the Charter, Canadian courts have on numerous occasions taken the view that the standard of reasonableness which prevails in the case of a search or seizure made in the course of enforcement of the criminal law will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context; see *Re Alberta Human Rights Commission and Alberta Blue Cross Plan* (1983), 1 D.L.R. (4th) 301 (Alta. C.A.), at p. 307; *R. v. Rao* (1984), 46 O.R. (2d) 80 (C.A.), at p. 96; *Re Belgoma Transportation Ltd. and Director of Employment Standards* (1985), 51 O.R. (2d) 509 (C.A.), at p. 512; *R. v. Quesnel* (1985), 12 O.A.C. 165, at p. 169; *Bertram S. Miller Ltd. v. R.*, [1986] 3 F.C. 291 (C.A.), at pp. 319, 324 and 341-43; *R. v. Bichel*, [1986] 5 W.W.R. 261 (B.C.C.A.), at pp. 271-73. The same approach underlies the decision of this Court in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, released concurrently, in which an order to produce documents issued under s. 231(3) of the Income Tax Act is viewed as administrative and held to be not unreasonable under s. 8 of the Charter.

The application of a less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the elaboration of s. 8.

34 The key aspect of the analysis is to assess the reasonableness of the power granted in light of the particular context in which it operates.

35 The coroner's role is to investigate deaths and to determine whether an inquest is required: s. 15. If an inquest is held, its purpose is to determine the identity of the deceased, how the deceased came to his or her death including when, where and by what means: s. 31(1). The determination of these matters is, of course, for the jury at the inquest, which is expressly prohibited from making any finding of legal responsibility: s. 31(2). The coroner has both investigative and quasi-judicial duties. He or she is required not only to investigate the death but also to preside at the inquest.

36 The powers under s. 16(2) are limited to inspection of any place in which the deceased person was prior to his or her death, to inspect and extract information from any records or writings relating to the deceased or his or her circumstances and reproduce such copies as he or she believes to be necessary and to seize anything that he or she has reasonable grounds to believe is material to the investigation.

37 The *Hunter v. Southam Inc.* criterion that there be reasonable and probable cause to believe that a specific offence has been committed is inapplicable in this context. It is not the coroner's role to investigate crime or to reach any conclusions about whether a crime has been committed.

38 Once it is determined that this criterion is not relevant, the applicability of the other *Hunter v. Southam Inc.* criteria is doubtful. As La Forest J. said in *Thomson* at p. 529:

If it is unnecessary under s. 17 to establish the existence, on reasonable and probable grounds, of a belief that a particular offence has been committed, then compliance with the remaining *Hunter v. Southam Inc.* criteria also becomes unnecessary. All of these are derivative from the reasonable and probable grounds requirement. This is obviously the case in respect of the requirement to show "reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered". It is also true of the requirement that the use of the power of search or seizure must depend on "a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the state against those of the individual". As Wilson J. today points out in *R. v. McKinlay Transport Ltd.*, there is no role for such an arbiter where there is no requirement of reasonable and probable grounds, since "his central role under *Hunter* is to ensure that the person seeking the authorization has reasonable and probable grounds to believe that a particular offence has been committed, that there are reasonable and probable grounds to believe that the authorization will turn up something relating to that particular offence, and that the authorization only goes so far as to allow the seizure of documents relevant

to that particular offence" (emphasis in original) (p. 649). The fact that s. 17 provides for an ex parte application by members of the Commission, who in *Hunter v. Southam Inc.* were found to be insufficiently detached from the process of investigation for the purposes of an application for permission to search premises, is not therefore fatal to its constitutionality.

39 The same flexible approach was adopted by Wilson J. (Lamer J., as he then was, concurring in this respect) although reaching a different conclusion on the facts of that case. Wilson J. said at pp. 495-96:

Not all seizures violate s. 8 of the Charter; only unreasonable ones. Put another way, an individual is accorded only a reasonable expectation of privacy. At some point the individual's interest in privacy must give way to the broader state interest in having the information or document disclosed. However, the state interest only becomes paramount when care is taken to infringe the privacy interest of the individual as little as possible. It is because of this need for delicate balancing that Dickson J. in *Hunter* identified several criteria which must be met if a search in a criminal investigation is to meet the test of reasonableness. I think that these criteria were accurately summarized by J. Holland J. at trial as set out earlier in these reasons. I would agree, however, that these criteria are not hard and fast rules which must be adhered to in all cases under all forms of legislation. What may be reasonable in the regulatory or civil context may not be reasonable in a criminal or quasi-criminal context. What is important is not so much that the strict criteria be mechanically applied in every case but that the legislation respond in a meaningful way to the concerns identified by Dickson J. in *Hunter*.

40 There are two important factors which take this seizure out of the *Hunter* criteria. The purpose of the investigation is not to uncover violations of the law or to obtain evidence for use in future prosecutions. The coroner is a quasi-judicial officer with limited powers to inspect and to seize items which he has reasonable grounds to believe are material to the purposes of an investigation. There is no criminal or quasi-criminal aspect to his or her investigation. Moreover, the coroner is a quasi-judicial officer who presides at inquests. In these circumstances, we find that s. 16(2) is not unreasonable because it does not require prior authorization or because material seized may later become admissible in a criminal proceeding.

iii) A further seizure occurred, according to the appellant, when the coroner's samples and analysis were "converted" into evidence tendered at criminal proceedings

41 As Justice La Forest stated in *R. v. Dyment*, supra, at p. 431: "the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority. . . . Section 8 was designed to protect against actions by the state and its agents. . . . the focus of enquiry must be on the circumstances in which the police officer obtained the sample. However, the circumstances under which it was obtained by the doctor are by no means irrelevant." So it was that in *R. v. Pohoretsky*, [1987] 1 S.C.R. 945, the taking of a blood sample by a physician at the request of the police, for no medical

purpose and without the consent of the accused, was conceded to be an unreasonable search. Similarly in *Dyment*, supra, the fact that the doctor, at the time he remitted the vial to the police, had in his possession the respondent's blood subject to a duty to respect respondent's privacy was sufficient to qualify the receipt by the police of the vial of blood without the consent of the doctor's patient as being a seizure within the meaning of s. 8. In *R. v. Dersch*, [1993] 3 S.C.R. 768, the medical personnel took a blood sample at the request of the police but contrary to the accused's unequivocal instructions to the officers. The Court held at p. 778 that the "obtaining of that information by the police in the circumstances of this case is analogous to a search or a seizure within the meaning of s. 8 of the Charter."

42 As La Forest J. made plain in *Dyment*, supra, the focus must be on how the public authority (at this point in the analysis the police) obtained the samples. The samples were seized by the coroner on the basis of statutory authority in s. 16(2) of the Coroners Act. This is admittedly a seizure for s. 8 purposes. The samples were turned over to the police as required by s. 16(5) of the Act. The police were essentially acting as a courier pursuant to the seizure made under statutory authority by the coroner. The medical personnel acted in taking the samples for medical purposes and with the accused's consent. They turned the samples over to the coroner on the basis of the latter's statutory powers to which their duty of confidentiality must yield, positing of course the validity of s. 16(2). The police did not request the sample or do anything beyond carrying out their duties as required by s. 16(5) of the Act. On the facts of this case, and for the moment assuming the constitutionality of s. 16(2) of the Act, we see no taking by the police of the sample without the person's consent apart from the actions which are consequent upon the coroner's seizure. We see no difference, as far as the police actions are concerned, between this case and one in which the Crown subpoenas a hospital lab technician to give evidence that came into existence during bona fide medical procedures and is relevant to a criminal proceeding. Here the appellant does not complain of how the police discovered the evidence (in which case the law relating to search would be implicated) nor with the steps taken by the police to preserve the evidence (in which case the law of seizure would be implicated). Here the police knew of the evidence and were not concerned to preserve it apart from fulfilling their duties with respect to the Coroners Act.

43 The situation is analogous to that foreseen by La Forest J. in *Dyment*, supra. He posited the case in which a doctor takes a sample, for valid medical purposes and with the consent of the patient, and then turns it over to the police. La Forest J. commented at p. 432: "that I cannot conceive that the doctor here had any right to take Mr. *Dyment*'s blood and give it to a stranger for purposes other than medical purposes unless the law otherwise required, and any such law, too, would be subject to Charter scrutiny" (emphasis added). In this case, the medical personnel acted with consent for proper medical purposes and turned the sample over to the coroner only in the face of his statutory powers. Those statutory powers are the focus of this case as La Forest J. suggests in the quoted passage that they should be.

44 It is suggested that somehow the actions of the police constitute a seizure because there was improper cooperation among the coroner, the police and the medical personnel. While it may be that the conduct of one actor in the chain is relevant to the characterization of that of others for this purpose, we do not see in this case any evidence or any reasonable inference of improper collusion among the medical personnel, the police and the coroner. There is nothing improper or even suspicious about the presence of the police officer in the emergency department in the circumstances disclosed by the evidence. The accused was under arrest. There was evidence at trial that the accused, after having been placed in a police cruiser, got out and started wandering southbound along the

highway. The police are not to be faulted for keeping their eye on a person under arrest. At the hospital, there was evidence that the accused was initially uncooperative. The emergency department was busy with seriously injured patients. The police officer was called back to the emergency department twice to assist the nurses who were trying to care for the accused. There is nothing suspicious in this. Indeed, the police could be faulted if they simply deposited an arrested person in a public hospital and then disappeared. The evidence is that the hospital lab technician was initially reluctant to turn over the samples to the coroner and only did so after speaking to the attending physician and obtaining a written note from the coroner. This is hardly consistent with any form of collusion or even over-readiness to cooperate. The police were required to take charge of the samples by virtue of s. 16(5) of the Coroners Act for the purpose of "safekeeping". The constitutionality of this provision is not challenged in these proceedings.

45 We conclude that the evidence in this case discloses no police seizure.

46 The remaining question is whether the calling of the analyst to testify as to the significance of the samples, constituted a seizure by the Crown within s. 8 of the Charter. It might be argued this amounted to appropriation or "seizure" of the accused's bodily fluids under the definition of "seizure" offered in *R. v. Dymont*, supra, at p. 431, amounting to "the use of a person's body without his consent". Against this argument, it might be countered that s. 8 is confined to physical seizures of property and does not apply to a witness's relevant and admissible testimony in Court.

47 However, we find it unnecessary to decide this issue on this appeal. Even if the analyst's testimony were regarded as a seizure within s. 8 of the Charter, it would comply with s. 8, as being a reasonable seizure. The trial itself establishes that there are reasonable and probable grounds to believe that the accused committed an offence. Since the issue arises only with respect to otherwise admissible evidence, it is also clear that the evidence is relevant to proof of the offence charged. In short, the conditions required for issuance of a warrant are met. The appropriate standard has been satisfied. In these circumstances, the interest of the state in taking and using the information takes precedence over the accused's privacy interest. It follows that the accused's rights under s. 8 cannot be said to have been violated by production of the evidence against him at trial.

48 While the police might have obtained a warrant to obtain blood from the accused or pursued their demand for a breath sample, these further intrusions were unnecessary given the existence of the samples and the fact that they were to be analyzed in any event. There is to us an important difference between obtaining samples in breach of the accused's right to refuse treatment or in breach of the patient's rights of confidentiality and, as occurred here, the use in court of relevant evidence obtained pursuant to statutory authority.

VI. Conclusion

49 We conclude that s. 16(2) does not limit the rights guaranteed by s. 8 of the Charter and is valid provincial legislation. The coroner's seizure pursuant to that section was therefore authorized by law and the law itself is reasonable. As mentioned above, we can find in the record nothing unreasonable in the way the coroner exercised his powers. The seizure therefore did not limit the rights guaranteed by s. 8 and it is unnecessary to consider s. 1 or s. 24(2). The subsequent admission of the analyst's evidence at trial was similarly reasonable and lawful.

50 We would answer the constitutional questions as follows:

1. Is s. 16(2) of the Coroners Act, R.S.O. 1980, c. 93, as amended, inconsistent with s. 8 of the Canadian Charter of Rights and Freedoms?

Answer: No.

2. If s. 16(2) of the Coroners Act, R.S.O. 1980, c. 93, as amended, is inconsistent with s. 8 of the Canadian Charter of Rights and Freedoms, does this provision operate as a reasonable limit, prescribed by law, which is demonstrably justified in a free and democratic society, pursuant to s. 1 of the Canadian Charter of Rights and Freedoms?

Answer: This question does not arise.

3. Does s. 16(2) of the Coroners Act, R.S.O. 1980, c. 93, as amended, encroach upon the federal criminal law power, and, if so, is the provision ultra vires provincial legislative jurisdiction?

Answer: No.

51 We would dismiss the appeal.

The judgment of La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Iacobucci JJ. was delivered by

52 LA FOREST J.:-- This appeal revisits the constitutionality of seizing blood or urine samples initially taken for medical purposes and using these samples as evidence against a defendant in a criminal prosecution. More specifically, the appeal requires this Court to determine whether a blood or urine sample initially seized and analyzed by a coroner acting pursuant to statutory authority and later appropriated by the state, without obtaining independent authorization, for the purpose of incriminating a defendant in an impaired driving trial violates the privacy rights inherent in s. 8 of the Canadian Charter of Rights and Freedoms, which guarantees everyone the right to be secure against unreasonable search or seizure.

Facts

53 The appellant, Nicola Colarusso, was involved in two motor vehicle accidents early in the morning of November 15, 1986. The accidents occurred only 1.6 kilometres apart on the same highway within the span of a few minutes. In both cases, the appellant's negligent driving was the obvious cause of the collisions.

54 The first accident occurred when the appellant struck a pick-up truck from behind, sending it out of control. After the collision, the appellant stopped his vehicle approximately 100 metres from the point of impact and pulled onto the shoulder of the road. He was observed by a witness (an

off-duty police officer) to glance back over his shoulder at the accident scene before driving away. Both occupants of the pick-up truck sustained significant injuries.

55 Minutes later, the appellant's vehicle crossed the centre line of the highway and struck an oncoming vehicle head-on, killing the female driver. The appellant was knocked unconscious for a period of approximately 15 minutes. Witnesses to the second accident testified that the appellant's car did not have its headlights on at the time of the collision (approximately 1:30 a.m.).

56 The Ontario Provincial Police arrived at the accident scene within minutes of the collision. The appellant was observed to be disoriented and his breath smelled of alcohol. The officers also noted that he had facial lacerations. The appellant was arrested for impaired driving at the scene and informed of his right to retain and instruct counsel. The officers also formally demanded a breath sample (although no breath sample was ultimately taken).

57 The police officers took the appellant to a hospital in the nearby town of Orangeville, Ontario. While waiting for treatment, the appellant asked a police officer if he could go to the bathroom, and then repeated the request to one of the emergency room nurses, who responded affirmatively. The nurse obtained a plastic jug and gave it to the police officer, who went with the appellant into the washroom and assisted in helping the appellant urinate into the jug. The police officer immediately returned the jug to the nurse who had given it to him.

58 Hospital staff testified that the hospital had a standard emergency procedure for the treatment of accident victims which they referred to as the "Trauma Protocol Procedure". As part of this procedure, the hospital routinely obtains both blood and urine samples for analysis. A nurse on duty tested the appellant's urine sample with a special "dipstick" which was used to determine if there was any blood in the urine. The urine sample was then placed in a container and transferred to the lab technician on duty. A syringe of blood was also taken from the appellant and placed into five vials, which were also given to the lab technician. Although the appellant was an uncooperative patient and indicated that he just "wanted to go home", the trial judge found that he ultimately consented to the samples being taken for medical purposes only.

59 After the samples had been transferred to the lab technician, the district coroner arrived at the hospital, accompanied by another police officer. He was met by the police officer who had brought the appellant to the hospital and assisted in obtaining the samples. At the hospital, the coroner examined the body of the deceased. In order to satisfy himself of the cause of the accident (which he was statutorily required to do), the coroner requested samples of the blood and urine from the lab technician. He was escorted there by the police officer who had assisted in taking the samples. After satisfying herself of the identity of the coroner, the lab technician released two vials of blood and the urine sample. The coroner wrote a signed note explaining the reason why he wanted the samples and provided this to the lab technician as his "warrant".

60 The coroner immediately turned the samples over to a police officer at the hospital with instructions that they be properly stored and taken to the Centre of Forensic Sciences for analysis. Pending their delivery to the Centre they were placed in the vault at the police station. The police officer prepared a report for the Centre indicating the tests to be performed. No further attempt was made to obtain a breath sample. An analysis of the blood samples ultimately determined that the blood alcohol level of the appellant at the time of the accident was between .14 and .17. The appellant was charged with two counts of impaired driving causing bodily harm, failing to stop at the scene of an accident, impaired driving causing death and criminal negligence causing death.

61 Although it is not clear how or when the police became aware of the results of the analysis, the analyst from the Centre of Forensic Sciences who had performed the analysis was subpoenaed at the trial and testified as to the results. This testimony formed an important element in the conviction of the appellant for impaired driving causing death and the other related offences as the police did not independently obtain any bodily fluid or breathalyser sample from the appellant.

Judicial History

Ontario District Court (Speyer Dist. Ct. J.)

62 At the beginning of his judgment, the trial judge made the following important findings of fact: (1) the appellant consented to the taking of the blood and urine samples for medical purposes only; (2) both the blood and urine samples were taken by the hospital for medical purposes pursuant to the Trauma Protocol Procedure and not for the purpose of assisting in any potential criminal investigation; and (3) the police officer who assisted the appellant in urinating was merely assisting the hospital in obtaining the urine sample for medical purposes and was not acting in furtherance of the criminal investigation.

63 As neither the police nor the coroner obtained a judicially authorized warrant for seizure of the blood or urine samples, the trial judge considered whether the seizure of the samples by the coroner was properly made. In his opinion, the coroner properly seized the samples in furtherance of his investigation into the cause of the fatal accident. The trial judge gave emphasis to the fact that the seizure was not made to assist the police officers in their criminal investigation, but, rather, was intended to be used solely for the coroner's investigation into the cause of death. In the result, the trial judge concluded that the seizure was authorized under s. 16(2) of the Coroners Act, R.S.O. 1980, c. 93, and, consequently, s. 8 of the Charter was not violated.

64 The appellant was convicted on the two counts of impaired driving causing bodily harm, failing to stop at the scene of an accident and criminal negligence causing death. The charge of impaired driving causing death was stayed. The appellant was sentenced to five years' imprisonment on the conviction for criminal negligence causing death and a term of 15 months for the other three convictions.

Ontario Court of Appeal (1991), 44 O.A.C. 241 (Finlayson, Krever and Galligan JJ.A.)

65 The Court of Appeal agreed with the trial judge's finding that the police did not seize the blood or urine samples at any time. Under its construction, the only seizure was initiated by the coroner and this was "legal" as he was acting under the authority of s. 16(2) of the Coroners Act.

66 The Court of Appeal chose not to address the appellant's contention that s. 16(2) of the Coroners Act was unconstitutional as being ultra vires the province or in violation of s. 8 of the Charter for want of procedural safeguards. Finlayson J.A. reached the following conclusion, at p. 243:

I do not think that we have to address these constitutional questions. The only issue before us on this appeal is the admissibility of the testimony of the analyst (from the Centre for Forensic Sciences) as to the blood and urine samples. The coroner testified at trial that he was not conducting a criminal investigation but that he was discharging his duties under the Coroners Act to determine how the deceased Carol Connors came to her death. Even assuming that s. 16(2) of the Coroners Act is unconstitutional

and that the coroner's obtaining of the samples was unlawful, the evidence would nevertheless be admissible under s. 24(2) of the Charter. The coroner's seizure was made in the good faith belief that he was acting lawfully. If the samples had not been obtained under s. 16(2) of the Coroners Act they could have been obtained by the police under a search warrant which, on the facts of this case, would most certainly have been obtained.

It is clear then that the admission of the evidence of the analyst in these circumstances would not bring the administration of justice into disrepute.

The Appeal to this Court

67 Leave to appeal to this Court was sought and granted, and the following constitutional questions were stated by the Chief Justice:

1. Is s. 16(2) of the Coroners Act, R.S.O. 1980, c. 93, as amended, inconsistent with s. 8 of the Canadian Charter of Rights and Freedoms?
2. If s. 16(2) of the Coroners Act, R.S.O. 1980, c. 93, as amended, is inconsistent with s. 8 of the Canadian Charter of Rights and Freedoms, does this provision operate as a reasonable limit, prescribed by law, which is demonstrably justified in a free and democratic society, pursuant to s. 1 of the Canadian Charter of Rights and Freedoms?
3. Does s. 16(2) of the Coroners Act, R.S.O. 1980, c. 93, as amended, encroach upon the federal criminal law power, and, if so, is the provision ultra vires provincial legislative jurisdiction?

68 Section 16(2) of the Coroners Act, R.S.O. 1980, c. 93 (now R.S.O. 1990, c. C-37), reads as follows:

16. . . .

(2) A coroner may, where he believes on reasonable and probable grounds that to do so is necessary for the purposes of the investigation,

- (a) inspect any place in which the deceased person was, or in which the coroner has reasonable grounds to believe the deceased person was, prior to his death;
- (b) inspect and extract information from any records or writings relating to the deceased or his circumstances and reproduce such copies therefrom as the coroner believes necessary;
- (c) seize anything that the coroner has reasonable grounds to believe is material to the purposes of the investigation.

Analysis

69 In the courts below, the appellant sought to impugn the introduction of the blood sample analysis in two ways. First, he argued that the sequence of events through which the police ultimately obtained the results of the blood sample analysis constitutes an unreasonable seizure by the police officers themselves. Secondly, he contended that the statutory provision enabling the coroner to seize the blood and urine samples, s. 16(2) of the Coroners Act, is unconstitutional on the basis that it is ultra vires the province of Ontario or, alternatively, that it violates s. 8 of the Charter by failing to incorporate sufficient procedural safeguards. I propose to deal with both these issues, although, as will appear, I do not find it necessary to rule definitively upon the constitutionality of s. 16(2) of the Coroners Act. I begin, then, by examining whether there was an unreasonable seizure on the assumption that s. 16(2) is constitutionally valid.

Was there an Unreasonable Seizure?

70 *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, teaches us that s. 8, like other Charter rights, must be broadly and liberally construed to effect its purpose. And that purpose, it identified, is to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments. The need for privacy can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion. That physical integrity, including bodily fluids, ranks high among the matters receiving constitutional protection, there is no doubt; see *R. v. Pohoretsky*, [1987] 1 S.C.R. 945; *R. v. Dyment*, [1988] 2 S.C.R. 417. Moreover, hospitals have been identified as specific areas of concern in the protection of privacy, given the vulnerability of individuals seeking medical treatment. The requirement for seizing items for the purpose of criminal law enforcement has also been set at a high level; not surprisingly -- it involves the freedom of the individual. Absent exigent circumstances, there is a requirement of prior authorization by a judicial officer as a precondition to a valid seizure for the criminal law purposes; see *Hunter*, supra. And the minimum requirement for such authorization is that the judicial officer be satisfied that there are reasonable and probable grounds that an offence has been committed and that the search will afford evidence of that offence. This high threshold, together with the general approach set forth in *Hunter*, at p. 155, that the function of the Charter "is to provide . . . for the unremitting protection of individual rights and liberties" sought to be protected, is the proper perspective from which the situation in the present case must be assessed.

71 It is beyond dispute that if the police had attempted to seize physically the blood sample directly from the hospital, the seizure would be subject to s. 8 scrutiny; see *Pohoretsky*. And *Dyment* establishes that even if a doctor or analyst had voluntarily given the sample to the police in a situation such as the present where the sample was taken solely for medical purposes, the sample would also fall within the protection of that provision.

72 The Court of Appeal obviously did not see the present case as falling within the ambit of the principles set forth in *Dyment*. It narrowly focused on the actions of the coroner in physically taking the blood and urine samples. After reviewing the chain of events leading up to the seizure of the samples by the coroner, the court concluded, at p. 243, that, given that the evidence was seized by the coroner and turned over to the police for safekeeping and transportation to the laboratory, it is "apparent that the police did not seize any blood or urine samples from the appellant at any time".

73 In proceeding in this way, it seems to me, the actions of the police, the nature of the coroner's possession of the blood sample and other surrounding circumstances are completely obscured. Assuming for the moment that the seizure by the coroner pursuant to s. 16(2) of the Coroners Act is constitutionally valid, such an approach is still, in my opinion, inappropriate. It is obvious from

Dyment that all the surrounding circumstances must be assessed to determine whether there has been a search by law enforcement officers, and I have no doubt the same is true in assessing the reasonableness of a search (a matter to which I shall return). Two statements in Dyment bear this out. In assessing the manner in which the police obtained the blood sample there, the Court at p. 431 observed:

As I see it, the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent. That is what occurred in Pohoretsky, *supra*. The focus of the enquiry in that case was on the actual taking of the blood sample. But one must bear in mind why that was so. In Pohoretsky, the blood sample was taken at the request of the police officer. The taking of the blood sample, therefore, immediately triggered s. 8 scrutiny. Section 8 was designed to protect against actions by the state and its agents. Here too the focus of enquiry must be on the circumstances in which the police officer obtained the sample. However, the circumstances under which it was obtained by the doctor are by no means irrelevant. [Emphasis added.]

Again, at p. 432, it is stated:

. . . I cannot conceive that the doctor here had any right to take Mr. Dyment's blood and give it to a stranger for purposes other than medical purposes unless the law otherwise required, and any such law, too, would be subject to Charter scrutiny. Specifically, I think the protection of the Charter extends to prevent a police officer, an agent of the state, from taking a substance as intimately personal as a person's blood from a person who holds it subject to a duty to respect the dignity and privacy of that person.

74 These excerpts make it clear that when a bodily fluid sample ends up being used by the police in a criminal prosecution, even when (as in Dyment) the sample was initially extracted for medical purposes in the absence of the police, the Court must focus on the actions of the police because s. 8 guarantees protection against the actions of the state or state actors, a protection that is particularly strict in relation to law enforcement activities. As discussed in Dyment the actions of the doctor are relevant and important. Though he or she may have obtained the sample under lawful circumstances, the limited purpose for which it was obtained cannot be ignored. Equally, the lawful possession of the sample by another cannot be allowed to detract from the review of the police actions which must remain a primary focus for the Court. The same is true in the present case. The police cannot rely on the actions of the coroner to shift the Court's focus away from their actions. The fact that the sample in this case may have initially been properly seized by the coroner is relevant, but this does not necessarily preclude a finding that the police may also have seized the sample or that the subsequent appropriation of the evidence for use in a criminal prosecution may make the seizure unreasonable.

75 Consequently, in dealing with a situation in which a bodily sample is seized by a party other than the police, but ultimately winds up being used against the individual by the criminal law enforcement arm of the state, it is essential that the court go beyond the initial non-police seizure and determine whether the actions of the police (or other agent of the criminal law enforcement arm of

the state) constitute a seizure by the state in and of themselves or make the initially valid seizure by the coroner unreasonable. That being so, the actions of the agents of the criminal law enforcement arm of the state will be subject to scrutiny under s. 8 of the Charter even if, absent the intervention of the police, the initial non-police seizure would not run afoul of the Charter.

76 In the present situation, we are aware of the following relevant facts: (1) the police charged the appellant at the accident scene before taking him to the hospital; (2) at the hospital, a police officer assisted the appellant in urinating into a bottle for subsequent analysis for medical purposes; (3) after seizing the blood and urine samples, the coroner turned the samples over to the police to transport them to the Centre for Forensic Sciences for analysis for the purpose of determining the cause of death as required by the Coroners Act; and (4) the Crown subpoenaed the analyst from the Centre to testify at the appellant's trial, an analyst also used by the police on previous occasions.

77 With these facts in mind, I will turn to a scrutiny of the two stages of police involvement, the first being the stage before the coroner was implicated, and the other following the seizure of the sample by the coroner.

78 I shall begin by briefly discussing the effect of the police officer's assistance in helping the appellant urinate into the bottle. According to the trial judge, the police officer was merely assisting the hospital in its medical analysis and had no ulterior motives respecting the sample. In other words, he was acting merely as an agent of the hospital and not in his capacity as a police officer, possessing no knowledge that the sample might ultimately be used for a purpose contrary to the interests of the appellant (which, as I discuss later, is a prerequisite to a s. 8 seizure). Since there was evidence to enable the trial judge to so conclude, I do not interfere with this finding of fact.

79 As an aside, I cannot, however, overstate my concern that such actions may reflect the type of unwelcome complicity between the police and hospital about which I wrote in *Dyment*, *supra*. The appellant in this case had already been charged with a criminal offence and, as such, was aware that the results of his treatment might ultimately be used to incriminate him. The presence of the police officer in the emergency room in such circumstances can only serve to undermine the physician-patient relationship, as the accused would likely interpret these facts as a sign that the medical staff was operating in conjunction with the police investigation. Such a scenario could have catastrophic results if an accused resisted essential treatment for fear it might incriminate him in future criminal proceedings. Although I have not categorized the assistance of the police officer at this early stage as a seizure, I would emphasize that such complicity is at best unwise and should be avoided at all times unless the assistance of the police officer is necessary in order to give essential medical treatment because of exigent circumstances. In this situation, the presence of the officer was unwarranted as the hospital staff could have obtained the sample themselves. The following words used in *Dyment*, at p. 434, are especially apt here:

Under these circumstances, the courts must be especially alert to prevent undue incursions into the private lives of individuals by loose arrangements between hospital personnel and law enforcement officers. The Charter, it will be remembered, guarantees the right to be secure against unreasonable searches and seizures.

80 I turn now to the activities of the police after the arrival of the coroner at the hospital. These can be viewed in two different ways: (1) as amounting to a seizure by the police independent of the prior seizure by the coroner, and (2) as making the originally valid seizure by the coroner unrea-

sonable because that seizure was not confined to the limited statutory purpose for which it was obtained, but was ultimately used for law enforcement purposes. I shall examine each of these approaches in turn.

Were the Samples Unreasonably Seized by the Police?

81 In *Dyment*, at p. 431, I observed that the essence of a seizure under s. 8 of the Charter is the taking of something from a person by a public authority without that person's consent. In my opinion, it is clear that the "taking" of a bodily fluid sample need not be directly from the person whose rights are affected (and from whom the sample originated), or even (as in *Dyment*) from the medical staff who extracted the sample, in order to constitute a seizure sufficient to invoke the protection of s. 8. The protection of s. 8 necessarily extends to a state seizure where the "taking" is from the immediate possession of another person who is lawfully in possession of the bodily sample.

82 In the present case, it is apparent that the coroner gave the police physical possession of the blood and urine samples for the purpose of transporting the samples to the lab. The coroner may well have intended that the police operate merely as his agents in transporting the samples to the laboratory and that their courier duties would be completely separate from their duties as police officers investigating a potential crime. It is evident, however, that the officers who transported the blood and urine samples knew of the potential incriminatory nature of the samples and intended to use the results of the analysis for their own purposes at the outset. They possessed the samples then and because of their close relationship with the coroner's office were effectively empowered and intended to deal with them for their own purposes -- criminal investigation.

83 At the time the coroner gave the samples to the police, the appellant had already been charged with several offences related to impaired driving. As such, the criminal investigation had already begun. Prior to the blood and urine samples, the only evidence that the appellant was impaired was the observation of the police officer at the accident scene who smelled alcohol on the appellant's breath and noted that he was "disoriented". It is apparent that this evidence would be insufficient to sustain a conviction for the impaired driving offences, as disorientation is consistent with any number of injuries that may be sustained in an automobile accident, and the smell of alcohol on the appellant's breath does not indicate that the appellant's blood alcohol level was over the legal limit. Indeed, the trial judge expressly stated that this evidence was inadequate to support a conviction.

84 Evidently, the police were also aware that further evidence of intoxication was required and, consequently, formally demanded a breathalyser sample at the accident scene. It is well established that a breathalyser sample must be obtained within a short time of the alleged infraction to be of evidentiary value. Yet, after the coroner gave the blood and urine samples to the police officers for the purpose of transporting it to the laboratory, no further attempt was made to obtain a breathalyser sample. Furthermore, the police did not request a blood sample from the appellant or even attempt to obtain a warrant to seize the original blood sample.

85 There is only one logical explanation for the strategy employed by the police: when the coroner gave possession of the blood and urine samples to the police officers for transportation to the Centre for Forensic Science, the police knew that they could use the results of the analysis as evidence against the appellant. Indeed, the police may have regarded the blood sample as the best available evidence. Not only was it obtained within an hour of the accident, but the analysis was to be undertaken by the same analysts at the Centre for Forensic Sciences who worked for the police

on a regular basis. As a result, the police saw no need to obtain further evidence of intoxication through the various means available to them. In my opinion, there can be no question that the police took possession of the samples and transferred them to the Centre of Forensic Sciences with the full knowledge that they might incriminate the appellant and with the intention of appropriating the results of the analysis for use in the criminal prosecution of the appellant. Given the effective control by the police over the samples held by another agent of the state, I would conclude that the police seized the blood sample from the appellant independently of the coroner's seizure (although the police seizure was obviously facilitated by the actions of the coroner).

86 At all events, they seized information involving the bodily integrity of the individual that could only be obtained originally with his consent or later pursuant to a statute for the limited purposes intended by the statute. This really goes to the underlying reason for the protection afforded by s. 8; one must not overemphasize the purely physical aspects of the seizure. In both *Hunter* and *Dyment*, the Court emphasized that what is protected by s. 8 is people, not places or things. The principal right protected by s. 8 is individual privacy, and the provision must be purposively applied to that end. The following statement from *Dyment*, at pp. 429-30, is relevant here:

Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the Privacy Act, S.C. 1980-81-82-83, c. 111. [Emphasis added.]

87 Given the conclusion that the police seized the blood and urine samples from the appellant, does the police seizure violate s. 8 of the Charter? In my opinion, it is readily apparent that the actions of the police violated the right of the appellant to be secure against unreasonable seizures. As earlier discussed, this Court has outlined the extent of s. 8 protection in *Hunter* and the privacy rights inherent in samples of one's own bodily fluids in *Dyment*. I can see no basis for holding that, at least in relation to the use of evidence for criminal law purposes, the reasonable expectation of privacy in one's own bodily fluids guaranteed by s. 8 of the Charter is diminished merely because a coroner chooses to exercise his or her power to seize evidence under s. 16(2) of the Coroners Act. As such, the intervention by the coroner does not alter the fact that the police must comply with the *Hunter* requirement of prior judicial authorization before seizing a bodily fluid sample which was initially taken from an impaired driving suspect for medical purposes.

88 In this case, the police obtained no such warrant prior to seizing the blood and urine samples. The note written by the coroner to obtain the release of the samples from the hospital staff is wholly insufficient under *Hunter*, since the coroner is not an independent judicial officer and the

standard with which the coroner must comply is only the good faith belief that the evidence is necessary for the purposes of his or her non-criminal investigation. So far as the subpoena obtained to bring the analyst to trial is concerned, it is inadequate, whatever might otherwise be the case, because it was not obtained until after the seizure by the police occurred. The evidence obtained by means of the subpoena was the fruit of the invalid procedure.

89 In the result, I would conclude that the actions of the police officers amount to a warrantless seizure of bodily fluids for use in a criminal prosecution and so violate the guarantee against unreasonable search and seizure in s. 8 of the Charter.

Did the Actions of the Police Make the Coroner's Seizure Unreasonable?

90 As earlier mentioned, there is another way to establish an unreasonable seizure by the state in the present circumstances. Assuming once again that s. 16(2) of the Coroners Act is constitutionally valid, the confiscation of evidence by the coroner in furtherance of his or her investigation is certainly a "seizure" within the meaning of s. 8 of the Charter. But it must be kept in mind that a coroner is also a state actor, albeit one who is intended to be separated from the criminal law enforcement arm of the state. If the coroner's power to seize under s. 16(2) of the Coroners Act is constitutionally valid, it must be on the basis that the coroner's seizure is "reasonable". The arguments advanced by the Crown seeking to establish the reasonableness of warrantless seizures by a coroner rely on the underlying premise that the coroner fulfils an essential non-criminal role. The state cannot, however, have it both ways; it cannot be argued that the coroner's seizure is reasonable because it is independent of the criminal law enforcement arm of the state while the state is at the same time attempting to introduce into criminal proceedings the very evidence seized by the coroner. It follows logically, in my opinion, that a seizure by a coroner will only be reasonable while the evidence is used for the purpose for which it was seized, namely, for determining whether an inquest into the death of the individual is warranted. Once the evidence has been appropriated by the criminal law enforcement arm of the state for use in criminal proceedings, there is no foundation on which to argue that the coroner's seizure continues to be reasonable.

91 In considering this position, it must be understood that the protection against unreasonable seizure is not addressed to the mere fact of taking. Indeed, in many cases, this is the lesser evil. Protection aimed solely at the physical act of taking would undoubtedly protect things, but would play a limited role in protecting the privacy of the individual which is what s. 8 is aimed at, and that provision, Hunter tells us, must be liberally and purposively interpreted to accomplish that end. The matter seized thus remains under the protective mantle of s. 8 so long as the seizure continues.

92 Consequently, so long as the evidence (or the information derived from the evidence) is in the possession of the state (i.e., the coroner or the criminal law enforcement branch), the following would hold true: (1) while the evidence is being used by the coroner for valid non-criminal purposes within the scope of the Coroners Act, the seizure is reasonable and not caught by s. 8 of the Charter; and (2) when the evidence, or the information derived from the evidence, is appropriated by the criminal law enforcement arm of the state for use against the person from whom it was seized, the seizure will become unreasonable and will run afoul of s. 8 of the Charter. In other words, the criminal law enforcement arm of the state cannot rely on the seizure by the coroner to circumvent the guarantees of Hunter, supra, as any seizure by the coroner pursuant to s. 16(2) is valid for non-criminal purposes only.

The Real Nature of the Investigative Procedures in this Case

93 Whichever of the foregoing approaches is taken, one arrives at the same conclusion: the seizure of the appellant's blood sample was unreasonable. It seems clear that what is involved in the circumstances of this case is a too convenient way of getting around the requirements set forth in *Hunter* and in *Dyment* for seizing property for purposes of law enforcement. What occurs is that property is seized by one state agent for a purpose for which the prerequisites for search may not be as demanding, and another state agent, one forming part of the law enforcement apparatus of the state, is permitted to claim the fruits of the search (the resulting information) for use for law enforcement purposes without regard to the rightly stringent prerequisites of searches for those purposes. That is the real nature of the procedures in this case. Upholding them, as the Court of Appeal did, requires incorrectly stressing the element of interference with property by a search, rather than what is really intended to be protected by s. 8 of the Charter, the right to individual privacy against governmental encroachment. The court's approach is a far cry from the statement of Dickson J. (as he then was) in *Hunter*, at p. 155, that the function of the Charter "is to provide . . . for the unremitting protection of individual rights and liberties", and specifically, of course, the right to privacy protected by s. 8, the right in issue in that case. That right, as has been frequently reiterated, must be liberally interpreted and defended by a purposive interpretation of s. 8. As noted in *Dyment*, at p. 426: "Its spirit must not be constrained by narrow legalistic classifications"

94 The decision of the Court of Appeal flies in the face of this admonition, and law enforcement officials are already looking at that decision as providing an easy passage around the constitutional requirements for searches for purposes of criminal investigation. The following comment by a counsel for the Attorney General for Ontario (see Michal Fairburn, "Case Comment: *R. v. Colarusso*" (1992), 4 J.M.V.L. 34, at p. 34) attests to this:

In *R. v. Dyment*, the Supreme Court of Canada made it clear that a warrantless seizure of bodily substances represents a serious breach of one's section 8 Charter rights and such a breach cannot be easily justified under section 24 of the Charter. Subsequent to this decision, any blood or urine seized by the police in the course of a criminal investigation, without obtaining pre-authorization, would appear to be inadmissible at trial. The *Colarusso* decision introduces an interesting caveat to the *Dyment* rule. The facts in *Colarusso* represent a new way in which to get otherwise inadmissible evidence relating to bodily substances in through the back door: the coroner's right of seizure.

This quotation captures the essence of the Court of Appeal's decision. As discussed, the effect of its analysis is that the privacy rights of an accused in his or her own bodily fluids are effectively circumvented by the intervention of a coroner who exercises his or her seizure powers under s. 16(2). Such a result is inconsistent with the purposive approach this Court has consistently adopted in dealing with the privacy rights guaranteed by s. 8 of the Charter, and cannot be countenanced. Basic constitutional principles governing the relations between the state and the individual must not be allowed to be displaced by such transparent devices.

Constitutionality of Section 16(2) of the Coroners Act Under the Charter

95 To this point, I have assumed the constitutionality of s. 16(2) of the Coroners Act. I now turn to a consideration of the constitutional issues arising from that provision, beginning with the concerns arising under s. 8 of the Charter. The obvious concern that arises from the quotation last

cited is that, in a fact situation such as existed here, the criminal law enforcement arm of the state is appropriating the bodily fluids to incriminate the accused through the "back door" without complying with the requirements of prior authorization outlined in *Hunter*, supra. In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, I alluded to the fact that the *Hunter* criteria may be more flexible in non-criminal situations. Citing this authority, the respondents have argued that the search and seizure power conferred on the coroner in s. 16(2) of the Coroners Act is justifiable because the coroner's investigation is undertaken for non-criminal purposes.

96 Having regard to the fact that a coroner's inquest fulfils an important non-criminal function, and some measure of investigatory powers is necessary to enable a coroner to fulfil his or her duties adequately, I am prepared to accept that a lower standard than the *Hunter* requirement of prior judicial authorization may be acceptable for seizures undertaken by a coroner for valid purposes. At the same time, however, the right of an accused to be free from unreasonable search and seizure under s. 8 of the Charter should not be forfeited merely because a coroner chooses to exercise his or her discretion to seize bodily fluids obtained from the accused for the purpose of investigating whether an inquest is necessary. In other words, I do not believe that the criminal law enforcement arm of the state should be able to "piggy-back" the coroner's investigation and appropriate evidence obtained by a coroner under s. 16 of the Coroners Act. While a coroner may be able to seize evidence without prior judicial authorization, the criminal law enforcement arm of the state must continue to comply with the *Hunter* requirements throughout its investigation.

97 In order for the s. 8 rights of an accused to be fully protected in a situation similar to the one in this case, the legislative scheme empowering a coroner to seize evidence for the purpose of his or her investigation must be carefully designed to incorporate procedural safeguards to prevent the state from circumventing the *Hunter* requirements through the coroner's actions. The investigation of the coroner must remain separate from any police investigation, and the legislative scheme must prevent the type of interaction between the coroner and the state that existed in the present case. The concerns about complicity between the state and medical personnel expressed in *Dymnt*, supra, are equally applicable to coroners and the criminal law enforcement arm of the state. The rights of individuals in their own bodily fluids must be carefully protected under s. 8 of the Charter. Where the courts determine that an individual's privacy rights in his or her own bodily fluids may be abridged in a particular non-criminal context for important policy reasons, such as those served by the coroner's inquest, the courts must be especially vigilant to ensure that the evidence is used for the designated purpose only. To permit such evidence to be appropriated by the state and thereby circumvent the *Hunter* requirement of prior authorization would be to limit unduly the privacy rights guaranteed by s. 8 of the Charter. In keeping with the purposive approach applied by this Court in past s. 8 jurisprudence, it is essential to ensure that the coroner's investigative powers are tempered in such a way as to ensure that the information derived by a coroner's investigation will not be used to circumvent the procedural requirements outlined in *Hunter* and thereby unfairly incriminate the appellant.

98 On reviewing the various subsections of s. 16 of the Coroners Act, I am particularly concerned about the potential for improper complicity between the police and the coroner. One has only to look to the facts of this case to see how the lack of procedural guidelines in the Act fails to protect adequately the privacy rights of an individual who consents to giving a blood sample for medical purposes only. It is sufficient to say that this Court will not tolerate using the coroner's right

of seizure as a "back door" means of defeating the spirit of *Dymnt* when it comes to protecting the privacy rights of an accused in his or her own bodily samples.

99 Since I have already found that the procedures adopted by the state in the present case violated s. 8 of the Charter, it is unnecessary for the purposes of disposing of this appeal to determine whether the failure of s. 16(2) of the Coroners Act to incorporate procedural safeguards violates that provision. Moreover, I believe it would be unwise to enter fully into the issue because, as I will presently indicate, s. 16(2) is inextricably linked with other subsections of s. 16. The relationship between these provisions was not at issue in this case, and the Crown has had no opportunity to respond to many of the points that I will address in the ensuing paragraphs.

Division of Powers Concerns

100 The appellant did not confine his attack to Charter arguments, but also raised questions relating to the constitutional powers of the province relating to s. 16(2) of the Coroners Act under the Constitution Act, 1867. As in the case of the validity of that provision under the Charter, I do not have to deal with these issues given my conclusion that, even assuming the validity of s. 16(2), an unreasonable seizure occurred. I think it right, however, to outline briefly a number of concerns I have about the investigative powers given to coroners under the Coroners Act with a view to providing some guidance.

101 The primary purpose of the coroner's inquest is to demonstrate that the state acknowledges the importance of each human life by requiring a determination of how each deceased individual died and, in appropriate circumstances, by directing a public investigation to consider how such fatalities may be avoided in the future. By preserving the essential dignity of human life, the coroner is obviously fulfilling an important societal function. The mandate of the modern coroner in Ontario is not to determine if any specific crime has been committed; in fact, s. 31(2) of the Ontario Coroners Act precludes any finding of legal responsibility during an inquest. It is apparent that coroners' inquests in Ontario today fulfil a role much different from that of their predecessors in the last century when the coroner acted as another criminal law enforcement arm of the state; see Christopher Granger, *Canadian Coroner Law* (1984), and T. David Marshall, *Canadian Law of Inquests* (2nd ed. 1991), for discussions of the development of the modern system of coroners.

102 Recognizing the development of the role played by the modern coroner, this Court has previously affirmed that the establishment of the office of coroner and legislation governing the conduct of inquests is within the legislative authority of the provinces; see *Faber v. The Queen*, [1976] 2 S.C.R. 9; *Starr v. Houlden*, [1990] 1 S.C.R. 1366. In these cases, the Court determined that investigation of whether a specific crime was committed is not the primary purpose of a coroner's inquest. Consequently, it appears to be settled that provincial legislation governing the conduct of inquests does not generally constitute an improper intrusion into the criminal law sphere reserved to Parliament.

103 The fact that this Court has affirmed that the provinces have the power to legislate with respect to inquests does not, however, necessarily lead to the further conclusion that all the investigative powers granted to coroners are within the legislative competence of the provinces. Whereas an inquest is only held in the absence of any criminal charges, the coroner's investigation may overlap with an existing police investigation after charges have been laid or where charges may be pending. Consequently, the potential for unacceptable infringement on the federal criminal law power is greater at the investigative stage than during the inquest itself. Several subsections of s. 16 give rise

to concerns in this regard. I set forth here only those that relate directly to the exercise by the police of the investigative powers given the coroner by s. 16(2), the provision directly challenged here, namely, s. 16(4) and (5):

16. ...

(4) A coroner may, where in his opinion it is necessary for the purposes of the investigation, authorize a legally qualified medical practitioner or a police officer to exercise all or any of his powers under clauses (2) (a), (b) and (c) but, where such power is conditional on the belief of the coroner, the requisite belief shall be that of the coroner personally.

(5) Where a coroner seizes anything under clause (2) (c), he shall place it in the custody of a police officer for safekeeping and shall return it to the person from whom it was seized as soon as is practicable after the conclusion of the investigation or, where there is an inquest, of the inquest, unless he is authorized or required by law to dispose of it otherwise.

104 The most troublesome element of the investigative powers in s. 16 of the Coroners Act is that, beyond providing the potential for complicity between a coroner and the police in a situation where criminal charges may be laid, s. 16(5) actually requires complicity. Under s. 16(5), a coroner who seizes any evidence in furtherance of his or her investigation is compelled, in the absence of legislation to the contrary, to place the evidence in the custody of a police officer for safekeeping. In many situations, this evidence may ultimately incriminate a defendant. As such, the coroner is assisting the police investigation into a potential crime by gathering the evidence and placing it into police custody. Often, the police will be in a better situation where the coroner seizes evidence because the coroner's power of search and seizure is restricted only by the pre-requisite that the coroner believes on reasonable and probable grounds that such action is necessary for the purpose of his or her investigation, whereas a police officer must generally comply with the prior authorization requirements of Hunter, supra, which can only be met if an independent arbiter is satisfied on reasonable and probable grounds that an offence has been committed and that a search may afford evidence of that offence. In effect, the coroner can easily find himself or herself in the position of assisting the criminal investigation merely by complying with the mandatory elements of s. 16(5) of the Coroners Act.

105 This cannot be allowed. We permit the coroner to seize without complying with the Hunter standards because he or she does so for a purpose that is unrelated to a criminal investigation. Section 16(5) of the Coroners Act cannot be interpreted to permit the coroner to convert this exemption from these standards into an exemption for the police in the conduct of a criminal investigation. The application of s. 16(5) of the Coroners Act must be restricted to situations in which it can clearly be determined that the police officers are acting merely as the agents of the coroner. While this may severely restrict its scope, any other interpretation would imperil its constitutional validity.

106 It is not possible to find in this case that the police officers were acting as the agents of the coroner at the material times. The trial judge made no finding in this regard; the issue was not raised before him. But the circumstances here, far from establishing that the police officers were acting

merely as agents of the coroner, make it abundantly clear that the police officers did what they did not as agents of the coroner but in furtherance of their criminal investigation. Let me reiterate these:

- (1) the appellant had been arrested and charged with impaired driving;
- (2) prior to the arrival of the coroner, the police officers had demanded a breath sample;
- (3) prior to the arrival of the coroner, a police officer assisted hospital staff to obtain a urine sample;
- (4) on his arrival, the coroner was met by the officer who had brought the appellant to the hospital and who had assisted in obtaining the sample;
- (5) the same officer escorted the coroner to the lab and introduced him to the lab technician;
- (6) the samples were placed in the vault at the police station pending delivery to the Centre for Forensic Sciences;
- (7) the police officer prepared a report for the Centre for Forensic Sciences which indicated the tests which were to be performed;
- (8) after obtaining the samples of blood and urine, the police made no further attempts to obtain a breath sample.

107 This is thus not a case in which an independent police officer was called in to take custody of the samples to further the coroner's investigation; the samples were released to the very officer who arrested the accused, thereby necessitating no further investigation by police through the proper channels of criminal procedure. Indeed, the arresting officer completed the paperwork for the Centre for Forensic Sciences and specified the tests to be conducted on the samples seized.

108 Section 16(4), which provides that a coroner may authorize a police officer or a medical practitioner to exercise all the investigative powers granted to the coroner in s. 16(2), is equally troubling. This provision was evidently enacted to allow a coroner to delegate certain powers in emergency situations where he or she is unable to attend at the scene immediately. Certainly, this provision will be of assistance in more remote areas where a coroner may be several hours' drive away from where the evidence is located. Yet, the potential for unacceptable overlap between the coroner's investigation and the criminal investigative sphere is extensive. When a coroner delegates s. 16(2) investigative powers to a police officer, the danger that the distinction between the coroner's investigation and the criminal investigation will be obliterated and the two investigations amalgamated into one is immediately obvious. It would seem difficult, as a practical matter, for the police to act for the coroner completely independently of their criminal investigation while exercising delegated power under s. 16. Whatever the police learn while acting for the coroner will readily become part of a foundation on which to build a case against a defendant. As well, by delegating s. 16(2) powers to the police, a coroner is giving the police investigatory powers beyond that which they normally possess given the reduced procedural requirements with which the investigator must comply under s. 16.

109 In my view, the dependency of the coroner on the police during the investigative stage mandated under s. 16(4) and s. 16(5) of the Coroners Act brings these provisions dangerously close to the boundary of legislation in the sphere of criminal law, an area within the exclusive jurisdiction of Parliament. As s. 16(4) and s. 16(5) operate in concert with s. 16(2), the problems I have identified affect s. 16(2) as well. I would, however, leave the question as to whether s. 16(2) of the Co-

roners Act is ultra vires unanswered as s. 16(4) and s. 16(5) have not been argued fully before this Court, and I have already found that the actions of the police constituted an unreasonable seizure, but I would reiterate that the previous decisions of this Court have not affirmed the validity of the investigative powers of the coroner and it is open to this Court in the future to determine that the interrelation between the police and the coroner under s. 16 of the Coroners Act impermissibly infringes on the federal criminal law power.

Should the Impugned Evidence Be Admitted Under Section 24(2) of the Charter?

110 Having concluded that the appellant's s. 8 Charter rights were infringed, should the evidence of the forensic analyst at trial as to the alcohol content of the blood sample be excluded under s. 24(2) of the Charter on the ground that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute? For the reasons that follow, I do not think that it should.

111 In *R. v. Collins*, [1987] 1 S.C.R. 265, this Court set out the factors to be taken into account in determining whether evidence should be excluded under s. 24(2), and grouped these factors under three headings:

- (1) the effect of admission of the evidence on the fairness of the trial process;
- (2) the seriousness of the Charter violation;
- (3) the effect of exclusion on the reputation of the administration of justice.

Fairness of the Trial

112 Lamer J. (as he then was) noted in *Collins*, at p. 284, that the factors relevant to the fairness of the trial "include the nature of the evidence obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was violated". In this part of the analysis, this Court has affirmed that the classification of evidence as being either "real" or "conscriptive" is of importance, although, as this Court has noted on other occasions, the mere fact that the impugned evidence is classified as either real or conscriptive should not in and of itself be determinative of the admissibility of the evidence; see my reasons in *Thomson Newspapers*, supra; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Mellenthin*, [1992] 3 S.C.R. 615; *R. v. Dersch*, [1993] 3 S.C.R. 768, per L'Heureux-Dubé J. However, it is a matter requiring close scrutiny.

113 This Court has previously undertaken a s. 24(2) analysis in the case of blood samples seized in violation of s. 8 of the Charter in several cases; see *Pohoretsky*, *Dyment* and *Dersch*, supra. The present case differs from these in that the impugned blood and urine samples in the present case were extracted by the hospital staff with the express consent of the accused, albeit a consent restricted to using the samples for medical purposes only. It is apparent, therefore, that the samples were already in existence prior to any seizure by the coroner or the police officers.

114 In *R. v. Erickson* (1992), 72 C.C.C. (3d) 75, the Alberta Court of Appeal was presented with a similar fact situation. In that case, a police officer was allowed to look at the results of a blood alcohol analysis done by the hospital and used this information as a basis for obtaining a warrant to seize the blood sample and report. The accused had consented to the taking of the blood sample for medical purposes. Although Major J.A. (as he then was) found that the s. 8 rights of the accused had been infringed, he determined that the blood sample was real evidence that existed in-

dependently of the Charter violation. This Court has recently affirmed this decision; see *R. v. Erickson*, [1993] 2 S.C.R. 649. L'Heureux-Dubé J.'s reasons in *Dersch* also support the proposition that blood samples obtained without the involvement of the state should be classified as real evidence. I would agree that in this case the blood sample should be classified as such.

115 The importance of determining that the blood sample was real evidence goes only so far as it demonstrates that the sample was given by consent and existed independently of the subsequent Charter violation. The coercive powers of the state played no role in creating the sample which was ultimately used to incriminate the appellant. As I discussed in *R. v. Wise*, *supra*, at p. 570, the prior existence of the sample is important in that it demonstrates "that [the sample] could have been discovered in any event". In my view, the independent and prior existence of the sample completely apart from any s. 8 infringement by the state is an important consideration weighing on the side of allowing the introduction of the evidence.

Seriousness of the Violation

116 Turning to the second group of factors, I would refer to the following excerpt from the judgment of Le Dain J. in *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 652:

The relative seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant. Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of the evidence.

117 In the present case, the hospital acted in good faith in taking the samples for medical purposes only. So did the coroner. His purpose, as determined by the trial judge, was only to find the cause of death as he is statutorily required to do, and his actions were within the ostensible authority granted by s. 16(2) of the Coroners Act. Finally, the police also appear to have acted in good faith throughout. Although I have determined that their actions constituted an unreasonable seizure of the blood and urine samples, the police believed that the coroner's seizure was valid and that they were within their rights in simply subpoenaing the analyst to testify as to the blood alcohol content of the sample initially seized by the coroner. Although this strategy led to a s. 8 violation which they could have easily avoided, the police did not wilfully circumvent any required procedural steps of which they were aware. Throughout the process, I believe, the actions that contributed to the s. 8 violation were inadvertent, and all parties reasonably believed they were acting within areas of ostensible authority. In this regard, the actions of the police are in direct contrast to those of the police officers in *Dersch*, *supra*, where the police wilfully attempted to circumvent appropriate procedures. The fact that all the parties in the present case believed they were following proper procedures and were acting under valid statutory authority is, in my view, an important distinguishing factor.

Effect of the Exclusion

118 Turning to the third arm of the *Collins* analysis, several factors bear comment. First, and most important, the critical evidence would almost certainly have been discovered absent the violation. The blood and urine samples had already been taken for medical purposes at the time of the seizure by the coroner, the police were aware of their existence, and charges had already been laid against the appellant. If the coroner had not intervened and seized the sample, the officers would

inevitably have obtained a warrant for the samples at the very first opportunity, would have done the same analysis and reached the same conclusions. A seizure pursuant to a warrant would be admissible under *Hunter v. Southam Inc.*, supra.

119 Furthermore, even without the existing sample, the police had several available means of pursuing evidence that would have been sufficient to convict the appellant. For instance, if the police had not been aware of the existence of the blood and urine samples, they would have pursued the breathalyser sample or another blood sample under s. 238(3) of the Criminal Code, R.S.C. 1970, c. C-34, am. by Criminal Law Amendment Act, 1985, S.C. 1985, c. 19, s. 36 (now R.S.C., 1985, c. C-46, s. 254(3), am. R.S.C., 1985, c. 27 (1st Supp.), s. 36.) In reality, the only factor that prevented the police from following accepted procedure under s. 8 of the Charter was the intervention of the coroner. Once the coroner had seized the samples and placed them in the possession of the police, the police did not foresee the need to obtain a warrant or independent evidence. On the whole, therefore, the Charter infringement only had a minimal effect on the outcome of the trial as the police would have obtained sufficient evidence in the course of alternative investigative measures.

120 Another factor to be considered is the appalling circumstances in which the underlying offence in this case was committed. Even in his drunken state, the appellant was lucid enough to realize that he was responsible for the first accident. This is demonstrated by the fact that he stopped, turned around to see what had happened and then proceeded to turn off his headlights to avoid detection and flee the scene of the accident. As a result of his failure to use headlights, the victim of the second accident did not have the opportunity to see that the appellant was driving on the wrong side of the road in the darkness. Although all cases of impaired driving causing death are tragic, the facts of this particular case are even more shocking to the conscience than usual. That the offence occurred in such aggravating circumstances would surely affect the repute of the administration of justice if the evidence were excluded.

121 I, therefore, conclude that the inclusion of the analyst's testimony at trial did not bring the administration of justice into disrepute. Although the right to privacy with respect to one's own bodily fluids is of fundamental importance and must be carefully protected, I am convinced that the particular circumstances of this case dictate that the evidence given by the analyst regarding the blood alcohol level of the appellant should be admitted even though the blood and urine samples were obtained in violation of s. 8 of the Charter. The criminal law enforcement arm of the state acted in good faith throughout the proceedings and, if the coroner had not intervened, the incriminating evidence would have ultimately been discovered through constitutional means. Coupled with the aggravating circumstances surrounding the commission of the offence, I am satisfied that the administration of justice would not be brought into disrepute by the admission of the evidence.

Disposition

122 I would dismiss this appeal on the basis that, although the seizure of the blood and urine samples violated s. 8 of the Charter, the evidence derived therefrom and introduced at trial should not be excluded under s. 24(2) of the Charter. Given this result, there is no need to rule upon the constitutionality of s. 16(2) and related provisions in the Ontario Coroners Act and the analogous legislation of other jurisdictions, although, as I noted, certain elements of s. 16 give rise to significant concerns. The conviction of the appellant at trial should be confirmed. It is unnecessary to reply to the constitutional questions.