

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

Between:

Her Majesty the Queen

Complainant

and

Terry Lee HAIGHT

Defendant

A transcript of the Oral Reasons for Judgment of His Honor Judge Robert Halifax, given at Hay River, N.W.T., on the 23rd day of September AD 1983.

Appearances:

Orval J.T. Troy Q.C., Esq      appeared on behalf of the Crown  
G. Boyd Esq                      appeared on behalf of the Defence

The Court:

This matter came on for trial on September 22nd 1983 at Hay River, in the Northwest Territories.

Prior to the trial the defence had served notice on the Crown that an application under Section 24 of the Charter of Rights would be made.

The facts of this case are that the R.C.M.P. received information concerning a vehicle accident in the town of Hay River in the Northwest Territories. As a result of that information Cst Otterman and Cst Simmonds attended at the emergency ward of the hospital in Hay River, where they found the accused. The accused was sitting in the emergency room, and it was ascertained from the accused that he was the driver of the vehicle involved in a single vehicle accident, which occurred within the previous twenty to thirty minutes. At this point the R.C.M.P. officers were asked to leave the room, and the accused for the next ten to fifteen minutes was attended to by the medical staff of the hospital. Thereafter the accused came out into the hallway where Cst Otterman made further observations as to the accused's state of intoxication. Cst Otterman then formed the opinion that the accused's ability to drive a motor vehicle was impaired, and made the breathalyzer demand in the following words pursuant to Section 235 of the Criminal Code:

"I am satisfied that your ability to drive a motor vehicle is impaired and therefore required

providing samples of your breath suitable for analysis to determine, if any, the proportion of alcohol in your blood in accordance with the provisions of the Criminal Code."

A voir dire was held regarding the admissibility of statements made by the accused to Cst Otterman after the above noted demand. At no point was the accused under arrest, nor at any point was he advised of his right to retain and instruct counsel without delay as provided by Section 10(b) of the Charter of Rights.

Upon this demand being made the accused inquired of Cst Otterman what would happen if he refused. Cst Otterman advised the accused that he would be charged with refusal to provide appropriate samples of his breath. At this point there was a pause of one to two minutes, which pause was brought to an end by Cst Otterman stating to the accused "You are going to have to make a decision". The accused then replied after a further pause "I refuse to". Cst Otterman then completed an appearance notice which was served on the accused, and at that point the accused was left to proceed on his way.

The defence's application under Section 24(1) is to exclude the evidence obtained after the demand for the breath samples due to an infringement under Section 10(b) of the Charter of Rights and Freedom. In support of this argument the defence relies on R v Therens (330QR (3rd) 204, a judgment of the Saskatchewan Court of Appeal; and R v

Ahearn 1983 Motor Vehicle Reports at page 199, a Prince Edward Island Supreme Court ruling.

Simply put, the defence argues that upon the demand being made, the accused was then and there detained and without compliance with Section 10(b) the evidence should be excluded pursuant to Section 24 of the Charter of Rights and Freedoms.

The Crown relied on R v Currie 33 CR (3rd) at 227, a Nova Scotia Court of Appeal report, and R v Trask, Nfld., the 12th of January 1983, that compliance of Charter of Rights 10(b) was not necessary, as the accused was not arrested or detained.

I have had the opportunity of reviewing the cases cited by counsel, for which I thank them. I have also referred to the case of Brownridge v R 1972 SCR 926, Chromiak v R 1981 SCR 471, R v MacDonald 1974 22 CCC (2nd) 350, Baldinelli v R 70 CCC (2nd) at 474; R v Sarrell MVR 223, and R v Engen 17 MVR 270.

Whether in the circumstances of this case there was a detention within the meaning of Section 10 of the Charter has resulted in two lines of authority. After careful review I have come to the conclusion that the word "detention" as used in Section 10 of the Charter should be given its normal and ordinary meaning, and not a restricted meaning. "Detention" is not defined in the Constitution Act of 1982 nor the Criminal Code. The Oxford English Dictionary Vol 3 provides four definitions for "detention" as follows:

- (1) Keeping in custody or confining, arrest.
- (2) Keeping back or withholding what is due or claimed
- (3) Keeping in place; holding in one's possession or control, retention
- (4) Keeping from going on or proceeding; hinderance to progress; compulsory delay.

Black's Law Dictionary defines "detained" as follows:

To retain as the possession of personality.

To arrest, to check, to delay, to hinder, to hold, or keep in custody.

To retard, to restrain from proceeding, to stay, to stop.

and detention is defined by the Law Dictionary as the act of keeping back or withholding, either accident or design a person or a thing.

These definitions indicate the stopping, hindering or restraining of a person from proceeding on his way amount to a detention.

In this case the accused was stopped in the hospital corridor. The demand was given to him, part of which demand, and I quote "You are required", and I emphasize "required" "to accompany me for the purpose of providing samples of your breath".

In such circumstances I have no doubt a normal citizen feels detained, within the ordinary meaning. I am satisfied the accused was detained, and was so detained at this point within the meaning of Section 10(b) of the Charter of Rights and Freedoms. The accused was informed of the reason for his detention by the words of Cst Otterman when he gave the breathalyzer demand. However, he was not advised of his rights to obtain and instruct counsel without delay. As a result I am satisfied the accused's rights provided by Section 10(b) of the Charter were infringed.

The next issue is what is the remedy for this infringement. The defence has argued that the evidence should be excluded. In effect, the Crown's position is that the infringement is not such that the admission of such evidence would bring the administration of justice into disrepute. This is the question of the admissibility of evidence which arose during the trial pursuant to the summary conviction provisions of the Criminal Code, before a judge of the Territorial Court of the Northwest Territories. There is no doubt this court has jurisdiction to deal with the question and to grant the remedy, and it is therefore a court of competent jurisdiction. Section 24(1) of the Charter of Rights and Freedoms provides that a court of competent jurisdiction can grant a remedy that the court considers appropriate and just in the circumstances.

The remedy under Section 24(1) is discretionary, and I refer to the case of R v Therens in the judgment of Mr. Justice Tallis at pages 224 to 226. The remedy in Section 24(1) is not as restrictive as the remedy provided by Section 24(2) where evidence obtained, in a manner that infringed or denied any right or freedom guaranteed by the Charter, the evidence shall - this is mandatory - be excluded if it is established, having regard to all the circumstances, the admission of it, if received, would bring the administration of justice into disrepute.

It is my view this court can exclude evidence, not only under Section 24(2), but also under the discretionary provisions as to a remedy provided under Section 24(1) of the Charter of Rights and Freedoms, and it is my view the Charter should not be interpreted in such a manner as to thwart proper law enforcement. However, in this case I do not see any interference with proper law enforcement if the accused had been advised of his right to counsel pursuant to Section 10(b) of the Charter of Rights and Freedoms. In fact, there was ample time for such to be done without any interference with the case, and I specifically point to the one to two minutes delay when the accused could have been advised of his rights under Section 10.

It is my view that in the circumstances of this case it is appropriate and just to exclude evidence obtained after the infringement of the accused's right under Section 10(b). Such is a remedy this court has the juris-

remedy available.

As a result, evidence obtained from the accused after the making of the demand on the accused at 2.17 am April 26th 1983 will be excluded.

Mr. Troy, are you prepared to proceed with the trial of this matter?

Mr. Troy: Yes. As I understand your ruling, Your Honor, it was the evince obtained -

The Court: After 2.17 am the 26th of April 1983.

Mr. Troy: I would like to recall Cst Otterman.

Cst Otterman, witness called on behalf of the Crown, was recalled to the witness stand.

The Court: Procedurally is there any objection?

Mr. Boyd: I beg your pardon?

The Court: Procedurally is there any objection?

Mr. Boyd: No sir.

The Court: Do you still understand Constable you are still under oath from yesterday?

The witness: Yes sir.

The Court: Proceed. Mr. Troy?

(Mr. Troy examined the witness on behalf of the Crown as follows)

Q Constable, you gave evidence, you told us yesterday that Mr. Haight had come out of the doctor's office and was with you in the corridor. Would you proceed with your evidence?





1 A Yes sir.

2 Q Would you proceed with your evidence from that point?

3 A The conversation sir?

4 Q No, the evidence. He came out of the doctors office, and  
5 you had formed the opinion that you were going to give  
6 him the demand. I would like that evidence. You were  
7 waiting, and gave him the demand?

8 A At, on the 26th of April 1983 approximately 2.17 Terry  
9 Haight came into the hallway of the emergency ward at  
10 Williams Memorial Hospital. At this time it was noted,  
11 from previously viewing the accused, that his words  
12 were slurred. There was a moderate odor of alcohol on  
13 his breath. His eyes were slightly bloodshot. As a  
14 result of the symptoms I formed the opinion that Mr.  
15 Haight's ability to drive a motor vehicle was impaired  
16 by alcohol, and the breathalyzer demand was subsequently  
17 read by myself.

18 Q And then what?

19 A The breathalyzer demand was subsequently read by myself to  
20 Mr. Haight.

21 Q Yes, and would you tell the court what the demand was?

22 A If I could refer to my notebook?

23 Q Yes.

24 The Court: Any objection Mr. Boyd?

25 Mr. Boyd: Your Honor, I believe the voir dire said after  
26 the demand. I have no objection to the demand itself.

27 The Court: You may refer to your notes.



1 A I am satisfied that your ability to drive a motor vehicle  
2 is impaired and you are therefore required to accompany  
3 me for the purpose of providing samples of your breath  
4 suitable for alcohol analysis to determine, if any, the  
5 proportion of alcohol in your blood in accordance with  
6 the provisions of the Criminal Code.

7 Q Yes, and who was present when you did this?

8 A Cst Simmonds was right beside me, and Mr. Haight's mother  
9 was in the general vicinity.

10 Q Yes, and all right, in view of the court's ruling in  
11 respect to evidence from the accused I don't want you  
12 to repeat any conversation of the accused, but did you  
13 have a conversation with the accused?

14 A Yes sir, there was a short conversation with the accused.

15 Q And as a result of that conversation -----

16 The Court: That is excluded.

17 Mr. Troy: What is excluded?

18 The Court: Any evidence obtained by the accused is excluded.

19 Now you are trying to refer half way to things that the  
20 accused may have said, and the court may not be going to  
21 know about it, but that is not acceptable in my view.

22 Q But you did speak to the accused?

23 A Yes sir.

24 Q What happened then in respect to the accused?

25 A He was issued an appearance notice by myself.

26 Q And what was on that appearance notice?

27 A The appearance notice was for refusing to provide a breath



1 Mr. Boyd:

2 Your Honor, I believe what has come out here on the appearance  
3 notice is evidence which was dealt with under the voir  
4 dire which was excluded under the Charter argument.

5 The Court: Mr Troy?

6 Mr. Troy: That would be evidence of any conversation from  
7 the accused regarding appearance notices. We have dealt with  
8 evidence of conversation with the accused.

9 The Court: I agree.

10 Mr. Troy: The ppearance notice certainly has nothing to  
11 do with evidence from the accused.

12 The Court: I will allow you to continue.

13 Q Yes, and what happened then?

14 A Mr. Haight was issued a copy of the appearance notice, and  
15 left the hospital.

16 Q Yes, and he left the hospital?

17 A Yes.

18 Q And who was there?

19 A I believe his mother.

20 Q And what did you and Cst Simmonds do?

21 A We left shortly thereafter.

22 Q And did you have any further dealings with Mr. Haight?

23 A No sir, I did not.

24 Mr. Troy: I have no further questions.

25 The Court:

26 Mr. Boyd:

27 (The witness was cross-examined on behalf of the defence by



1 Mr. Boyd as follows)

2 Q Cst Otterman, on the 26th of April, that evening in  
3 question, I believe you saw Mr. Haight on two occasions, the  
4 first and second being separated by his going into a  
5 room and being attended, is that correct?

6 A Yes sir.

7 Q How long were you speaking to him on the first occasion?

8 A Approximately five to seven minutes.

9 Q And at that time were you in the presence of Cst Simmonds?

10 A Yes sir I was.

11 Q And Mrs. Haight?

12 A I cannot recall if Mrs. Haight was present right at that  
13 first instance, at that time, I cannot recall.

14 Q And where were you in relation to Mr. Haight's physical  
15 position. Were you face to face with him?

16 A He was sitting on the edge of the bed at the emergency  
17 ward, and I was standing face to face from him.

18 Q What distance would you say you were from him?

19 A To the best of my recollection it was just a couple of  
20 feet.

21 Q OK now, did you at that time, as a result of your five  
22 to seven minutes with him, form the opinion that an  
23 offence had been committed?

24 A Yes.

You formed an opinion, you had formed an opinion at that  
point in time he had committed an offence?

Yes sir.



1 Q Why did you not give him a breathalyzer demand at that  
2 time?

3 A My reason for that sir was that he was going to be  
4 checked by a doctor, and if the doctor was going to  
5 hold him overnight it would free him from the demand.

6 Q Because if he was staying at the hospital you can't  
7 take a breath test, a blood alcohol test, it would have  
8 been futile to read him the demand.

9 Q Why?

10 A If he stayed in the hospital he can't take a breath test,  
11 and I would require a blood alcohol test if he con-  
12 sented.

13 Q Would you tell me what symptoms you noted, symptoms of  
14 his having been drinking?

15 A Well, there was a moderate odor of alcohol on his  
16 breath. His eyes were slightly bloodshot, and his  
17 words were slurred.

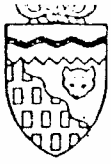
18 Q And what time of the night was this when you made these  
19 observations?

20 A Approximately between 1.50 am and shortly after 2 o'clock  
21 am.

22 Q At that point in time did you notice anyone else's  
23 eyeballs that were bloodshot? To see if they were bloodshot?

24 A No sir.

25 Q At that time, did you at that point ask Mr. Haight to  
26 perform any physical tests with respect to his degree  
27 of sobriety?



1 A No sir, I did not.

2 Q Did you at any time that evening ask Mr. Haight to perform  
3 any physical tests?

4 A No sir.

5 Q Are you familiar with physical tests?

6 A Yes sir.

7 Q Have you yourself performed them in other cases?

8 A Yes sir.

9 Q I should re-phrase that. Have you had someone else  
10 perform them?

11 A Yes.

12 Q Why is it that you didn't have Mr. Haight perform any  
13 of these physical tests at that time?

14 A The situation in my opinion didn't dictate to perform  
15 physical tests at that time.

16 Q But after he emerged the second time, having been given  
17 that, could he not have performed the tests then?

18 A There was no reason he could not.

19 Q Do you think perhaps the reason why you didn't have him  
20 perform the tests is that you thought he might pass?

21 A No sir.

22 Q Did it appear he indicated to you he couldn't walk a  
23 straight line or touch his nose with his eyes closed?

24 A In my opinion his ability to drive was impaired by alcohol.

25 Q You formulated that opinion on the basis of a slight  
26 odour of alcohol, his bloodshot eyes and slightly slurred  
27 speech?



1 A Yes sir, I did.

2 Q Did Cst Simmonds, to your knowledge, have Mr. Haight  
3 perform any of those physical tests?

4 A No, he did not.

5 Mr. Boyd: I have no further questions.

6 The Court: Re-examination?

7 Mr. Troy: No Your Honour.

8 The Court: Thank you constable, you may step down. Does  
9 the Crown have any further evidence?

10 Mr. Troy: No Your Honor, that's the case for the Crown.

11 The Court: Does the defence wish to call any evidence?

12 Mr. Boyd: No Your Honour.

13 The Court: Submissions please, from the Crown.

14 (Mr. Troy addressed the court on behalf of the Crown)

15 (Mr. Boyd addressed the court on behalf of the Defence)

16 The Court: I think count one can be dealt with very  
17 clearly. The only evidence of impairment is the evi-  
18 dence provided by the accused to the police officers  
19 prior to the breath demand being made. There is no  
20 evidence of any physical tests. The observation of the  
21 police officers as to the accused's condition in my  
22 view do not in the circumstances of this case amount  
23 to show beyond a reasonable doubt that the accused was  
24 impaired.

25 The evidence is not before me to satisfy me  
26 beyond a reasonable doubt that the accused's ability  
27 to drive a motor vehicle was impaired by alcohol. I



1 I do not have any evidence of the accused's method of  
2 driving, other than the fact that there was an acci-  
3 dent, a single motor vehicle accident. I have no  
4 physical tests that were done on the accused as to  
5 his impairment, and in the circumstances before me it is  
6 my view that the Crown has not satisfied its onus beyond a  
7 reasonable doubt on Count 1 under Section 234. The  
8 Crown has not shown beyond a reasonable doubt that the  
9 accused's ability to drive a motor vehicle was impaired  
10 by alcohol.

11 With regard to Count No. 1, I find the  
12 accused not guilty. With regard to Count No. 2, a  
13 charge under Section 235(2) alleging the accused failed  
14 to provide suitable samples of his breath for analysis  
15 upon demand by a peace officer, the evidence before me,  
16 and the only evidence I have to look at in this problem  
17 is the evidence up to and including the time the demand  
18 was made upon the accused in the hallway of the emergency  
19 ward of the hospital in Hay River. What I do have before  
20 me is the further evidence of the fact that an appearance  
21 notice was served on the accused, wherein the accused  
22 was charged with refusing to provide a breath sample,  
23 and that the accused thereafter left the hospital in the  
24 company of his mother, and the police officers went  
25 their way.

26 What do I really have as evidence of a  
27 refusal? I do not know whether or not there was an





1 attempt made by the accused to blow. I have no  
2 evidence before me as to whether or not even one,  
3 whether one sample was obtained or not, It would have  
4 been a simple matter for the Crown to ask the question  
5 of the police officer "Did, or were you present when any  
6 samples were obtained from the accused?" That question  
7 was never asked. I think we can all presume that it  
8 did not occur, but I do not have that, and I am not pre-  
9 pared to draw that in the circumstances of this case.

10 It is my view on the evidence before me  
11 that the Crown is asking the Court to draw, which may be  
12 reasonable inferences, but in my view the Crown is asking  
13 the Court to draw inferences which will infringe the  
14 accused's right to stand quiet, and the onus is on the  
15 Crown, and that onus being that the Crown must prove that  
16 beyond a reasonable doubt.

17 In the circumstances of this case I cannot  
18 say that the Crown has satisfied its onus. I find the  
19 accused not guilty on Count 2. You are free to go,  
20 Mr. Haight.

21 (The trial concluded)

22 Certified Correct

23  
24 *Everett Tingley*  
25 Everett Tingley  
26 Court Reporter  
27