Court of Queen's Bench of Alberta

Citation: R. v. Griffin, 2009 ABQB 696

Date: 20091218
Docket: 070674528Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Jason Murray Griffin

Accused

Reasons for Judgment
of the
Honourable Madam Justice S. J. Greckol

I. Introduction

[1] On March 10, 2007, between 10:30 and 11:00 a.m., Jamal Kemaldean was operating his motor vehicle, a red Toyota Yaris, southbound on Calgary trail in Edmonton. He was stopped at a red light on 42nd Avenue and Calgary Trail when his vehicle was stuck from behind by a grey Dodge Ram truck driven by Jason Murray Griffin. As a result of this accident, Mr. Kemaldean suffered bodily harm.

[2] A number of civilian witnesses observed the crash. The truck driven by Mr. Griffin did not slow at all as it approached the intersection and consequently the Toyota was struck with great force. After the collision, the truck ran over a fire hydrant and crashed into a nearby Olive Garden sign. One of the witnesses found Mr. Griffin with his eyes rolled back in his head, shaking as though he was having a seizure.

[3] Mr. Griffin was charged with operating a motor vehicle in a manner that was dangerous to the public and thereby causing bodily harm to Mr. Kemaldean, contrary to s. 249(3) of the *Criminal Code*.

[4] Mr. Griffin's preliminary hearing began on October 22, 2008. The matter proceeded to trial on April 20, 2009. During the trial, the Crown invited the Court to dismiss the charge against Mr. Griffin since he had been diagnosed with epilepsy, and his medical doctor was unable to say with certainty that he had warned Mr. Griffin at the relevant time prior to this accident that he should not drive because of his medical condition.

[5] Despite the acquittal, Mr. Griffin has advanced a *Charter* application, alleging breaches of s. 7 and s. 8 of the *Canadian Charter of Rights and Freedoms* and seeking costs against the Crown.

II. Facts

[6] On January 7, 2007, when Mr. Griffin was travelling on Wye Road near Sherwood Park, he lost consciousness and found himself in the ditch. The next day, he saw his family physician, Dr. Zaragoza, who diagnosed him as having suffered a "vasovagal syncope rule out seizure" and advised Mr. Griffin not to drive.

[7] Dr. Zaragoza arranged for a work-up to further investigate Mr. Griffin's condition, and referred him to Dr. Neil Roberts, a neurologist. The EEG, administered on January 17, 2007, showed paroxysmal discharges compatible with epileptic seizures. The results of the Carotid Doppler test undertaken on January 18, 2007 were normal, as were the March 5, 2007 results of the Holter monitor.

[8] Dr. Zaragoza saw Mr. Griffin again on March 6, 2007. However, at trial Dr. Zaragoza could not confirm that he again warned Mr. Griffin not to drive at this consultation.

[9] On March 10, 2007, Mr. Griffin was driving his truck when he collided with a Toyota Yaris, causing bodily injury to its driver, Mr. Kemaldean.

[10] Mr. Griffin had a further seizure in the presence of his father on April 10, 2009.

[11] On April 13, 2007, Dr. Roberts formally diagnosed Mr. Griffin with epileptic disorder and notified the Driver Control Board of this diagnosis on April 25, 2007.

[12] The charges against Mr. Griffin arose as a result of the car accident on March 10, 2007.

[13] On July 19, 2007, counsel for Mr. Griffin wrote to the Crown Prosecutor. His letter, endorsed with the words "**WITHOUT PREJUDICE**" in bolded capital letters, reads in part:

> *Synopsis*
>
> Mr. Griffin, a 35 year old automotive mechanic, with no criminal record and prior to March 10 2007 "the accident date" had never been diagnosed with or medically treated for seizure disorder. One month following the accident date his father witnessed Mr. Griffin have a seizure and after that incident Mr. Griffin was

prescribed *Dilantin* - antiepileptic – medication. His treating physician Dr. A.J. Zaragoza is willing to offer an opinion that "it is more than likely that Jason had a seizure on March 10, 2007 causing the MVA.".

. . .

I forward this letter for your kind review and consideration. I am hopeful that after review of same you will be in a position to withdraw or stay the charges.

I enclose the following:

1) Witness Statement of Donald Griffin, father of Jason Griffin, who observed Jason have a seizure on April 9, 2007 1 month after the accident;

2) Medical report and opinion of Dr. Zaragoza;

. . .

Conclusion

. . . I trust after your review of this file and the evidence I have provided you will be able to withdraw or stay the charge. I am certain my client will agree not to drive until the Driver Control Board has medically cleared him to do so.

. . .

[14] There were a number of documents enclosed with this correspondence, including a letter from Mr. Griffin's father describing the apparent seizure episode experienced by his son on April 9, 2007.

[15] Also enclosed was a letter dated July 3, 2007 from Dr. Zaragoza, who indicated that Mr. Griffin had been driving and found himself in a ditch on January 7, 2007. The doctor wrote:

- Diagnosis Vasovagal syncope (rule out seizure).

- Work up arranged

1) 24 hour Holter Monitor.

2) Carotid Doppler.

3) EEG.

4) Fasting Blood Sugar.

5) Referral - Dr. Neil Roberts - Neurologist.

6) We needed STAT CT Scan so he was sent to ER Grey Nuns Hospital.

- As is our usual advice in people with syncope is to caution him in climbing heights and operating machinery until work up is completed.

- He was also going to Kelowna after the January 7, 2007 incident. After his CT Scan was seen by the ER Specialist he was allowed to fly to Kelowna by the ER Doctor

- On March 10, 2007 Jason went through the intersection and had MVA and broke his ankle requiring surgery at University of Alberta.

- On April 10, 2007 while his Dad was driving him, his Dad witnessed a seizure for the 1st time - Dilantin was started 100 mg three times daily.

- Carotid Doppler was normal. EEG showed finding of abnormal. EEG compatible with Epileptic seizure. 24 hr monitor was normal

- Since Dr. Neil Roberts was to see him we were waiting for his consult as well.

In summary - It is more than likely that Jason had a seizure on March 10, 2007 causing his MVA.

[16] On June 27, 2008, a pre-trial conference was held between defence counsel, the Crown Prosecutor and a Provincial Court Judge, during which the Crown Prosecutor indicated she would be calling Dr. Zaragoza as a witness at the trial.

[17] On August 6, 2008, the defence filed notice that Dr. Roberts would be presented as an expert neurologist at trial. Counsel's covering letter asked whether the Crown required the attendance of Dr. Roberts or whether there would be agreement to enter his report without his attendance.

[18] Dr. Roberts concluded in his report that Mr. Griffin suffered from tonic clonic seizures with no form of warning. He reported that it was his understanding that, prior to April 13, 2007, Mr. Griffin had never been diagnosed with suffering from seizure or epileptic disorder. Dr. Roberts confirmed that the results of an EEG performed on January 17, 2007 were compatible with epileptic disorder, but that Dr. Zaragoza had not faxed him a referral request until March 13, 2007. Dr. Roberts advised that he saw Mr. Griffin on March 17, 2008.

[19] On September 2, 2008, the Crown Prosecutor sent a request for further investigation to the Edmonton Police Service (EPS), asking that a search warrant be obtained to seize Mr. Griffin's medical records. The request stated:

> Please obtain a search warrant and seize any medical records/treatment notes regarding Jason Murray Griffin from Dr. Antonio Zaragoza. There is evidence in the file that Mr. Griffin may have a pre-existing medical condition dating back to early January 2007 that he blacked out and drove off the road and may or may not have been told not to drive or should have known not to be driving.

[20] The Crown Prosecutor sent notice to the defence on September 22, 2008 indicating that the Crown would seek to have Dr. Zaragoza qualified as an expert in family medicine.

[21] On October 2, 2008, Constable MacPherson, a peace officer and member of the EPS, swore an Information to Obtain ("ITO") a production order pursuant to s. 487.012 of the *Criminal Code*. Constable MacPherson indicated in her ITO that she had presented an application for a production order to Judge Creagh on September 15, 2008, but that it had been denied because:

> (a) Judge Creagh had grave concerns about the privacy issue as the documents requested might be the property of the Accused and not of the doctor and s. 8 of the *Charter* might be violated.
>
> (b) There was no indication that the prosecutor had asked the defence for the documents.
>
> (c) There was no statement of reasonable and probable grounds respecting the documents.
>
> (d) The Constable had not affirmed "I believe these facts to be true."

[22] Constable MacPherson further deposed in her ITO that:

> I was contacted by Assistant Chief Crown Prosecutor, . . . by e-mail and by phone and she advised that the statutory pre-requisites for issuance of a Production Order are enumerated in section 487.012 of the *Criminal Code*. Regarding paragraph 2(a), I was advised that a Production Order orders a person, other than the person under investigation for the offence, to produce the documents or data or copies of them. This is the individual with possession or control of the documents. In this case, it is Dr. ZARAGOZA, as the holder of the medical records who is subject to the order to produce the documents or data, even though he does not have a reasonable expectation of privacy in same. Any *Charter* concerns are addressed by obtaining judicial pre-authorization as mandated by parliament. If the state complies with the conditions set by parliament (i.e. satisfies the statutory conditions outlined in section 487.012 of the *Criminal* Code), the warrant and seizure of those documents or data is *prima facie* in compliance with the *Charter*. Regarding paragraph 2(b), I was advised that there is no requirement in law to attempt to obtain the documents or data by consent prior to making an Application for a Production Order or for that order to issue. . .

[23] Constable MacPherson deposed that she had contacted the Crown Prosecutor, who advised her that the Crown had received a letter from defence counsel, including a report from Dr. Zaragoza indicating that Mr. Griffin had suffered a blackout and ended up in the ditch while driving on January 7, 2007; that Dr. Zaragoza had diagnosed vasovagal syncope (fainting) and had arranged for further tests for Mr. Griffin; and that he had cautioned Mr. Griffin against climbing heights and operating machinery until the work-up could be completed.

[24] Constable MacPherson deposed to her belief that there were documents or data kept by Dr. Zaragoza recording the examination, treatment and diagnosis of Mr. Griffin that might afford evidence on the dangerous driving charge since Mr. Griffin may have known of a pre-existing medical condition and that he should not have been driving. She asserted that Mr. Griffin's attendance on Dr. Zaragoza for treatment and referral for further testing, and any advice given to Mr. Griffin by Dr. Zaragoza, would be directly relevant to Mr. Griffin's state of mind and whether his conduct amounted to a marked departure from the standard of care of a reasonable person in his circumstance.

[25] Constable MacPherson deposed that she was requesting the records from January 6, 2007 to March 11, 2007 because it was during that period of time when Mr. Griffin first sought treatment and the records would indicate the treatments and advice he received up to and including the date of collision.

[26] On October 2, 2008, Judge Creagh granted a production order for the Accused's medical records pursuant to s. 487.012 of the *Criminal Code*, being satisfied that the ITO prepared by Constable MacPherson met all the requirements of that section; namely, that there were reasonable grounds to believe that Mr. Griffin had committed the offence of dangerous operation of a motor vehicle causing bodily harm contrary to s. 249(3) of the *Code*, and the documents or data would afford evidence respecting the commission of the offence (the "Production Order"). Specifically, she ordered production of the following:

> Medical Records for Jason Murray GRIFFIN from 2007 January 6 to 2007 March 11 to wit: all medical reports regarding GRIFFIN'S diagnosis by Dr. ZARAGOZA relating to his Syncope episode on 2008 January 7, and any other referrals to other doctors and their reports and diagnosis, all tests referrals and the test results, and all letters of correspondence from doctor to doctor and/or doctor to patient, and all doctor's or doctors' notes concerning this medical condition.

[27] Judge Creagh further ordered that:

> Dr. ZARAGOZA shall as soon as possible and in any case no later than 14 days from the date of the service of this Order, provide Constable MacPHERSON or her designate of the Edmonton Police Service the documents or data described in this Order. <u>If Dr. ZARAGOZA has any concerns about patient confidentiality or privilege he may provide the documents in a sealed envelope to be kept until further order of the court</u>.
>
> [Emphasis added.]

. . .

> Dr. ZARAGOZA shall surrender the records in ready to use photocopied paper format, and contact Cst MacPHERSON or her designate when the documents are ready for collection.

[28] On October 14, 2008, Constable MacPherson collected Mr. Griffin's medical records from Dr. Zaragoza's office. She also seized the letter from defence counsel to the doctor, and the letter from Mr. Griffin's insurance company to the doctor, and the doctor's response to each request. She did not check the contents or the dates on the medical records to ensure compliance with the terms of the Production Order.

[29] Constable MacPherson's Report to a Justice stated that on October 14, 2008, pursuant to s. 487.012 of the *Criminal Code*, she had searched the doctor's business premises and had seized an envelope containing 142 pages of medical records.

[30] Constable MacPherson's notes with respect to the Crown's request for further investigation stated in part:

08 Sep 8	Received request	
08 Sep 11	1546	Provided information by defence via letter from Dr. Zaragoza 1030 Y road. Neil Roberts, Grey Nuns March 10 April 10.
08 Sep 15	1100	Presented to Judge Creagh. She wanted to think about it and told me to come back at 1330.
	1330	1. Gave concerns private med are doctor or patient sec 8 of the *Charter*. 2. No statement of RPG that prosecutor didn't ask defence for the records. 3. No where say I believe these facts to be true
08 Sep 22	11:22	Spoke with clinic personnel, they asked for two weeks.
08 10 2	1445	If he has concerns of patient confidentiality he can hand documents in a sealed envelope to me
	1545	Served at medical clinic
08 10 14	1350	Picked up records from clinic.
	1508	Submitted PEU locker #4 Scona

[31] Constable MacPherson testified that she had some recollection of a brown envelope, about an inch and a half thick, with a yellow sticky affixed to it, but could not say for sure if the medical file in question was in such an envelope. She did not remember scotch tape or packing tape. Relying on her usual practice, she advised that she would have taken the envelope, opened it, checked to see if the contents were double sided, copied them, sealed the 142 pages of medical records in a brown envelope and sent them to the Court liaison office. From there, they would have been transmitted to the Crown. She eventually said that had the documents been in a sealed envelope, she would have submitted the envelope to the property control unit and asked the Prosecutor for instructions. If the Order required the envelope to be sealed until further order of the Court, that would have been done.

[32] The Crown consented to the defence cross-examining Constable MacPherson on the steps she took in obtaining and executing the warrant, but would not consent to her cross-examination on the contents of the ITO, resting on its right to require a formal ***Garofoli*** application.

[33] Valerie Prince was a receptionist and secretary working at Dr. Zaragoza's clinic when the Production Order was served. She was directed to make a copy of Mr. Griffin's medical file. She testified that the usual practice was to seal the documents in an envelope with glue and tape or with tape and staples. It was her belief that she glued and taped the envelope that contained Mr. Griffin's medical records.

[34] Taking into account the equivocal nature of Constable MacPherson's evidence, including her vague memory of a sealed envelope, and the confidence Ms. Prince had in her own recollection that the envelope was sealed, I have no doubt that Ms. Prince sealed the medical records in an envelope, and that the envelope was given to Constable MacPherson in that state.

[35] The medical records were reviewed by the Crown prosecutor on October 20, 2008 and then forwarded to the Crown's disclosure unit to be disclosed to the defence. The records were copied and made available to the defence for pickup on October 22, 2008. Mr. Griffin's preliminary inquiry, at which Dr. Zaragoza testified, began that same day. Prior to commencement of the preliminary inquiry, defence counsel had not been given any notice that the Crown had obtained a Production Order to obtain Mr. Griffin's medical records.

[36] As noted, a letter written by defence counsel to Dr. Zaragoza was included with the seized medical records, as was a letter from an adjuster representing Mr. Griffin, and the doctor's reply. The Crown still has possession of those letters. Defence counsel learned the Crown had these letters in its possession when he collected the medical records on November 18, 2008. The letter from defence counsel to Dr. Zaragoza solicited an opinion with respect to Mr. Griffin's accident on March 10, 2007, set out facts and assumptions counsel thought would support an opinion that the accident was a result of a seizure, and asserted that:

> ... if Mr. Griffin suffered a seizure without knowledge he suffered from an epileptic type condition on the date of the accident March 10, 2007 he would be

> found not guilty. If an opinion could confirm that he likely suffered an epileptic seizure on March 10, 2007 (given the facts and assumptions above) I am confident the Crown will withdraw the charges at these early stages and your help in this matter would be greatly appreciated.

[37] The trial proceeded by judge alone on April 20, 2009. A *Charter* notice was filed by Mr. Griffin seeking an order pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* staying the charge against him; alternatively, if he was found not guilty, an order awarding him costs. The grounds he relied on included the following:

> 1. The Applicant was denied his right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, contrary to section 7 of the *Canadian Charter of Rights and Freedoms*.
>
> 2. The Applicant was subject to unreasonable search or seizure contrary to section 8 of the *Canadian Charter of Rights and Freedoms*.

[38] Counsel were at odds over the procedure for considering the *Charter* application. The Crown was of the view that the *Charter* application should be heard and determined at the conclusion of Dr. Zaragoza's evidence so that exclusion of his evidence and/or the medical file could be considered as a s. 24 remedy if the application was successful. Defence counsel argued that the trial should proceed to conclusion and a determination of the *Charter* issue should be made at that time. Dr. Zaragoza's evidence was taken in a *voir dire* in order that the *Charter* application and any s. 24 exclusion remedy could be considered at the conclusion of his testimony.

[39] As it turned out, Dr. Zaragoza was unable to confirm that during his second meeting with Mr. Griffin, just prior to the accident of March 10, 2007, he had cautioned Mr. Griffin that he should not drive. As a result, the Crown quite properly asked the Court to dismiss the charge against Mr. Griffin since it was apparent the Crown could not prove its case beyond a reasonable doubt.

[40] Defence counsel then indicated that the defence wished the *Charter* issues to be determined since Mr. Griffin was seeking to have the entire costs of the proceedings paid by the Crown as a remedy under s. 24(1) of the *Charter*.

III. Legislation

[41] Section 487.012 of the *Criminal Code* states:

487.012(1) A justice or judge may order a person, other than a person under investigation for an offence referred to in paragraph (3)(a),

(a) to produce documents, or copies of them certified by affidavit to be true copies, or to produce data; or

(b) to prepare a document based on documents or data already in existence and produce it.

(2) The order shall require the documents or data to be produced within the time, at the place and in the form specified and given

(a) to a peace officer named in the order; or

(b) to a public officer named in the order, who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament.

(3) Before making an order, the justice or judge must be satisfied, on the basis of an ex parte application containing information on oath in writing, that there are reasonable grounds to believe that

(a) an offence against this Act or any other Act of Parliament has been or is suspected to have been committed;

(b) the documents or data will afford evidence respecting the commission of the offence; and

(c) the person who is subject to the order has possession or control of the documents or data.

(4) The order may contain any terms and conditions that the justice or judge considers advisable in the circumstances, including terms and conditions to protect a privileged communication between a lawyer and their client or, in the province of Quebec, between a lawyer or a notary and their client.

(5) The justice or judge who made the order, or a judge of the same territorial division, may revoke, renew or vary the order on an ex parte application made by the peace officer or public officer named in the order.

(6) Sections 489.1 and 490 apply, with any modifications that the circumstances require, in respect of documents or data produced under this section.

(7) Every copy of a document produced under this section, on proof by affidavit that it is a true copy, is admissible in evidence in proceedings under this or any other Act of Parliament and has the same probative force as the original document would have if it had been proved in the ordinary way.

[42] Section 487.015 of the *Criminal Code* states:

487.015(1) A person named in an order made under section 487.012 and a financial institution, person or entity named in an order made under section 487.013 may, before the order expires, apply in writing to the judge who issued the order, or a judge of the same territorial division as the judge or justice who issued the order, for an exemption from the requirement to produce any document, data or information referred to in the order.

(2) A person, financial institution or entity may only make an application under subsection (1) if they give notice of their intention to do so to the peace officer or public officer named in the order, within 30 days after it is made.

(3) The execution of a production order is suspended in respect of any document, data or information referred to in the application for exemption until a final decision is made in respect of the application.

(4) The judge may grant the exemption if satisfied that

(a) the document, data or information would disclose information that is privileged or otherwise protected from disclosure by law;

(b) it is unreasonable to require the applicant to produce the document, data or information; or

(c) the document, data or information is not in the possession or control of the applicant.

[43] Sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* state:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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

IV. Issues

[44] The issues in this case are:

A. Was defence counsel's letter of July 19, 2007 to the Crown Prosecutor and its attachments, including the letter of Dr. Zaragoza, clothed with plea bargain privilege?

B. Is there a breach of s. 7 of the *Charter of Rights and Freedoms*?

C. Is there a breach of s. 8 of the *Charter of Rights and Freedoms*?

D. If there is a breach of ss. 7 or 8, what is the appropriate remedy under s. 24(1) of the *Charter of Rights and Freedoms*?

V. Analysis

A. Was Defence Counsel's Letter of July 19, 2007 to the Crown Prosecutor and Its Attachments, Including the Letter of Dr. Zaragoza, Clothed with Plea Bargain Privilege?

1. Settlement negotiation privilege generally

[45] Two categories of privilege have been recognized: class privilege and case-by-case privilege. In ***R. v. Gruenke***, [1991] 3 S.C.R. 263 at para. 26 , Lamer C.J.C. described these two categories of privilege:

> Before delving into an analysis of the issues raised by this appeal, I think it is important to clarify the terminology being used in this case. The parties have tended to distinguish between two categories: a "blanket", *prima facie*, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule). Such communications are excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence. Solicitor-client communications appear to fall within this first category (see: ***Geffen v. Goodman Estate***, [1991] 2 S.C.R. 353 and ***Solosky v. The Queen***, [1980] 1 S.C.R. 821). The term "case-by-case" privilege is used to refer to communications for which there is a *prima facie* assumption that they are not privileged (i.e., are admissible). The case-by-case analysis has generally involved an application of the "*Wigmore* test" (see above), which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the

> case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case.

[46] As noted in ***R. v. McClure***, 2001 SCC 14, [2001] 1 S.C.R. 445 at para. 28:

> For a relationship to be protected by a class privilege, thereby warranting a *prima facie* presumption of inadmissibility, the relationship must fall within a traditionally protected class. Solicitor-client privilege, because of its unique position in our legal fabric, is the most notable example of a class privilege. Other examples of class privileges are spousal privilege (now codified in s. 4(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5) and informer privilege (which is a subset of public interest immunity).

[47] In recognition of their fundamental importance, both solicitor-client and informer privilege are subject only to the innocence at stake exception in criminal proceedings. In ***R. v. Leipert***, [1997] 1 S.C.R. 281 at para. 12, McLachlin J. for the majority stated with respect to informer privilege that:

> Informer privilege is of such importance that once found, courts are not entitled to balance the benefit enuring from the privilege against countervailing considerations, as is the case, for example, with Crown privilege or privileges based on *Wigmore's* four-part test: J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (1992), at pp. 805-6. In ***Bisaillon v. Keable***, *supra*, this Court contrasted informer privilege with Crown privilege in this regard. In Crown privilege, the judge may review the information and in the last resort revise the minister's decisions by weighing the two conflicting interests, that of maintaining secrecy and that of doing justice.

[48] In ***R. v. Blank***, 2006 SCC 39, [2006] 2 S.C.R. 319, the Court distinguished between solicitor-client and litigation privilege, noting that litigation privilege generally ends when the litigation ends, it is not restricted to communications between solicitor and client and may include non-confidential communications or material of a non-communicative nature and the interest which underlies it relates to the adversarial process of litigation. As recognized by R. J. Sharpe in "Claiming Privilege in the Discovery Process," in *Law in Transition: Evidence*, [1984] Special Lect. L.S.U.C. 163 at 166, "[l]itigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

[49] Settlement negotiation privilege, sometimes referred to as "without prejudice privilege," the "without prejudice rule" or in a criminal context, "plea negotiation privilege," operates to limit the disclosure and admissibility of communications between parties engaged in settlement discussions. In ***Middelkamp v. Fraser Valley Real Estate Board*** (1992), 71 B.C.L.R. (2d) 276, [1992] B.C.J. No. 1947 (C.A.) at para. 18, the court suggested that settlement negotiation privilege should be regarded as a form of class privilege (see also ***R. v. Delorme***, 2005 NWTSC 34, 198 C.C.C. (3d) 431 at para. 9). In my view, given the number of recognized exceptions to

the privilege, it is better thought of as a case-by-case privilege. Certainly, while regarded as important, it has not been afforded the same level of significance as solicitor-client or informer privilege (***Histed v. Law Society of Manitoba***, 2005 MBCA 106, 195 Man.R. (2d) 224 at para. 37). Like litigation privilege, it aims to facilitate a process (the resolution of litigation) rather than to protect a relationship.

[50] Several justifications for "without prejudice privilege" have been proposed (see e.g. David Vaver, "*Without Prejudice Communications — Their Admissibility and Effect*" (1974) 9 U.B.C. L. Rev. 85). The two primary justifications are described in David Paciocco & Lee Steusser, *The Law of Evidence*, 5th ed. (Toronto: Irwin Law, 2009) at 249:

> The privilege is in place primarily as a matter of public policy to encourage litigants to settle their disputes without the need to go to trial. Communications made for the furtherance of settlement are protected from disclosure; otherwise few parties would engage in such settlement discussions for fear that any concessions or statements made could be used against them if no settlement is reached. A second rationale for the rule — occasionally cited — is the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence.

[51] The public policy justification appears to be the dominant rationale. In ***Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*** (1990), 105 A.R. 4 (Q.B.), Wachowich J. (as he then was) reviewed the Canadian and English authorities on settlement negotiation privilege, and concluded that the "public policy" rationale is a better foundation for the rule, because it puts into focus the balance that is struck between encouraging settlement discussion and putting all relevant information before the trier of fact:

> [B]oth the Ontario Court of Appeal in *Waxman* and House of Lords in *Rush & Tompkins* were unanimous in their conclusions that the rationale underlying the "without prejudice" rule is public policy. In my view, this conclusion properly makes express the process of balancing the policy of fostering the extra-judicial settlement of disputes against the policy of ensuring that, when litigation is not avoided, all facts relevant to determining liability are disclosed. In avoiding the inflexibility inherent to other rationales, the public policy approach is better equipped to rationalize existing principles governing the "without prejudice" rule and produces results which are less artificial than other rationales. The weight of authority in Canada supports this view[.]

[52] As noted by the court in ***Gruenke***, the *Wigmore* test generally is involved in determining case-by-case privilege. The four criteria in the *Wigmore* test are that:

> (1) The communications must originate in a confidence that they will not be disclosed.

> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. [Emphasis deleted.]

[53] The specific test for determining whether a communication is covered by settlement negotiation privilege was set out in Sopinka's *The Law of Evidence in Canada* and adopted by the Alberta Court of Appeal in ***Costello v. Calgary (City)*** (1997), 209 A.R. 1 at para. 91, 152 D.L.R. (4th) 453 (C.A.):

> (a) A litigious dispute must be in existence or within contemplation.
>
> (b) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed.
>
> (c) The purpose of the communication must be to attempt to effect a settlement.

[54] Settlement negotiation privilege cannot be waived unilaterally by either party to the communication; the consent of both parties is required (***Phillips v. Rodgers*** (1988), 92 A.R. 253 (Q.B.)).

2. Scope of settlement negotiation privilege in the criminal context

[55] It is common ground between the parties that settlement negotiation privilege also applies in negotiations between criminal defence counsel and the Crown. The applicability of this privilege to criminal cases was discussed by Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (3rd ed.) (Markham: LexisNexis, 2009) at para. 14.314:

> With respect to persons facing criminal charges, there is a public interest in preserving the confidentiality of plea negotiations between such accused and their counsel, and the Crown. A privilege is necessary to encourage full and frank discussions with a view to coming to a resolution of the matter. There is a substantial saving by the public and a resulting benefit to the administration of justice - including victims and witnesses - in resolving such cases on a just basis.

[56] There is also strong support in Canadian case law for the application of settlement negotiation privilege to the criminal law. The policy rationale for criminal settlement negotiation privilege was discussed by Lesage A.C.J. (as he then was) in ***R. v. Bernardo***, [1994] O.J. No.

1718 (Ont. Ct. (Gen. Div.)). Counsel for the accused sought disclosure of information relating to the negotiations between the Crown and Ms. Homolka with respect to her plea agreement to testify against Mr. Bernardo. The Crown took the position that such plea negotiations were privileged. Lesage A.C.J.(at para. 16) accepted that plea negotiation privilege exists:

> I agree with the Crown's submissions that there should be a recognized privilege surrounding plea discussions vis-a-vis the accused and the Crown. There are many reasons in the nature of public policy that would suggest that such a privilege does exist or ought to exist in order to encourage Crown and defence to have full, frank and private negotiations in criminal cases. I believe, as in civil cases, settlement negotiation privilege ought to exist. The rules or [sic] this Court concerning pre-hearing conferences in criminal matters contemplate that those negotiations will normally occur in private and that they will remain confidential, unless a resolution is achieved in which case the discussions would normally be disclosed in court. I am of the view that the public interest is well served by encouraging such frank and full discussions between counsel for the accused and counsel for the Crown. The saving to the public and the resulting benefit to the administration of justice in resolving cases that ought to be resolved is substantial. Although there may be exceptions to that confidentiality or privilege such as obstruction of justice, or other issues, I am of the view that public policy would dictate that there be a confidentiality concerning such negotiations. That privilege applies in the sense that the information disclosed will not be used against that person.

[57] Lesage A.C.J. ultimately ruled that this privilege should not extend to negotiations that result in agreements where an individual agrees to testify against a co-accused for the Crown, because the records of the negotiations were not being sought for use against Ms. Homolka, but for the defence of another person.

[58] In ***R. v. Lake***, [1997] O.J. No. 5447 (C.J.), the Crown took the position that if defence counsel in resolution discussions attributed a statement to his or her client, that statement and the discussions that led to that statement are no longer covered by solicitor-client privilege. The Crown argued that although there is a public interest in the promotion of resolution discussions, negotiation privilege must yield to the stronger public interest in the search for the truth. McCombs J. restricted ***Bernardo*** to its particular facts, where the co-accused Homolka no longer faced any risk of having the plea negotiations used against her, and where Bernardo had a s. 7 right to make full answer and defence. In a case where such considerations are absent, the privilege remains much stronger (at para. 51):

> In my view, a ruling favourable to the Crown in the circumstances of a case such as this would have a profound chilling effect upon resolution discussions, an essential component of the administration of justice, and would do irreparable damage to the public interest in the proper administration of justice. This public interest is of such importance that it must outweigh all other considerations.

[59] Likewise, in ***R. v. T.J.C.***, [1997] N.W.T.J. No. 141 (S.C.), Vertes J. strongly endorsed settlement negotiation privilege in criminal negotiations. Defence counsel had written a "without prejudice" letter to the Crown which included the accused's recollection of certain facts of the alleged offence, and set out a proposal for a joint submission on sentence in exchange for a guilty plea. Police attended the accused's cell and, in the course of interrogating the accused, referred to the letter sent by counsel for the accused. Several months later, in response to another letter from defence counsel offering a plea deal, Crown counsel wrote a letter that rejected the plea offer. This letter from the Crown also warned:

> [S]tatements made to you by Mr. C. may become part of the Crown's case, should this matter proceed to trial. Unless we can tender evidence of Mr. C.'s statements by agreement, you may be required as a Crown witness.

[60] Defence counsel subsequently was issued a subpoena. At trial, the new Crown counsel stated the Crown would not be calling defence counsel as a witness. Defence counsel brought a motion for a stay of proceedings on the basis of these and other incidents. In reference to the "without prejudice" letter, Vertes J. stated (at para. 32):

> I know of no reason why [settlement negotiation] privilege does not apply as well to criminal cases. Indeed, I think there is a stronger case to be made that the privilege applies in criminal cases because of the liberty interests and constitutional rights at stake. I note in passing only that such a privilege had been extended to plea bargaining communications in United States criminal law. Perhaps the reason why there is no obvious Canadian case on this point is that the point is obvious.
>
> [Emphasis added.]

[61] In ***R. v. Larocque*** (1988), 124 C.C.C. (3d) 564 (Ont. Ct. (Gen. Div.)), the Crown wrote to counsel for the accused with an offer of a joint submission in exchange for a guilty plea. Counsel for the accused responded with a letter stating that the accused accepted the offer and would plead guilty. The accused reneged, and did not plead guilty as planned. The matter proceeded to trial and the Crown took the position that the letter from counsel for the accused was admissible to prove the accused's guilt. The trial judge, citing ***Bernardo*** and ***Lake***, concluded that the communications were privileged and inadmissible and the privilege remained in effect even though the accused reneged on the offer to plead guilty. The court distinguished the situation from the civil context, where a settlement itself is not covered by settlement negotiation privilege, because in a criminal context a plea agreement is not enforceable against the accused.

[62] Settlement negotiation privilege applies equally to communications made by Crown counsel in the course of settlement negotiations. For example, in ***R. v. Hainnu***, [1997] N.W.T.J. No. 76 (S.C.) (QL), counsel for the accused attempted to use a comment made by a Crown prosecutor at a pre-trial conference as the basis for an abuse of process application, but the comment was deemed to be protected by privilege. Similarly, an attempt by the accused to refer to a pre-trial resolution offer by the Crown during sentencing submissions was rejected as a

violation of settlement negotiation privilege in ***R. v. Roberts***, 2001 ABQB 520, 289 A.R. 127 at paras. 59-62 (cited with approval in ***R. v. Tkachuk***, 2001 ABCA 243, 159 C.C.C. (3d) 434)).

[63] In ***R. v. Bernard***, 2002 ABQB 747, 392 A.R, 204, Veit J. also emphasized (at para. 43) that settlement negotiation privilege exists even in the absence of criminal practice rules against the production of without prejudice communications, such as existed in ***Bernardo***.

[64] Most recently, in ***R. v. Delorme***, 2005 NWTSC 34 at paras. 9-32, 198 C.C.C. (3d) 431, Vertes J. revisited the issue of criminal settlement negotiation privilege and summarized the Canadian authorities on the matter. He found (at para. 33) that "[t]he common theme in those cases where the plea negotiation privilege has been set aside is that of the accused's right to make full answer and defence," and concluded that rather than applying an "innocence at stake" test to determine whether the privilege should be overcome, an ***O'Connor***-like "likely relevance" test was more appropriate (para. 45).

[65] Based on these authorities, I conclude that criminal plea bargain privilege is a recognized form of privilege and should be sedulously protected in the interests of encouraging fair, reasonable, and efficient disposition of criminal cases, in the interests of the public, victims, witnesses, and accused persons.

3. Does plea bargain privilege apply to enclosed documents?

[66] The case of ***Forest Protection Ltd. v. Bayer A.G.*** (1998), 46 C.P.C. (4th) 52 (N.B.C.A.) is relevant. The Director of the Competition Bureau sent part of an investigative summary to the Attorney General, who sent it to the accused, Chemagro Ltd., during plea bargaining negotiations relating to a charge of conspiracy under the *Competition Act*. The summary in question was of eight interviews and had been prepared by investigators for the Director of the Competition Bureau in order to advise the Attorney General of Canada. Chemagro pleaded guilty to conspiracy. Forest Protection and Forest Patrol subsequently brought a civil action against Chemagro and others. Chemagro refused to produce the summary, claiming settlement negotiation privilege. It also refused to answer questions about the interviews on discovery or to specifically identify the six employees who had been interviewed. The chambers judge held that the summary was privileged. The Forest companies argued on appeal (at para. 13) that the claim of privilege should not be recognized because:

> (1) the Attorney General of Canada had to disclose the information to Chemagro under the ***Stinchcombe*** rule;
>
> (2) the prosecution is at an end and the privilege no longer exists;
>
> (3) there is a statutory directive to aid civil suits in this case; and
>
> (4) in any event there is an overriding discretion in a judge to deny a claim of privilege in the interests of justice and fairness.

[67] They also maintained that the summary had not been prepared for the purpose of settlement and, therefore, no privilege should attach to it.

[68] The Court of Appeal agreed with the chambers judge that the summary was privileged and held it did not matter that it had not been prepared specifically for the purpose of settlement as it was handed over for that specific purpose. At para. 17, Ryan J.A., with whom the rest of the panel agreed, referred to other cases involving documents passing between parties during settlement negotiations, including ***Plourde v. Morin*** (1991), 125 N.B.R. (2d) 361 (Q.B.); ***I. Waxman & Sons Ltd. v. Texaco Canada Ltd.***, [1968] 1 O.R. 642 and ***Middelkamp et al. v. Fraser Valley Real Estate Board*** (1992), 96 D.L.R. (4th) 227.

[69] Ryan J.A. (at para. 18) also cited the following passage from ***Middelkamp*** at 232-33:

> ... I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged...

[70] The Forest companies referred to ***Bernardo*** in support of their request for the summary. In response, Ryan J.A. commented at para. 19:

> In that case, Lesage J., now C.J., raised the curtain to expose the plea bargaining arrangement and a special deal on sentence for Bernardo's accomplice, Homolka. The appellants' arguments on this point are not persuasive because Homolka was to testify against Bernardo. Any deal she made with the Crown for a reduced sentence was pertinent to Bernardo's right to make full answer and defence. See also, ***R. v. Ross***, 28 W.C.B. (2d) 242, 095/261/052, July 4, 1995 per Salhany, J., (Ont. Ct. Gen. Div.).

[71] ***Middelkamp*** also dealt with settlement privilege. Documents in that case were exchanged on a "without prejudice" basis for purposes of negotiating a resolution to possible criminal charges under the *Competition Act*. In addition to the passage quoted above, McEachern C.J.B.C., for the majority, stated at paras. 19 and 20:

> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.
>
> [Emphasis added]

> I recognize that there must be exceptions to this general rule. An obvious exception would be where the parties to a settlement agree that evidence will be furnished in connection with the litigation in which the application is made. In such cases, the public interest in the proper disposition of litigation assumes paramountcy and opposite parties are entitled to know about any arrangements which are made about evidence. Other exceptions could arise out of such matters as fraud, or where production may be required to meet a defence of laches, want of notice, passage of a limitation period or other similar matters which might displace the privilege. As we did not have argument on these matters I prefer to say nothing further about them.

[72] In ***Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*** (1988), 90 A.R. 323 (C.A.), working papers recording raw data and a resulting report analyzing the data were created by Price Waterhouse, which had been retained by counsel for the Caterpillar companies that were the subject of investigation under the *Combines Investigation Act*. The Caterpillar companies supplied a copy of the report, but not the working papers, to the Director of Investigation and Research. Ultimately, the investigation was discontinued without any charges being laid. In a later civil action, Ed Miller Sales sought production of the report and the working papers. It claimed that if litigation privilege ever existed in relation to these documents, it was waived when the Caterpillar companies handed the report to the Director. Laycraft C.J.A. held that: "... to hand a privileged document to one party to litigation for the purpose of settlement or any other purpose, does not, in my opinion, show any intention that the privilege is thereby to terminate as to other parties or in related litigation."

[73] Also, in ***La Roche v. Armstrong***, [1922] 1 K.B. 485, Lush J. stated at p. 489:

> ... If the solicitor cannot place before the other side all the material reasons which make the offer of settlement reasonable without fear of an action if the offer is refused, it would be difficult to negotiate at all.."

[74] In ***Toronto (City) Economic Development Corp. v. Olco Petroleum Group Inc.***, [2008] O.J. No. 2413 (S.C.J.) (QL), the plaintiff City of Toronto commenced an action against Joy Petroleum, a tenant of city lands, to recover the cost of remediating the contaminated lands. Joy issued a third party notice against the previous tenant, Olco Petroleum Group Inc. The City then sued Olco directly and asked for production of an expert report prepared for Olco years before during the course of its negotiations with Joy in relation to sharing the costs of remediation. The Master concluded that the report was covered by settlement privilege as litigation was in contemplation at the time.

[75] Finally, in ***Delorme***, the accused applied for production of communications and documents relating to plea bargaining negotiations of three others jointly charged with him with first degree murder in order to make full answer and defence. The others pleaded guilty to lesser offences. Vertes J. held that certain of the documents in relation to two of the co-accused who might be called as witnesses by the Crown should be produced as they were potentially useful for testing credibility and motivations of the witness. At para. 54, he held that certain documents

need not be produced as they raised work product privilege. These included memoranda to file prepared by Crown counsel for their reference, a letter containing legal opinions of one of the co-accused's counsel conveyed to Crown counsel and drafts of agreed statements of facts.

[76] In my view, there is no meaningful distinction between enclosing a document and reiterating its contents in a negotiation letter. As a result, a document which otherwise would not have to be disclosed in the ordinary course (i.e documents covered by work product privilege, solicitor-client privilege, etc.), but which is included with settlement communications, is an intrinsic part of the communication and should be subject to the same privilege, at least until such time as it would have to be disclosed pursuant to ***Stinchcombe***, the *Rules of Court* or the *Criminal Code* (i.e. the privilege is not an exception to the Crown's disclosure obligation or to the requirement that parties produce any expert reports on which they intend to rely.)

[77] The privilege itself is a case-by-case privilege, which is subject to an accused's right to make full answer and defence, and which has certain exceptions as outlined in the case law (fraud, threats, or where there is a dispute as to whether an agreement was reached in civil matters). Yet another exception would be where the privilege is sought to be invoked with respect to communications intended to facilitate the commission of a crime or where the communication itself is the material element of the crime (***Descoteaux v. Mierzwinski***, [1982] 1 S.C.R. 860 at para. 22). Also, the privilege will not protect physical evidence of a crime ***®. v. Murray*** (2000), 48 O.R. (3d) 544 (S.C.J.)).

4. Applying the test in *Costello*

(a) *Was a litigious dispute in existence?*

[78] In this case, at the time the Crown received the letter from Mr. Griffin's defence counsel seeking a withdrawal of charges, Mr. Griffin was the subject of criminal process. A litigious dispute was in existence, as the Crown concedes.

(b) *Was the communication made with the express or implied intent that it not be disclosed?*

[79] The communication from defence counsel to the Crown was marked "without prejudice." While use of that phrase is not determinative, it is meant to act as a "flag of truce" under which negotiations may safely be carried on (***British Columbia Children's Hospital v. Air Products Canada Ltd.***, 2003 BCCA 177 at para. 14, 224 D.L.R. (4th) 23, leave to appeal to S.C.C. granted 233 D.L.R. (4th) vi). Clearly, the "without prejudice" condition was meant to apply to the covering letter and to the attached medical opinion of Dr. Zaragoza. The information that Mr. Griffin had been involved in a previous accident and that medical intervention occurred was not volunteered gratuitously but rather to provide an exculpatory explanation. Defence counsel exposed his client's medical history to provide information that would found a defence, in the expectation that the rejoinder would be an offer of a reduced plea or a withdrawal. It would not have been reasonably contemplated that the doctor's information would be used against Mr. Griffin since the communication was crafted and sent with the express intent,

demonstrated by the "without prejudice" heading, that it not be disclosed to the Court. The defence was reserving its right to use or not use the information concerning Dr. Zaragoza and his opinion in defence of Mr. Griffin. It was communicated to the Crown in an effort to resolve the matter without trial, inviting a resolution by withdrawal of charges; or a counter proposal of a plea to reduced charges.

[80] The Crown argues that the defence ought to have expected that the information in the attachment would serve as a starting point for further investigation, since the Crown has the obligation to do so. It maintains that the Crown is duty bound in a criminal trial to place relevant and material evidence before the Court. There should be no expectation that lawyers can claim ownership over evidence and witnesses by forwarding it to the Crown as part of a communication.

[81] Certainly, the claim of plea bargain privilege will not avail an effort to withhold physical evidence of a crime from the Crown as such conduct would amount to obstruction of justice. However, that issue does not arise on these facts. The medical opinion here was created for the defence as part of its litigation work product, and need not have been shared with the Crown at all unless the defence chose to call Dr. Zaragoza at trial, in which case the defence would have been obliged to comply with s. 657.3 of the *Criminal Code*. The medical opinion was only shared in the interests of the plea bargain negotiation overture and is clothed with privilege.

[82] The Crown argues that there is no interest in attaching privilege to exculpatory information. However, I note that the medical report included information concerning the previous accident, information that could be considered inculpatory as well, as indeed the Crown viewed it.

[83] I conclude that the communication from defence counsel to the Crown was made with both express and implied intent that it not be disclosed.

(c) *Was the purpose of the communication to effect a settlement?*

[84] Defence counsel wrote advising the Crown that Mr. Griffin's physician, Dr. Zaragoza, was willing to offer an opinion that Jason had a seizure on March 10, 2007 which caused the motor vehicle accident, that he was forwarding Dr. Zaragoza's letter ". . . hopeful that after review of same you will be in a position to withdraw or stay the charges." The purpose of the communication was to effect settlement.

[85] In my view, the letter from defence counsel to the Crown proposing that the charges be withdrawn or stayed was clothed with plea bargain privilege. The intriguing question in this case is whether the attached letter from Dr. Zaragoza was similarly clothed with privilege. "Communications" for the purpose of the privilege analysis in both the civil and criminal context involve the verbal or written discussions between lawyers in which positions are exchanged, concessions made, and deals struck, in the hopes of effecting resolution. Documents prepared or advanced in the interests of supporting and advancing those resolution discussions also are

settlement communications and clothed with privilege: ***Forest Protection Ltd.***; ***Middelkamp***; ***Ed Miller Sales & Rentals Ltd.***; ***La Roche***; ***Delorme***. None of the exceptions that would have warranted tipping the balance in favour of disclosure of the privileged communications apply.

[86] The problem presented in this case could have been avoided by defence counsel alluding to the evidence it proposed to provide without disclosing the physician's identity or his report. In other words, the plea bargain negotiations could have proceeded on an abstract basis without disclosure of the physician's identity or particulars of his opinion. Similarly, the Crown could have returned the letter with the enclosure unread had the Crown decided that it could not engage in plea bargain negotiations without disclosing to the Court any potential evidence obtained in that process. The prudent course of action for counsel involved in plea bargain negotiations is to set the terms of engagement in advance of the negotiations so that these problems, with uncertain outcomes, do not arise. Counsel cannot be faulted since there are no procedural rules and little jurisprudence touching on this point to guide them.

B. Is There a Breach of s. 7 of the *Charter of Rights and Freedoms?*

[87] Section 7 of the *Canadian Charter of Rights and Freedoms* states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

1. Mr. Griffin's position

[88] Mr. Griffin submits that a number of actions by the Crown cumulatively amount to abuse of process:

(a) the use of the privileged plea bargain communications by the Crown to obtain the Production Order for Mr. Griffin's medical file;

(b) the failure to disclose to Constable McPherson and the authorizing judge that the information in the ITO was derived from privileged communications;

(c) some of the documents seized were beyond the scope of the Production Order, which authorized seizure of "Medical Records ... from 2007 January 6 to 2007 March 11 ..." , in particular:

- a letter from Mr. Griffin's auto insurer to Dr. Zaragoza, dated May 22, 2007, requesting details regarding Mr. Griffin's medical condition;

- a letter from defence counsel to Dr. Zaragoza, dated June 27, 2007, attempting to obtain more details from Dr. Zaragoza about the nature of

Mr. Griffin's condition, with a view to whether it could provide a possible defence;

• a letter from Dr. Zaragoza to defence counsel, dated July 3, 2007, which summarized the details of Dr. Zaragoza's diagnosis and treatment of Mr. Griffin;

• a letter from Dr. Zaragoza to Mr. Griffin's auto insurer, dated July 4, 2007, which summarized the details of Dr. Zaragoza's diagnosis and treatment of Mr. Griffin;

(d) Constable McPherson failed to observe the authorizing judge's condition that if there were privacy concerns, the medical record should remain sealed until further Court order; and

(e) the Crown did not disclose the seizure of the medical file until the preliminary inquiry.

[89] Mr. Griffin seeks costs of the trial as a remedy for the alleged breach. He also contends that all but the first of the above noted actions constitute breaches under s. 8 of the *Charter*.

2. The Crown's position

[90] The Crown denies that any or all of the alleged breaches of s. 7 amount to abuse of process. Initially, the Crown took the position that if they do, the appropriate remedy would be exclusion of the medical records from evidence or an adjournment to remedy any delayed disclosure.

[91] The Crown contends that no privilege attached to Dr. Zaragoza's letter. It suggests that it would be novel law if the Court concludes otherwise. The Crown maintains that if the communication was privileged, the disclosure still does not meet the threshold of abuse of process set out in ***R. v. Regan***, 2002 SCC 12, [2002] 1 S.C.R. 297 as it was not oppressive, vexatious, or so egregious as to contravene fundamental notions of justice, thereby undermining the integrity of the judicial process.

[92] The Crown submits that the defence assertion that there was a failure to comply with the Court order to secure privacy interests has not been proved on a balance of probabilities and, in any event, the evidence does not show that this was frivolous and vexatious.

[93] The Crown argues there is no evidence that documents were seized beyond the scope of the Production Order, except for the letter from defence counsel to Dr. Zaragoza and the letter from the insurance adjuster. The Crown argues there was no prejudice in the disclosure of this information, including the defence strategy, since it already had been disclosed in the plea offer, in the pre-preliminary conference, and in the expert notice.

[94] In terms of the defence's complaint that the Crown did not disclose the seizure of the medical file until the preliminary inquiry, the Crown argues that Mr. Griffin and his counsel had the medical records before it obtained them; the Crown knew that Mr. Griffin had them at the pre-preliminary conference as early as June 27, 2008, when the Crown advised it would be calling Dr. Zaragoza; and the Crown disclosed the records two days after receiving them, following standard disclosure protocol.

3. Analysis

[95] In ***R. v. O'Connor***, [1995] 4 S.C.R. 411 at paras. 69-73, the Supreme Court of Canada considered the relationship between *Charter* and common law abuse of process. The Court adverted to a balancing of interests in the analytic approach to abuse of process, and to the distinction between conduct affecting the fairness of the trial or other procedural rights, and a residual category of conduct of the prosecution which connotes unfairness to such a degree that it undermines the integrity of the judicial process.

[96] Paperny J.A., writing for the Alberta Court of Appeal, recently summarized the law concerning abuse of process in ***R. v. Nixon***, 2009 ABCA 269 at paras. 36-39, 246 C.C.C. (3d) 149:

> Since ***R. v. O'Connor***, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235 ("***O'Conno***r"), the common law doctrine of abuse of process and s. 7 of the *Charter* are fundamentally intertwined. The two categories of conduct amounting to an abuse of process are: (1) conduct which causes prejudice to the accused by rendering the trial unfair, and (2) conduct not affecting the fairness of the trial or causing prejudice to the accused, but which falls into a "residual category" and affects the integrity of the justice system, i.e. when the judicial process itself has been abused. See: ***O'Connor*** at paras. 64 and 73; ***Regan*** at paras. 49-50 and 55; and ***Ng*** at paras. 31-33. As described in ***O'Connor*** at para. 73, the residual category addresses the
>
> > ... panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.
>
> A party alleging an abuse of process under the first category must prove, on a balance of probabilities, prejudice or adverse effect to his or her *Charter* rights: ***O'Connor*** at para. 68. Consideration can be given to the propriety of Crown conduct or intention, but the focus must be primarily on the effect of the impugned actions on the fairness of the trial: ***O'Connor*** at para. 74.
>
> In the "residual category", the analysis under the *Charter* and common law dovetail. This is where the concept of abuse of process, as described at common

> law, is reflected. To establish an abuse of process under this category, there must be conduct or proceedings that are egregious, oppressive or vexatious and that offend the community's sense of fair play and decency. See ***Ng*** at para. 31; and ***Regan*** at paras. 49-50 and 55. Put another way, there must be conduct which "shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention": ***Power*** at 615; ***Ng*** at para. 27. To satisfy the threshold of "vexatious or oppressive," prosecutorial misconduct or improper motive need not be established, but they are two of the factors to be considered when deciding whether there is conduct or circumstances amounting to an abuse of process: ***R. v. Keyowski***, [1988] 1 S.C.R. 657 at 659, 40 C.C.C. (3d) 481.
>
> Once a violation of s. 7 is made out, there are a variety of remedies available under s. 24(1). In exceptional circumstances and the "clearest of cases", one possible remedy is a stay of proceedings: ***O'Connor*** at paras. 75-79 and 83.

[97] Here, the Applicant alleges an abuse of process which falls in the residual category. The facts do not show prosecutorial misconduct or improper motive. Rather, the facts show inadvertent administrative errors in judgment and mistakes, including the Crown's failure to recognize and protect privileged communications made in the context of a plea bargain negotiation overture; its failure to fully apprise Constable MacPherson and, therefore, the authorizing judge, of how the information came to the Crown's attention under claim of privilege; the failure by Constable MacPherson to comply with the Court order to keep the file sealed in the interests of privacy until further Court order; and the failure of Constable MacPherson to ensure that she only seized documents within the scope of the Production Order. The Crown further erred in not correcting that mistake by returning the documents that were seized without proper authority.

[98] The evidence does not show undue delay by the Crown in its disclosure of the fact and contents of the seized medical file.

[99] Do these facts show that an abuse of process in the residual category has occurred or that the prosecution was conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process? In my view, more care should have been taken to recognize that plea bargain privilege was asserted in defence counsel's letter not only because of the clear signal in the words "without prejudice" but also because this was a settlement overture containing both the defence theory of the case and an expert opinion that had been solicited. As the Crown argues, the law in this area has been unclear.

[100] However, even if in doubt, an appropriate response would have been for the Crown to alert the defence to its position that there was no privilege attached to the information, and that it was the Crown's intention to seize the file and call the doctor. As the trial turned out, Dr. Zaragoza's evidence did not assist the Crown and the Crown asked that the charges be dismissed. Further, through advertence, the medical file was not adduced in evidence in a timely

fashion, and was not admitted. In the final analysis, there was no prejudice to Mr. Griffin in the sense that nothing occurred in the trial that would not have occurred in any event had the privilege been respected: the medical file was not adduced in evidence and Dr. Zaragoza's evidence came to naught.

[101] Similarly, in my view, the Crown should have ensured that the ITO set out the background to the receipt of the information that there had been a previous accident and that Dr. Zaragoza had previously treated Mr. Griffin. It should have indicated that the information arguably was privileged. Complete disclosure is an underlying element of fair decision making and avoidance of arbitrary decision making. The learned Provincial Court judge may have declined to issue the Production Order or may have done so under terms, permitting the point to be argued before issuing the Production Order. The Crown's error was compounded by Constable MacPherson's failure to pay attention to and to obey the Court order to secure the privacy interest in the medical file.

[102] There was a similar lack of attention paid to the contents of the file to ensure that nothing beyond the terms of the Production Order were seized. Neither Constable MacPherson nor the Crown paid close attention nor sufficient respect to the privacy interests in Mr. Griffin's personal medical file. Their approach, to be most charitable, was cavalier. However, I cannot find that their conduct was so egregious, oppressive or vexatious as to offend the community's sense of fair play and decency. Also, I am mindful of my conclusion below that their conduct was in violation of s. 8 of the *Charter*, and appropriate remedies for such are readily apparent and suffice to remedy these wrongs.

C. Is There a Breach of s. 8 of the *Charter of Rights and Freedoms?*

[103] Mr. Griffin argues that the same Crown misconduct alleged to have breached s. 7 of the *Charter* also amounts to a breach of s. 8 of the *Charter*, which provides that:

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

1. <u>The use of the privileged plea bargain communications by the Crown to obtain the Production Order for Mr. Griffin's medical file</u>

[104] Mr. Griffin submits that if the information subject to plea negotiation privilege is excised from the ITO, there were insufficient grounds for granting the Production Order.

[105] The standard of review to be applied to an authorization to search was set out in ***R. v. Garofoli***, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161 and ***R. v. Araujo***, 2000 SCC 65, [2000] 2 S.C.R. 992. The law in this area recently was summarized by Ross J. in ***R. v. Elkadri***, 2008 ABQB 55 at paras. 52-55, 441 A.R. 38:

> The Court in ***R. v. Araujo***, *supra* confirmed its earlier holding in ***R. v. Garofoli***, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161 that a court, in reviewing the

authorization, does not substitute its view for that of the authorizing judge or justice of the peace. It does not re-hear the application, rather its task is to determine whether, on the evidence, there is any basis upon which the authorization could have been granted. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then she should not interfere. In ***R. v. Araujo***, *supra* the review was further described as follows (at para. 51):

> In looking for reliable information on which the authorizing judge could have granted the authorization, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued." [Emphasis in original].

During the course of amplification on the review, of course details will be added to that which was in the ITO, and in addition misstatements in the ITO may be revealed. The evidence will also address whether these misstatements arise from mere oversight or are an indication of an intent to mislead. A statement from ***R. v. Garofoli***, *supra*, at 1452, repeated with approval in ***R. v. Araujo***, *supra*, at para. 51, deals with the impact of this evidence:

> If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

The reviewing judge must exclude from consideration erroneous information in the ITO. Where the erroneous information results from simple error and not a deliberate attempt to mislead, that excluded information may be amplified by evidence on the review showing the true facts. Further, amplification may not even be necessary if there is sufficient reliable information in the ITO even after excising erroneous material ®. ***v. Araujo***, *supra*, at paras. 56-57, citing ***R. v. Morris*** (1998), 173 N.S.R. (2d) 1, 134 C.C.C. (3d) 539 at p. 558 (N.S. C.A.), and ***R. v. Bisson***, [1994] 3 S.C.R. 1097 at 1098, 94 C.C.C. (3d) 94).

Thus errors, even fraudulent one, do not automatically invalidate a warrant. On the other hand:

> This does not mean that errors, particularly deliberate ones, are irrelevant in the review process. While not leading to automatic vitiation of the warrant, there remains the need to protect the prior authorization process. The cases ... do not foreclose a reviewing judge, in appropriate

> circumstances, from concluding on the totality of the circumstances that the conduct of the police in seeking prior authorization was so subversive of the process that the resulting warrant must be set aside to protect the process and the preventative function it serves. ***®. v. Morris***, *supra*, cited in ***R. v. Araujo***, *supra*, at para. 54).

[106] Information that is obtained illegally, including information that is obtained in violation of the *Charter*, must be excised from the ITO in order to ensure that the state does not benefit from the illegal acts of police officers or the Crown. However, the Court must consider if the search warrant (or production order) could have issued without the illegally obtained information. In this way, a search warrant (or production order) need not be sacrificed if the ITO contained other facts to support its issuance: ***R. v. Grant***, [1993] 3 S.C.R. 223 at 251.

[107] In this case, the entirety of the ITO was based on information that I have found to have been privileged. That information should not have been included in the ITO. If the privileged information is excised from the ITO, there is insufficient evidence remaining to justify issuance of the Production Order. Therefore, the seizure of Mr. Griffin's medical file from Dr. Zaragoza's office was unlawful and in violation of s. 8 of the *Charter.*

2. The failure to disclose to Constable MacPherson and the authorizing judge that the information in the ITO was derived from privileged communications

[108] Mr. Griffin argues that there was material non-disclosure to the authorizing judge in that she was never informed the documents were "obtained under the cloak of negotiation privilege."

[109] The law with respect to candour, misstatements in, as well as omissions from ITOs was summarized at length in ***R. v. Maton***, 2005 BCSC 330, [2005] B.C.T.C. 330 at paras. 20-22, 25-27, 30. Romilly J. referred in that case to ***R. v. Morris*** (1998), 134 C.C.C. (3d) 539 (N.S.C.A.), in which Cromwell J.A. (as he then was) stated for the court at para. 34:

> The nature of the process demands candour on the part of the police. They are seeking to justify a significant intrusion into an individual's privacy. This is especially when it is proposed to search a dwelling house which has long been recognized as the individual's most private place. The requirement of candour is not difficult to understand; there is nothing technical about it. The person providing the information to the justice must simply ask him or herself the following questions: "Have I got this right? Have I correctly set out what I've done, what I've seen, what I've been told, in a manner that does not give a false impression?" see ***R. v. Dellapenna*** (1995), 62 B.C.A.C. 32 (B.C.C.A.) per Southin J.A. at para. 37.

[110] As indicated by Cromwell J.A. in ***Morris*** at para. 43, a reviewing judge, in appropriate circumstances, may conclude on the totality of the circumstances that the conduct of the police

in seeking a prior authorization was “so subversive of that process that the resulting warrant must be set aside to protect the process and the preventive function it serves."

[111] Romilly J. in ***Maton*** also referred to ***Araujo***, in which LeBel J. instructed that the obligation of anyone seeking an *ex parte* wiretap authorization order is to make full and frank, clear and concise disclosure of material facts and to avoid the use of boiler plate language, where possible. It is preferable that the affidavit be sworn by someone with first hand knowledge. Obviously, the affiant must not be deceptive or misleading in “the language used or strategic omissions:” ***Araujo*** at para. 47.

[112] However, as noted in ***R. v. Bisson***, [1994] 3 S.C.R. 1097 at para. 2, “errors in the information presented to the authorizing judge, whether advertent or even fraudulent, are only factors to be considered in deciding to set aside the authorization and do not by themselves lead to automatic vitiation of the wiretap authorization.” The trial judge must determine whether there was sufficient reliable information to support the authorization with the offending passage expunged.

[113] Since I have concluded that the information received from defence counsel was privileged and should be excised from the ITO, there is no need to address the issue of material non-disclosure. In any event, I note that Constable MacPherson faithfully advised the authorizing judge that the information concerning Mr. Griffin's medical records came from defence counsel. There is no evidence that she was aware of the privilege issue. There is no evidence before the Court that the Crown intentionally or in bad faith misled the constable and, through her, the authorizing judge. To the contrary, the Crown has continued to argue that the letter from Dr. Zaragoza that formed the basis of the ITO was not privileged. Therefore, Mr. Griffin has not demonstrated bad faith nor intentional non-disclosure by the constable or the Crown in the preparation and submission of the ITO to the authorizing judge.

3. Some of the documents seized were beyond the scope of the Production Order , which authorized seizure of "Medical Records ... from 2007 January 6 to 2007 March 11 ..."

[114] Mr. Griffin argues that the documents disclosed to the constable went beyond the scope of the Production Order. As noted above, in addition to the medical records, also seized were a letter from Mr. Griffin's auto insurer to Dr. Zaragoza, dated May 22, 2007, requesting details regarding Mr. Griffin's medical condition; a letter from defence counsel to Dr. Zaragoza, dated June 27, 2007, in which defence counsel attempted to obtain more details from Dr. Zaragoza about the nature of Mr. Griffin's condition with a view to whether it could provide a possible defence; a letter from Dr. Zaragoza to defence counsel, dated July 3, 2007, which summarized the details of Dr. Zaragoza's diagnosis and treatment of Mr. Griffin; and a letter from Dr. Zaragoza to Mr. Griffin's auto insurer, dated July 4, 2007, which summarized the details of Dr. Zaragoza's diagnosis and treatment of Mr. Griffin.

[115] These were not medical records, although they did concern confidential medical matters. Also, they did not fall within the date range prescribed in the Production Order.

[116] Section 8 is engaged if Mr. Griffin had a reasonable expectation of privacy with respect to the documents in question. There is little doubt that a person has a reasonable expectation of privacy in medical records and other confidential, treatment-related documents held by his or her physician: see ***R. v. Dersch***, [1993] 3 S.C.R. 768 at para. 23; ***Re F.E.L.***, 2008 ABQB 10, 438 A.R. 194 at paras. 4-5; *Health Information Act*, R.S.A. 2000, c. H-5.

[117] In order for a search to be reasonable within the meaning of s. 8, the search must be authorized by law, the law authorizing the search must be reasonable, and the search must be carried out in a reasonable manner: ***R. v. Collins***, [1987] 1 S.C.R. 265 at para. 23.

[118] If the police search an area that is not described in the search warrant, or seize an item not covered by the search warrant, the search or seizure is not authorized by law, and therefore is contrary to s. 8. For example, in ***R. v. Church of Scientology of Toronto*** (1997), 116 C.C.C. (3d) 1 (Ont. C.A.), the police executed a valid search warrant against the Church of Scientology. The warrant authorized the seizure of certain kinds of documents if they related to specified time periods and if they related "directly to" certain described offences. The police apparently seized all documents that fell within the specified time periods, regardless of whether they related to the described offences. The trial judge excluded the documents under s. 24(2) of the *Charter*, and the Court of Appeal (although it did not address the issue directly) did not disturb this finding: see also ***R. v. Khan*** (2005), 133 C.R.R. (2d) 29 (Ont. S.C.J.), where the court found a s. 8 breach after police seized computer hard drives that contained thousands of documents that fell outside the relevant time frame set out in the information.

[119] A search warrant gives an officer physical access to a location where documents are stored. The officer may then review the documents to determine which, if any, may be seized pursuant to the search warrant. Production orders, however, shift some of the investigative burden to the party in control of the information. As Abella J. indicated in ***Tele-Mobile Co. v. Ontario***, 2008 SCC 12, [2008] 1 S.C.R. 305 at para. 1: "[p]roduction orders compel third parties in possession of information relevant to a criminal investigation to produce and generate documents and data for law enforcement agencies." Only the party named in the production order will be able to determine which of the documents that they possess or control fall within the scope of the production order. The initial "screening" is done by the party in control of the information, not the investigators.

[120] Dr. Zaratoga was the party named in the Production Order. The obligation fell on him to properly screen the documents to determine whether they should be disclosed pursuant to the order. He failed to do so and documents were disclosed when they should not have been.

[121] Here, the seizure of the documents that went beyond the scope of the Production Order was unauthorized and presumptively unreasonable: ***Hunter v. Southam***, [1984] 2 S.C.R. 145. No attempt was made to justify the seizure of those documents as a valid warrantless search.

[122] Constable MacPherson cannot be faulted for having come into possession of those documents. She simply accepted the documents provided by Dr. Zaratoga's office. However, both Constable MacPherson and the Crown had a reasonable opportunity after receiving the

documents to discover that certain of them fell outside of the scope of the Production Order and should not have been disclosed. In the following section, I will discuss whether the documents should have remained sealed.

[123] When there has been an inadvertent over-seizure of documents pursuant to a search warrant, investigators should return the documents that fall outside of the scope of the warrant and destroy any copies. In ***R. v. Khan*** (2005), 133 C.R.R. (2d) 29 (Ont. S.C.J.), police seized a number of computer hard drives pursuant to a search warrant. These hard drives contained some documents that fell outside of the scope of the investigation. The accused objected not only to the original over-seizure of documents, but also to their retention, arguing that after the original seizure, the officers should have reviewed the seized documents to determine which documents were relevant and which ought to be returned. Minden J. concluded (at para. 91) that the officers' failure to return seized materials that were irrelevant to the prosecution was part of a "pattern of conduct violative of the applicant's section 8 *Charter* rights."

[124] In ***R. v. Daley***, 2008 NBPC 29, 335 N.B.R. (2d) 255, Canada Revenue Agency investigators seized a computer hard drive that contained a number of documents, some of which were created outside the time frame specified in the search warrant. Brien Prov. Ct. J. accepted that it was not feasible for the investigators to determine which documents fell within the applicable time frame at the time the warrant was executed. Accordingly, it was acceptable for the investigators to seize the hard drive. However, Brien Prov. Ct. J. held (at para. 41) that the investigators violated s. 8 by failing to return the documents once it became clear that they fell outside the scope of the warrant.

[125] The same obligation to return documents arises when there has been an over-disclosure under a production order, particularly given that it is the third party rather than an investigator who initially screens the documents to determine whether they fall within the scope of the order. A third party who faces the possibility of prosecution for failure to comply with a production order may be hesitant to under-disclose documents and, therefore, may err on the side of caution by disclosing more information than is required. The third party's failure to properly interpret the production order does not mean that investigators are entitled to retain all documents produced by the third party, even if they should not have been disclosed.

[126] ***Calanese Canada v. Murray Demolition Corp.***, 2006 SCC 36, [2006] 2 S.C.R. 189 concerned an *Anton Pillar* order rather than a production order. It is instructive nevertheless. Binnie J., writing for the court, noted (at para. 62) that lawyers who inadvertently come into possession of privileged information through an *Anton Pillar* order should promptly return the privileged material and advise the opposing party of the extent to which the materials have been reviewed. The Law Society of Alberta's *Code of Professional Conduct* imposes a similar requirement on counsel to return privileged documents and to inform opposing counsel if they have read any of the privileged document: Chapter 4, Rule 8.

[127] I conclude that Constable MacPherson and the Crown had an obligation to ensure that any produced documents which fell outside of the scope of the Production Order, and of which they were aware, were returned (and that all copies of those documents were returned or

destroyed). The retention of those documents after it was clear that they should not have been produced constitutes a s. 8 *Charter* breach, since the seizure of the documents was not authorized by the Production Order.

4. Constable MacPherson failed to observe the authorizing judge's condition that if there were privacy concerns, the medical record should remain sealed until further Court order

[128] An authorizing judge has the authority to add conditions to a search warrant or production order. This power has been recognized as a part of a trial judge's discretion when deciding whether to grant a search warrant under s. 487: ***Descôteaux v. Mierzwinski***, [1982] 1 S.C.R. 860 at 889; ***Baron v. Canada***, [1993] 1 S.C.R. 416. The authority to include reasonable conditions is made explicit with respect to production orders in s. 487.012(4).

[129] There are limits to the kinds of conditions that can be imposed pursuant to s. 487.012(4). One court has questioned whether an authorizing judge could impose a "publication ban" style provision, given that other sections of the *Code* explicitly grant this power to authorizing judges while the production order procedure does not include such a provision: ***Canadian Broadcasting Corporation v. Attorney General for Manitoba et al.***, 2008 MBQB 229 at para. 68, [2008] 11 W.W.R. 515. The Supreme Court recently agreed with a trial judge who found that the power to add terms and conditions does not allow authorizing justices to make orders reimbursing organizations for the costs associated with complying with production orders: ***Tele-Mobile Co. v. Ontario***, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 59, aff'g ***R. v. Tele-Mobile Company (Telus Mobility)***, 2006 ONCJ 229 at paras. 16-40, 81 O.R. (3d) 745.

[130] The question in the present case is whether s. 487.012(4) permitted the authorizing judge to add the condition that if Dr. Zaragoza had privacy concerns, the medical records should be placed in a sealed envelope until further court order. Section 487.015 sets out a process by which the party subject to a production order can contest the order. However, this provision may not avail the person who has a privacy interest in the documents: see Daniel Ikonomov, *The Effect of New Production Orders in the Criminal Code on Records and Data in the Hands of Third Parties* (2005), 31 C.R. (6th) 60 [*The Effect of New Production Orders*].

[131] It is not necessary to impose conditions on the seizure of records from a medical office that are similar to the conditions required for seizure of records from the media, a lawyer, or a psychiatrist's office: ***R. v. Serendip Physiotherapy Clinic*** (2004), 189 C.C.C. (3d) 417 (Ont. C.A.). The Ontario Court of Appeal in ***Serendip*** dealt with a search warrant issued under the terms of s. 487 of the *Code* in relation to medical records. Rosenberg J.A., who delivered the judgment of the court, held that the requirements of s. 487(1)(b) strike the proper balance between state and individual interests, even when health records are the target. At para. 35, he wrote:

> ... Thus, where, as here, it is conceded that the medical records are not protected by privilege, the only mandatory pre-requisites to the granting of the search warrant are those set out in that section. In the absence of a Constitutional

> challenge to the validity of s. 487, I can see no principled basis for drawing a line around the types of records seized in this case and exempting them from the s. 487 regime and I can find no legal basis for engrafting common law requirements on to a comprehensive statutory scheme.

[132] Section 487(1)(e) of the *Criminal Code* allows for issuance of a search warrant authorizing the officer named in the warrant to execute the search warrant and bring the thing seized before a justice, or make a report to a justice. Persons with a proprietary or possessory interest in the thing seized or the premises may apply for the warrant to be quashed. In s. 488.1 of the *Code*, Parliament also has seen fit to provide specific protection for documents that may be subject to a claim of solicitor- client privilege.

[133] Section 487.012(4) of the *Code*, which deals with production orders rather than search warrants, explicitly notes that the order " ...may contain any terms and conditions that the justice or judge considers advisable in the circumstances, including terms and conditions to protect a privileged communication between a lawyer and their client...". It includes specific reference to conditions that protect solicitor-client privilege. It is an inclusive provision that contemplates conditions that protect other types of privacy interests, such as those which exist in relation to medical records.

[134] In this case, the authorizing judge was aware that the information in the ITO originated from defence counsel. She was aware that the records sought were medical records. A production order is directed at the party with possession of the documents. Section 487.015 of the *Code* provides a process for the person in possession of the records to contest the order. However, that party may have no privacy interest in the documents. Since the authorizing judge must have been concerned about the privacy interests of the patient, Mr. Griffin, she exercised her discretion to grant a conditional Production Order pursuant to s. 487.012(4) of the *Code*. In my view, this was an entirely reasonable exercise of that discretion. Indeed, the conditions imposed by Creagh P.C.J. were contemplated by Ikonomov in *The Effect of New Production Orders*:

> Under the current legislation the issuing or reviewing judge may hear submissions by the recipients of production orders. To expect, however, that the recipients of production orders, short of their mandatory requirements to do so, would raise privacy concerns on behalf of third parties is unrealistic. This raises the possibility that in appropriate cases non-involved third parties will be notified and will be entitled to a ruling from the court as to the materiality and, where applicable, the validity of any claims of privilege. Where produced records likely contain confidential information, the issuing judges could, pending further determination, include special sealing conditions aimed at preserving privacy interest in records and data over which third parties claim privilege. Likewise, return and reporting requirements could be read in a way requiring the reporting officer to account for all potential privileged material and privilege holders so that a justice or judge may make an informed decision as to appropriate steps to follow.

[Emphasis added.]

[135] Had the condition imposed by Creagh P.C.J. been observed and the documents remained sealed subject to Court order, Mr. Griffin would have had the opportunity to assert privilege over the documents and to challenge the breadth of the seizure at a preliminary stage. Constable MacPherson violated the conditions of the Production Order by unsealing the envelope containing the documents in question, and this rendered the seizure unreasonable and in violation of s. 8 of the *Charter*.

5. The authorizing judge impermissibly delegated her authority to Dr. Zaragoza by including the "sealed envelope" condition

[136] Mr. Griffin argues that the authorizing judge violated s. 8 of the *Charter* by including the "sealed envelope" condition on the Production Order as this was an impermissible delegation of the trial judge's authority to Dr. Zaragoza.

[137] The authorizing judge did not delegate her obligations to Dr. Zaratoga. She evaluated whether the following statutory preconditions for issuance of a production order, as set out in s. 487.012(3), had been met:

> 487.012(3) Before making an order, the justice or judge must be satisfied, on the basis of an *ex parte* application containing information on oath in writing, that there are reasonable grounds to believe that
>
> > (a) an offence against this Act or any other Act of Parliament has been or is suspected to have been committed;
> >
> > (b) the documents or data will afford evidence respecting the commission of the offence; and
> >
> > (c) the person who is subject to the order has possession or control of the documents or data.

[138] All three of these conditions were met, but for the concern that the information in question was clothed with privilege. The constitutional requirement of reasonable and probable grounds was made out. There was no obligation on the authorizing judge to include any other conditions to protect the medical information: ***Serendip***. The fact that she imposed an additional condition in the Production Order to address confidentiality concerns has not been shown to be an impermissible delegation of her authority. Rather, she exercised her discretion as contemplated in s. 487.012(4) of the *Criminal Code*.

D. What is the Appropriate Remedy under s. 24(1) of the *Charter of Rights and Freedoms*?

[139] Mr. Griffin claims costs on the basis of breaches of ss. 7 and 8 of the *Charter*, relying on the remedial terms of s. 24(1).

1. Case law on costs awards as a *Charter* remedy

[140] The Supreme Court of Canada has emphasized that s. 24(1) should not be interpreted narrowly, or in a manner than restricts the availability of remedies to individuals whose *Charter* rights have been infringed. In ***R. v. 974649 Ontario Inc.***, 2001 SCC 81 at para. 19, [2001] 3 S.C.R. 575, McLachlin C.J. stated : "If the Court's past decisions concerning s. 24(1) can be reduced to a single theme, it is that s. 24(1) must be interpreted in a manner that provides a full, effective and meaningful remedy for *Charter* violations..."

[141] Costs generally are not awarded in criminal proceedings. As indicated in ***R. v. M. (C.A.)***, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327 at para 97: "... the prevailing convention of criminal practice is that whether the criminal defendant is successful or unsuccessful on the merits of the case, he or she is generally not entitled to costs." While costs may be awarded against the Crown in some circumstances, the test for awarding costs is stricter than in the civil context. In ***R. v. McKay***, 2003 ABQB 499 at para. 54, Veit J. noted:

> In civil proceedings, being wrong - at least where the case is not a novel one or where there is some other exceptional circumstance - is all that is required to be subjected to costs. For public policy reasons, the bar is set much higher in criminal proceedings. A prosecutor and his client can be wrong in law, but, by itself, that does not make the state subject to costs.

[142] Mr. Griffin based his application for costs on the alleged s. 7 violation of abuse of process. Abuse of process can lead to an award of costs, as can a breach of disclosure obligations where the breach results in additional litigation costs to the accused: ***R. v. Pang*** (1993), 95 C.C.C. (3d) 60 (Alta. C.A.); ***974649 Ontario Inc.*** at para. 80. In the present case, however, I have found no breach of s. 7 of the *Charter*.

[143] Costs may be awarded under s. 24(1) as a remedy for other kinds of *Charter* violations as well. In ***R. v. Costa*** (2006), 149 C.R.R. (2d) 223 (Ont. S.C.J.) ("***Costa*** costs decision"), Watt J. (as he then was) recognized that costs awards under s. 24(1) are not limited to cases of abuse of process or s. 7 violations resulting from inadequate disclosure. He determined (at para. 82) that "there is nothing in the expansive language of s. 24(1) of the *Charter* that limits costs awards against the Crown to s. 7 *Charter* breaches, much less those arising out of defaults in disclosure obligations."

[144] The test in Alberta for when costs should be awarded in these situations was set out in ***R. v. Robinson***, 1999 ABCA 367, 142 C.C.C. (3d) 303. In an application for costs stemming from improper disclosure, McFadyen J.A., writing for the majority of the Court of Appeal, concluded that while costs may be awarded against the Crown under s. 24(1), such awards are an exceptional event, stating (at paras. 29-30):

> ... The reasons for limiting costs are that the Crown is not an ordinary litigant, does not win or lose criminal cases, and conducts prosecutions and makes decisions respecting prosecutions in the public interest. In the absence of proof of misconduct, an award of costs against the Crown would be a harsh penalty for a Crown officer carrying out such public duties. It is also clear that the Court may also grant costs as a remedy under s. 24(1) of the *Charter* on proof of breach of the accused's *Charter* rights.
>
> ... Costs should not be routinely awarded. Something more than a *bona fide* disagreement as to the applicable law, or a technical, unintended or innocent breach, whether clearly established or not, must be required. ... Some degree of misconduct or an unacceptable degree of negligence must be present before costs are awarded against the Crown under s. 24(1) of the *Charter*. With respect, I am unable to concur in the view expressed by [Berger J.A., writing in dissent] that costs may be awarded as a remedy for breach of *Charter* rights in any case of an "unequivocal failure to discharge one's clearly established constitutional duty to disclose." ... I view this as opening the floodgates to even more disclosure litigation. Other remedies short of a stay of proceedings are available. The most important of these is an order compelling disclosure which was never sought in this case. Others include an adjournment, an order for a new trial or a mistrial, if applicable.
>
> [Emphasis added.]

[145] The Supreme Court of Canada in ***974649 Ontario Inc.*** was called on to decide whether a statutorily created provincial offences court had jurisdiction to award costs against the Crown as a remedy for a *Charter* breach, such as a failure to provide full disclosure. It considered whether recognizing the Provincial Court's jurisdiction to hear costs applications of this nature would overburden the court. It concluded that it would not, and made reference to the high threshold for awarding costs against the Crown (at para. 87):

> Crown counsel is not held to a standard of perfection, and costs awards will not flow from every failure to disclose in a timely fashion. Rather, the developing jurisprudence uniformly restricts such awards, at a minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution.
>
> [Emphasis added.]

[146] Although Berger J.A. suggested in ***R. v. Henkel***, 2003 ABCA 23, 172 C.C.C. (3d) 387 at paras. 36-41 that ***974649 Ontario*** may have overruled ***Robinson*** and imposed a different standard (see also Berger J.A.'s proposed test set out in ***Robinson*** at para. 66), the majority view of the Court of Appeal in that case was that a costs award still requires some degree of Crown misconduct or unacceptable negligence: ***Henkel*** at para. 29, per Ritter J.A.; see also ***R. v. Neil***, 2003 ABCA 45, 320 A.R. 274; ***R. v. Fattah***, 2005 ABQB 523, 390 A.R. 312 at para. 32, per

Marceau J.; and Veit J.'s analysis in ***McKay*** at paras. 35-41. As Wittman J.A. stated in ***Neil*** (at para. 8):

> Although the standard or nature of the misconduct sufficient to justify an award of costs in ***R. v. Robinson*** may have been modified by ***R. v. 974649 Ontario Inc.***, we remain bound by ***R. v. Robinson*** to the extent that some misconduct is a necessary element in a costs award against the Crown in a criminal case, absent a ... "rare" or "unique" or never-to-occur again circumstance, or similar case.

[147] As a result, the test for a s. 24(1) costs award against the Crown essentially remains: Was there some degree of misconduct or an unacceptable degree of negligence on the part of the Crown? It is not clear what constitutes an "unacceptable degree of negligence," although the court in ***Robinson*** noted that it is "[s]omething more than a *bona fide* disagreement as to the applicable law, or a technical, unintended or innocent breach," and must involve more than an "unequivocal failure to discharge one's clearly established constitutional duty," at least in a disclosure context.

[148] The Crown and the police are regarded as indivisible with respect to the state's disclosure obligations, and costs can be awarded against the Crown as a result of police misconduct or negligence that violates the accused's disclosure rights: ***R. v. Luipasco***, 2007 ABPC 250, 430 A.R. 53 at paras. 52-70; ***McKay*** at para. 60; ***Robinson***; ***R. v. Taylor***, 2008 NSCA 5, 230 C.C.C. (3d) 504 at para. 88. Otherwise, before costs will be awarded against the Crown, generally it must have been the Crown itself which engaged in misconduct or demonstrated an unacceptable degree of negligence.

[149] In the ***Costa*** costs decision, the applicant sought costs against the Crown due to a s. 8 breach involving an overly broad seizure. The police had executed a search warrant on a law office. The warrant authorized the seizure of particular client files, but investigators made a copy of an entire hard drive containing virtually all of the law firm's client files. Watt J., as he then was, held (in ***R. v. Costa*** (2005), 130 C.R.R. (2d) 226 (Ont. S.C.J.)) that the search far exceeded what was authorized by the search warrant and permitted by law, and excluded the evidence under s. 24(2). He denied the subsequent application for costs on the basis that it was the investigating police officer and not the Crown who was solely responsible for the misleading ITO and the unreasonably executed search that led to the s. 8 violation.

[150] In ***R. v. Branton*** (2001), 53 O.R. (3d) 737 (C.A.), the Court of Appeal agreed (at para. 11) that there had been a "massive and unnecessarily over-inclusive seizure of the respondents' inventory," but refused (at para. 41) to order costs against the Crown, stating:

> The real misconduct here was the overseizure of the respondent's goods <u>not the conduct of the litigation by the Crown</u>... The remedy for the overseizure of the respondent's goods is a civil action for damages. Accordingly, while I would dismiss the appeal, I would not award costs against the Crown.

[Emphasis added.]

[151] Although the court in ***Branton*** did not address the costs issue at length, the decision supports the proposition that costs should not be awarded against the Crown as a result of investigator misconduct.

[152] In ***Taylor***, the Nova Scotia Court of Appeal overturned a costs award against the Crown because it was not Crown conduct that led to the *Charter* breaches in question. An investigator for the Canada Revenue Agency swore an ITO for a search warrant that included a number of misrepresentations. The reviewing justice excised the paragraphs from the warrant, quashed the warrant, and granted costs in favour of the applicant. The applicant's claim for costs was based almost entirely on misconduct by the CRA investigator. The Court of Appeal overturned the costs award, as there was no evidence that implicated the Crown in the conduct of the CRA investigator: see also ***O'Neill v. Canada (Attorney General)*** (2007), 151 C.R.R. (2d) 370 (Ont. S.C.J.) and ***R. v. Tiffin***, 2008 ONCA 306, 232 C.C.C. (3d) 303 at para. 96, in which the court stated: "... costs orders will not be made against the Crown for the misconduct of other parties, such as witnesses or investigative agencies, unless the Crown has participated in the misconduct."

[153] Although costs typically are meant to compensate the successful party for its expenses (see ***Young v. Young***, [1993] 4 S.C.R. 3 at para. 254; ***R. v. McGillivary*** (1990), 56 C.C.C. (3d) 304 (N.B.C.A.)), the Supreme Court of Canada suggested in ***974649 Ontario*** at para. 81 that deterrence may also be a rationale for costs awards against the Crown:

> Such awards, while not without a compensatory element, are integrally connected to the court's control of its trial process, and intended as a means of disciplining and discouraging flagrant and unjustified incidents of non-disclosure. Deprived of this remedy, a provincial offences court may be confined to two extreme options for relief - a stay of proceedings or a mere adjournment - neither of which may be appropriate and just in the circumstances.

[154] Even though the rationale for a costs award against the Crown might be based in part on deterring unacceptable Crown conduct, the quantum of the award is linked to the expenses incurred by the applicant as a result of the Crown's inappropriate conduct, to prevent the applicant from enjoying a windfall as a result of a *Charter* breach. The applicant, if successful, does not recover all of his legal expenses, but instead recovers only those expenses that result from the *Charter* breach, including the legal expenses associated with the application for costs: see ***Robinson*** at paras. 31, 38, 68; ***R. v. Gateway Collections Inc.***, 2004 ABPC 93, 360 A.R. 299 at para. 41.

2. Should costs be awarded as a remedy under s. 24(2) of the *Charter*?

[155] Mr Griffin has established on a balance of probabilities that his s. 8 right was breached as a result of the Crown's failure to observe his plea bargain privilege; Constable MacPherson's seizure of documents beyond the scope of the Production Order and the Crown's failure to

immediately return those documents; and Constable MacPherson's failure to abide by the conditions imposed by the authorizing judge to protect privacy rights.

[156] Counsel for Mr. Griffin argues that these breaches warrant an order of costs, both as recompense and as an admonition to the Crown and police for their conduct.

[157] The Crown argues that if there were *Charter* breaches, they were unintended and there is no evidence of Crown misconduct. It submits that the following factors weigh against a finding of Crown misconduct or a marked and unacceptable departure from the reasonable standards expected of the prosecution:

(a) A finding that the Zaragoza letter is covered by plea bargain privilege is novel in criminal law jurisprudence.

(b) The medical records were in Mr. Griffin's possession before the preliminary inquiry and were discussed at the pre-preliminary conference.

(c) The Crown advised at the pre-preliminary conference that it intended to call Dr. Zaragoza, and it would have had access to the medical file at the preliminary hearing in any event through the subpoena *duceus tecum* process.

(d) The Crown obtained the medical records in the interests of presenting a true theory of guilt, not for oppressive or vexatious motives. Its motivation of seeking truth and fairness is illustrated by its invitation to the Court to dismiss the charges.

(e) As a result of the Crown's actions, Mr. Griffin did in fact have a fair trial.

(f) Mr. Griffin has pursued this application despite lack of prejudice and in the absence of Crown misconduct; although he did not seek more appropriate remedies such as exclusion of evidence, adjournments, or setting aside the Production order.

[158] While I have found s. 8 breaches, in my view Mr. Griffin has not demonstrated "some degree of misconduct or unacceptable negligence on the part of the Crown itself." As noted in ***Robinson***, something more is needed than "a *bona fide* disagreement as to the applicable law, or a technical, unintended or innocent breach."

[159] Although there is no direct evidence concerning the understanding of Crown counsel when she received the plea bargain overture from defence counsel, on the basis of the position taken by the Crown in these proceedings, I am prepared to conclude that the Crown's failure to observe the privilege was due to a *bona fide* disagreement as to the applicable law.

[160] I conclude that Constable MacPherson's initial seizure of documents beyond the scope of the Production Order was unintended. While the retention of those documents by the Crown displayed a cavalier attitude towards the terms of the Production Order and Mr. Griffin's privacy interests and constituted a breach of s. 8, it was not a matter of misconduct or unacceptable negligence. The Crown seems to have sincerely held the view that the seizure was of no moment since the documents in question contained only information to which the Crown would be privy in any event, and that the overly broad nature of the seizure was unimportant since defence had shared its theory at the pre-preliminary conference and by providing Dr. Zaragoza's letter.

[161] Finally, Constable MacPherson's failure to observe the conditions of Judge Creagh's Production Order cannot be brought home to the Crown and, therefore, cannot be the basis for an order of costs against the Crown. However, a judge's order concerning privacy interests warrants scrupulous observance.

[162] Also, I note that there is no evidence that Mr. Griffin faced any additional legal costs as a result of the *Charter* violations except for those associated with the present costs application.

[163] The appropriate remedy for the breaches of Mr. Griffin's s. 8 right would have been to exclude the evidence of Dr. Zaragoza and the medical file at trial. However, since the medical file was not adduced in evidence in a timely fashion, and ultimately was not admitted, and since Dr. Zaragoza did not provide inculpatory evidence, the breaches did not result in prejudice to Mr. Griffin. The facts in this case do not meet the threshold of some degree of Crown misconduct or unacceptable negligence so as to warrant an order for costs. There were *bona fide* questions as to the law concerning plea bargain privilege which resulted in an unintended s. 8 breach. There were further unintended breaches in execution of the Production Order. These breaches did not result from misconduct or negligence by the Crown. In the final analysis, Mr Griffin had a fair trial.

E. Non-*Charter* Costs

1. The scope of the Court's inherent jurisdiction to award costs in a criminal matter

[164] In civil matters, a superior court may invoke its inherent jurisdiction to award costs against a party: see ***Stiles v. Workers' Compensation Board of British Columbia*** (1989), 38 B.C.L.R. (2d) 307 (C.A.). In the criminal context, in addition to the ability to award costs as a *Charter* remedy, a superior trial court may use its inherent jurisdiction to award costs. As stated in ***974649 Ontario*** at para. 80:

> Costs awards have a long history as a traditional criminal law remedy. Although sparingly used prior to the advent of the *Charter*, superior courts have always possessed the inherent jurisdiction to award costs against the Crown: ***R. v. Ouellette***, [1980] 1 S.C.R. 568; ***R. v. Pawlowski*** (1993), 12 O.R. (3d) 709 (C.A.), at p. 712.

[165] The law with respect to costs awards in criminal matters continues to develop, but it is clear that the Court's powers in this regard are far more limited than in the civil context. A review of the authorities from the provincial appellate courts is instructive.

[166] One frequently cited Quebec Court of Appeal decision concerning costs against the Crown, ***Quebec et al. v. Cronier*** (1981), 63 C.C.C. (2d) 437 (Que. C.A.), was authored by L'Heureux-Dubé J.A. (as she then was). She recognized that a court has the inherent jurisdiction to award such costs, but was careful to emphasize that costs awards in criminal matters should not simply follow the event, as in a civil case. At paras. 54 and 62, she stated:

> [Translation] A superior court has the power to maintain its authority and to control its procedure so as to put justice in order and efficiently. That this implies sometimes ordering one of the parties and even lawyers to pay the costs of a proceeding in cases of the abuse or of the frivolity of proceedings, of misconduct or dishonesty or of taken for some other ulterior motive, is a recognized principle. But the conditions for the exercise of this inherent power must exist.
>
> ...
>
> ... In the absence of reprehensible conduct by the appellants, or a serious affront to the authority of the Court or of a serious interference with the administration of justice, which is not the present case, the imposition of costs on appellants in the context of the present debate is in no way justified.

[167] The British Columbia Court of Appeal hinted at a somewhat wider scope for costs awards against the Crown in ***R. v. King*** (1986), 26 C.C.C. (3d) 349 (B.C.C.A.). In particular, Lambert J.A. accepted the Crown's submission that costs may sometimes be awarded in a "test case" (at 351):

> Counsel for the Crown then submitted that because of the public interest, costs should be awarded in a criminal matter compensating an accused only in cases where the prosecution has been frivolous, or where the prosecution has been conducted for an oblique motive, or where the case has been taken by the Crown as a test case. I agree with the submission to the extent of saying that those three situations would appear to be situations where costs might well properly be awarded to the accused against the Crown. I would not like to limit the classes of case in which costs might properly be awarded. But cases in which consideration would be given to awarding costs to the accused would have to come into some special category like the three categories mentioned by counsel for the Crown.
>
> [Emphasis added.]

[168] The Ontario Court of Appeal briefly discussed the court's inherent jurisdiction to award costs in criminal matters in ***R. v. Pawlowski*** (1993), 79 C.C.C. (3d) 353 (Ont. C.A.). The trial judge in ***Pawlowski*** awarded costs against the Crown as a *Charter* remedy. In the course of

addressing whether the *Charter*-based costs award was appropriate, Galligan J.A. mentioned (at p. 356) that the court did in fact have inherent jurisdiction to award costs against the Crown in a criminal proceeding, but also noted that this power "has been exercised only rarely and, before the advent of s. 24(1) of the *Charter*, could be exercised only where there was serious misconduct on the part of the prosecution."

[169] The Ontario Court of Appeal took up this costs issue again in ***R. v. Chapman*** (2006), 204 C.C.C. (3d) 457 (Ont. C.A.). The accused had made an unsuccessful third party records request involving the Children's Aid Society, and the judge who heard the application ordered the accused to pay costs in favour of the Society. In overturning the costs award, Simmons J.A. noted (at paras. 15 and 17)that some degree of fault appears to be necessary to justify a costs award against the Crown:

> ... to the extent that a Superior Court may have inherent jurisdiction to make a costs order in a criminal matter against an accused person, the Crown concedes, and I agree, that the trial judge erred by departing from the general principles governing the making of such an award, thereby fashioning a legal standard that makes it easier to obtain a costs award against an accused person than it is to obtain a costs award against the Crown.
>
> . . .
>
> ... In this case, by rejecting fault or some form of conduct requiring censure as at least an element of what is necessary to justify a costs award in a criminal matter, the trial judge erred in principle. Therefore, the costs order cannot stand on the basis on which it was made.

[170] A few months after ***Chapman*** was decided, Rosenberg J.A. also discussed the principles underlying costs in criminal matters in ***Canada (Attorney General) v. Foster*** (2006), 215 C.C.C. (3d) 59 (Ont. C.A.). Of particular note, he summarized the law with respect to costs awards against the Crown in situations where there was no Crown misconduct, and accepted that there may be exceptional circumstances where a costs award is justified (at para. 66):

> Courts have not attempted to exhaustively define the scope of exceptional circumstances, outside Crown misconduct, that will justify an award of costs in a criminal matter. The language used in the cases, however, captures the unusual nature of such an order. For example, in ***R. v. M.(C.A.)*** (1996), 105 C.C.C. (3d) 327 (S.C.C.) at 377, the court referred to the "prevailing convention of criminal practice" that, absent oppressive or improper conduct by the Crown, a criminal defendant is generally not entitled to costs unless the circumstances are "remarkable". To a similar effect is ***R. v. Leblanc***, [1999] N.S.J. No. 179 (C.A.) at para. 15. In ***R. v. King*** (1986), 26 C.C.C. (3d) 349 (B.C.C.A.) at 351, the court suggested that while the classes of cases for awarding costs beyond improper Crown conduct or a test case were not closed there would have to be "some special category". In ***R. v. Curragh Inc.*** (1997), 113 C.C.C. (3d) 481 (S.C.C.) at

> para. 13 the circumstances were described as "unique" and justified an order for costs against the Crown. In ***Curragh Inc.*** the Supreme Court did not, however, identify the jurisdictional basis for awarding costs.
>
> [Emphasis added.]

[171] Rosenberg J.A. also concluded (at para. 69) that: "... the court's inherent power to protect against abuse of process" may be a principle that assists a court in determining whether there should be a costs award against the Crown.

[172] In ***R. v. Magda*** (2006), 213 C.C.C. (3d) 492 (Ont. C.A.), a decision heard and decided at about the same time as ***Foster***, the trial judge had ordered that the Crown pay a portion of the costs of a party responding to a third party records application. Feldman J.A. held (at para. 18) that, based on the Ontario authorities, "... Crown misconduct or a serious interference with the authority of the court or with the administration of justice ... [was] an essential prerequisite for a trial judge to make an order of costs against the Crown."

[173] The most recent Ontario Court of Appeal case of note, ***R. v. Leyshon-Hughes***, 2009 ONCA 16, 240 C.C.C. (3d) 181, involved an application for costs at an Ontario Review Board hearing. Simmons J.A. reiterated (at para. 55) that: "... apart from the remedial powers under s. 24(1) of the *Charter*, the jurisdiction for awarding costs in criminal matters is extremely narrow and the threshold is very high."

[174] The Nova Scotia Court of Appeal effectively has adopted the Ontario approach. In ***Taylor*** at para. 54, the court summarized the law as follows:

> Distilling the relevant legal principles from these several authorities leads me to three general conclusions. First, in criminal proceedings, where exceptional circumstances exist, a costs award may be made against the Crown, whether as a remedy pursuant to s. 24(1) of the *Charter* or pursuant to the court's own inherent jurisdiction. Second, the prosecution's own misconduct may draw a costs sanction in criminal proceedings where, for example, its actions go well beyond inadvertence or carelessness, and amount to oppressive or otherwise improper conduct. Examples would include a Crown Attorney's failure to disclose evidence. Third, whether seen as a remedy under s. 24(1) of the *Charter*, or an exercise of the court's own inherent jurisdiction, the imposition of a costs award against the Crown in criminal proceedings will be an unusual order, reserved to situations which may be seen to involve circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution, or if not involving prosecutorial misconduct, conduct by the police or systemic failures so extraordinary as to be virtually unique in character.
>
> [Emphasis added]

[175] Finally, in the leading case from Alberta, ***Robinson,*** the court focused on the power to award costs under s. 24(1), but also cited ***Pawlowski*** and mentioned (at para. 29) the test to be applied when a superior court invokes its inherent jurisdiction to award costs:

> While costs may be awarded against the Crown in the exercise of the Court's general jurisdiction, the clear rule has been that such costs will only be awarded where there has been serious misconduct on the part of the Crown.

[176] The issue in ***Robinson*** related to Crown misconduct and, in particular, allegations that the Crown had breached its disclosure obligations. The question arises as to whether the "clear rule" set out in ***Robinson*** is that, in those criminal matters where the acts of the Crown are impugned, costs will be awarded only in situations where that misconduct was serious, or whether the court was suggesting a more categorical rule that the only circumstances when costs against the Crown ever are justified pursuant to the court's inherent jurisdiction are when there is serious Crown misconduct (emphasis added).

[177] The case law suggests that there may be some "exceptional" circumstances where the rationale for awarding costs is not Crown misconduct, but instead some other relevant consideration. If ***Robinson*** is interpreted as setting out a categorical rule against costs in any matter where the acts of the Crown are not challenged, this would seem to conflict with one of the cases cited in support of the Court of Appeal's statement in ***Robinson***. In ***R. v. M.(C.A.)***, [1996] 1 S.C.R. 500, the Supreme Court of Canada seemed to suggest that there may be "remarkable" situations other than those involving Crown misconduct where costs are justified. I also note that ***Foster***, ***King***, and ***Taylor*** all suggest that there may be some limited exceptional or unique situations where costs are justified even absent prosecutorial misconduct.

[178] In ***Neil***, Wittmann J.A., as he then was, writing for the Court, appeared to recognize the "unique circumstances" exception to the need to show Crown misconduct before the court will exercise its inherent jurisdiction to award costs, stating at para. 8:

> Although the standard or nature of the misconduct sufficient to justify an award of costs in ***R. v. Robinson*** may have been modified by ***R. v. 974649 Ontario Inc***., we remain bound by ***R. v. Robinson*** to the extent that some misconduct is a necessary element in a costs award against the Crown in a criminal case, absent a ***Pawlowski*** "rare" or "unique" or never-to-occur again circumstance, or similar case.

[179] Therefore, I conclude that the Court of Appeal in ***Robinson*** was not closing the door on costs awards in situations other than where there has been Crown misconduct. Rather, in my view, ***Robinson*** holds that, in the context of a disclosure case which typically will be about Crown conduct, the misconduct must rise to the level of being "serious" in order for a costs award to be made.

[180] Finally, in ***R. v. Curragh***, [1997] 1 S.C.R. 537, the Supreme Court of Canada dealt with a case where there were delays and the legal costs incurred were primarily attributable to

systemic problems beyond the control of the appellant. To a large extent, they were occasioned by the words and actions of the trial judge, which gave rise to an apprehension of bias. The majority of the court awarded the appellants reasonable legal costs of the proceedings to that date as well as the costs of the new trial. The court did not appear to be troubled by its jurisdiction to do so. Rather, the majority adverted to the "uniqueness" of the circumstances, while the minority described the Crown conduct as abuse of process.

2. Costs awards in other contexts

[181] The *Criminal Code* specifically allows for an award of costs in summary conviction appeals: ss. 809, 826, 839. In ***R. v. Trask,*** [1987] 2 S.C.R. 304 at para. 7, the court noted that costs have been be awarded when the Crown appeals a summary conviction matter in order to settle a point of law, explaining that:

> This is because it is the public-at-large who are the beneficiaries of such a step and it is not considered just that one individual should be put to substantial expense when it is the Crown that seeks to effect a valid social purpose by taking the appeal.

[182] The court in ***Trask*** indicated that this was not the situation before it. The appellant rather than the Crown had brought the matter to the court and there was nothing remarkable about the case, such as oppressive or improper conduct on the part of the Crown. In ***R. v. Garcia*** (2005), 194 C.C.C. (3d) 361 (Ont. C.A.), the Ontario Court of Appeal emphasized that a costs award under s. 826 is not appropriate in every case that raises a novel point of law. Doherty J.A. suggested (at para. 26) that the court must assess the importance of the issue in relation to the significance of the issue for the accused:

> In deciding whether the public interest at stake in an appeal justifies a costs order against the Crown under s. 826, the summary conviction appeal court must consider both the public importance of the legal issue raised on the appeal and the significance of the outcome of the appeal to the individual respondent. Where the public interest is high and the appeal has little or no significance to the particular respondent, a costs order against the Crown may be appropriate regardless of the outcome of the appeal. Where, however, there is a significant public interest in the legal issue raised on the appeal and the respondent has a significant personal interest, it is not unfair to follow the general rule and require each side to bear its own costs.

[183] Courts sometimes depart from the typical costs rules in cases where there is a broader public interest in the determination of the issues before the court. For example, in ***Harris v. Canada***, 2001 FCT 1408 at para. 222, [2002] 2 F.C. 484, Dawson J. adopted a set of principles for determining when costs should not be awarded against a public interest litigant, drawn from the *Report on the Law of Standing* (Toronto: Minister of the Attorney General, 1989), issued by the Ontario Law Reform Commission.

[184] Almost all litigation has at least some precedential value that extends beyond the parties to that action. However, this alone does not justify a costs award against the Crown: ***Pauli v. ACE INA Insurance Co.***, 2004 ABCA 253, 354 A.R. 348. This caution against commonplace cost awards against the Crown remains true in the criminal context as well.

3. Should non-*Charter* costs be awarded in this case?

[185] I do not interpret ***Robinson*** as limiting costs awards pursuant to the court's inherent jurisdiction to only those cases involving Crown misconduct. ***Foster***, ***King***, ***Taylor***, ***Neil*** and ***Curragh*** all suggested that there may be some limited exceptional or unique situations where costs are justified even absent prosecutorial misconduct. While ***Trask*** and ***Garcia*** involved the statutory power to award costs under s. 826 of the *Code*, and the "public interest" costs decisions did not involve criminal matters, I am of the view that the principles set out in those cases also are applicable to the exercise of the court's inherent jurisdiction to award costs against the Crown in criminal cases. A situation where the public interest in resolving an issue is high but the issue has little practical significance for the particular accused may be one of the unusual, unique, or extraordinary cases where there is no Crown misconduct but a costs award against the Crown may be justified pursuant to the court's inherent jurisdiction to award costs in a criminal case. Some ability on the part of a superior court trial judge to exercise the discretion to award costs in cases where systemic concerns are raised also makes public policy sense.

[186] As was noted in cases such as ***Garcia*** and ***Pauli***, costs are not justified every time a court rules on a novel issue or an issue that has some precedential value. Clearly, this would offend the principles laid out by the various Courts of Appeal that have warned about the negative consequences of making regular costs awards against the Crown. The default rule is and must remain that there is a strong presumption the Crown need not pay costs in criminal matters. It is only a rare, unique, or exceptional case where the combined effect of the public interest aspect of a matter and the absence of any personal interest for the accused in pursuing the issue might weigh in favour of a costs award.

[187] Unlike ***Trask***, in my view there is something remarkable or unusual in the present case, in that the Crown sought a Production Order to seize the medical records of Mr. Griffin by use of information clothed with plea bargain privilege; the judge who issued the Order imposed conditions to protect privacy interests; and the police officer who effected the seizure disregarded those conditions. I am of the view that these relatively unusual proceedings involve unique questions affecting criminal practice that apply beyond this particular case.

[188] I also note that the outcome of this application has very little practical effect on Mr. Griffin. He had already been acquitted of the charge. There were no appreciable increased costs of trial associated with the *Charter* breaches. The Crown was proceeding based on driving pattern until it learned of Dr. Zaragoza and the previous accident, reliance on which, paradoxically, resulted in a dismissal of the charges. There is no indication the trial would not have proceeded had the medical file not been obtained. It appears that Mr. Griffin pursued the *Charter* issues largely as a matter of principle and with the fond hope that there might be an award for costs of the trial as a remedy for the *Charter* breaches.

[189] Although it is necessary to rely on the inherent jurisdiction of this Court to award costs for the *Charter* application that followed this criminal trial, it seems unfair for Mr. Griffin to have to bear the costs of that application in these unusual and exceptional circumstances where systemic concerns are raised. Similar considerations apply to this case as in the summary conviction appeal cases in that police and Crown practices at issue in this case have broad practice implications beyond those that affected Mr. Griffin.

[190] Simply put, the issues raised by Mr. Griffin have a broader reach than his personal interests, and may result in the police and Crown considering whether to develop a protocol or practice concerning plea bargain privilege and production orders. At a minimum, consideration of these issue may provide guidance in like circumstances in the future.

[191] I am satisfied that this is one of those rare situations virtually unique in character where a modest costs award is justified, made pursuant to the Court's inherent jurisdiction and limited solely to the costs of the *Charter* application that followed the acquittal of Mr. Griffin.

VI. Conclusion

[192] Plea bargain privilege attached to both the letter from defence counsel to the Crown and to the enclosure, the defence work product prepared for the litigation, being the medical legal opinion from Dr. Zaragoza.

[193] There was no abuse of process in this case and no failure to provide full evidentiary disclosure to Mr. Griffin in a timely fashion.

[194] However, there were breaches of s. 8 of the *Charter*, including the Crown's use of documents clothed with plea bargain privilege to obtain the Production Order; Constable MacPherson's seizure of documents beyond the scope of the Production Order and the Crown's failure to return them; and Constable MacPherson's failure to observe the conditions imposed by the issuing judge when she effected the seizure under the Production Order.

[195] I have found that the facts in this case do not meet the threshold of some degree of Crown misconduct or unacceptable negligence to warrant an order for costs of the trial process as a remedy under s. 24 of the *Charter*. Rather, there were unintended s. 8 *Charter* breaches, including that which resulted from *bona fide* uncertainty as to the law concerning plea bargain privilege.

[196] The criminal trial proper had concluded when the costs application proceeded in a motion akin to a civil motion. Mr. Griffin sought a determination of his rights, a determination that involved unique practice issues and addressed larger systemic concerns but which would have limited practical effect for Mr. Griffin. I have concluded that in these exceptional circumstances, it is appropriate to exercise my inherent jurisdiction to award Mr. Griffin his costs of the present application for both counsel, pursuant to the *Rules of Court*.

[197] The schedules set out in the *Rules of Court* are not binding in criminal proceedings. However, some courts have made reference to the *Rules* to assist in fixing costs against the Crown: ***Robinson***; ***R. v. Yeun***, 2001 ABPC 145, 291 A.R. 359 at para. 29; ***R. v. Wood***, [1997] A.J. No. 1365 (Q.B.) (QL) at para. 19; ***R. v. Pendrak***, 2000 ABQB 862, 273 A.R. 92 at para. 54.

[198] I reserve jurisdiction as to quantum of costs pursuant to the *Rules of Court* relative to this *Charter* application in the event the parties are unable to agree.

Heard on the 20th day of April, 2009.
Dated at the City of Edmonton, Alberta this 17th day of December, 2009.

S.J. Greckol
J.C.Q.B.A.

Appearances:

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for the Crown

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for the Accused