Date: 2014 01 24
File: T1-CR-2013-000696

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JANET COLLEEN HARRIGAN

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at:	Yellowknife, Northwest Territories December 4, 2013
Date of Decision:	January 24, 2014
Counsel for the Crown:	Laura Wheeler
Counsel for the Accused:	Caroline Wawzonek

[Sections 253(1)(a) and 253(1)(b) of the *Criminal Code*]

[Ruling on a *voir dire*]

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A. BACKGROUND AND ISSUES

A.1 Introduction

[1] Janet Colleen Harrigan is charged that she:

(a) on or about the 14th day of April 2013 at or near the City of Yellowknife in the Northwest Territories while her ability to operate a motor vehicle was impaired by alcohol did operate a motor vehicle contrary to section 253(1)(a) of the *Criminal Code* ("the impaired driving charge") and

(b) on or about the 14th day of April 2013 at or near the City of Yellowknife in the Northwest Territories having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood did operate a motor vehicle contrary to section 253(1)(b) of the *Criminal Code* ("the over 80 charge").

[2] Prior to the trial, counsel for Janet Harrigan filed a Notice of Application alleging breaches under sections 8, 9 and 10(a) of the *Canadian Charter of Rights and Freedoms* and seeking to have all evidence from the fact of her detention to provide samples including the certificate of analysis excluded pursuant to section 24(2) of the *Charter*. At the trial, the application was expanded to include an alleged breach under section 10(b) of the *Charter*.

[3] It was agreed that the trial would begin with a *voir dire* with regard to the subject matter of the application. In this regard, an Agreed Statement of Facts was filed and one witness, Cst. Tina Acreman, testified. This decision is with respect

to the *voir dire*. It is agreed that if the certificate of analysis is admitted into evidence, then all evidence of the *voir dire* will be applied to the trial. At the conclusion of the testimony of Cst. Acreman, it was also agreed that neither the defence nor the Crown would call further evidence at the trial.

A.2 Background

[4] At about 4:30 p.m. on April 14, 2013, Cst. Acreman and another officer responded to a report of an impaired driver near a car wash in Yellowknife, Northwest Territories. When Cst. Acreman and her partner arrived, Cst. Acreman noticed a car starting and stopping on the road. Another police vehicle, with its emergency lights activated, was behind the car. The car came to a complete stop. Cst. Acreman approached the car and offered her assistance in moving the car to the side of the road. The accused, Ms. Harrigan got out of the car and spoke to Cst. Acreman's partner at the side of the road, while Cst. Acreman drove the vehicle out of the traffic. In driving the car to the side of the road, Cst. Acreman had difficulties with it starting and stopping. This was because the floor mat was covering the brake and the accelerator. Cst. Acreman went back to speak with Ms. Harrigan. As a result of her observations concerning odour of alcohol, flushed face and slurred speech, Cst. Acreman arrested Ms. Harrigan for impaired driving and gave her a breathalyzer demand. Ms. Harrigan was taken to the detachment where she gave breath samples.

A.3 Issues in the *Voir Dire*

[5] The defence submits that Cst. Acreman did not have the proper grounds to make the breathalyzer demand; that there were issues with respect to the timing of the demand; that there was an arbitrary detention; that Ms. Harrigan was not given the reason for her detention; and that Ms. Harrigan was not given her right to counsel.

[6] The issues that will be dealt with in this decision are as follows:

(a) Did Cst. Acreman have reasonable grounds to make the breathalyzer demand?

(b) Was the breathalyzer demand pursuant to section 254(3) of the *Criminal Code* made "as soon as practicable"?

(c) Was there a violation of the section 10(a) and 10(b) *Charter* rights of the accused?

(d) Was there an arbitrary detention of the accused contrary to section 9 of the *Charter*?

(e) If there have been *Charter* breaches, should the results of the breath analysis be excluded?

[7] In the decision that follows, a reference to a section number without mention of a specific statute means a section of the *Criminal Code*.

B. OUTLINE OF THE FACTS

[8] On April 14, 2013 at approximately 4:30 p.m., Cst. Acreman and her partner were on patrol in a police vehicle and received a report from the detachment of a possible impaired driver leaving the Monkey Tree Gas Bar Car Wash onto Range Road in Yellowknife. An attendant at the car wash had provided a licence plate number, the colour and type of car and stated that the driver smelled of alcohol. Cst. Acreman and her partner, Cst. Brouwer drove to the location. This trip took approximately 3 to 4 minutes. In examination in chief, Cst. Acreman agreed that she probably would have arrived on the scene at about 4:33 p.m. or 4:34 p.m. In cross-examination, Cst. Acreman agreed that she could have arrived as early as 4:30 p.m. or 4:31 p.m.

[9] It was a Sunday afternoon. There was no snow or ice. The roads were dry and clear.

[10] Cst. Acreman observed a police truck operated by Cst. Dunphy behind a car on the road. The police truck had its emergency lights activated. To Cst. Acreman, it appeared that the car had just pulled out of the Monkey Tree parking lot. The car was starting and stopping as if, according to Cst. Acreman, the driver was having problems with the gas and clutch pedals of a manual transmission.

[11] After the car stopped, Cst. Acreman and Cst. Brouwer approached the car. Cst. Brouwer tried to speak to the driver. Although she was pushing on various buttons on the arm rest, the driver was unable to get the window down and eventually Cst. Brouwer opened the driver's side door. Cst. Acreman did not know the driver and had not dealt with her before. Neither of the police officers tried the controls for the window afterwards to see if they were functioning properly.

[12] Cst. Acreman observed the driver to be wearing heavy rubber boots that were too big for her feet and was of the initial impression that the boots might be the reason for the difficulties she was having in driving the car. Cst. Acreman

asked the driver if she could get in the vehicle and move it to the side of the road and the driver agreed.

[13] Cst. Acreman testified that in her initial interaction with Ms. Harrigan, she wanted to determine what was wrong with the vehicle and also to observe Ms. Harrigan to see if there were signs of impairment. Cst. Acreman did not observe an odour of alcohol from Ms. Harrigan during this interaction.

[14] As Cst. Acreman was moving Ms. Harrigan's car off the road, it started and stopped in the same jerking motion that Cst. Acreman had observed when Ms. Harrigan was driving it. Cst. Acreman determined that the floor mat was over both the gas and brake petals and that by pressing on the gas, the mat caused the brake pedal to be pressed also. Since the accused said that she had just washed the car and Cst. Acreman was aware that the Monkey Tree Car Wash was a self-serve car wash, Cst. Acreman thought that the driver had taken the mat out to clean and replaced it incorrectly. Cst. Acreman smelled alcohol when she was sitting in the car.

[15] After parking the vehicle, Cst. Acreman walked across to where Cst. Brouwer was standing with the accused beside the police truck. This was three to four minutes after initially speaking to Ms. Harrigan. Cst. Acreman observed Cst. Brouwer with the licence of the accused and speaking to a central communications centre. Cst. Acreman started speaking with the accused. Cst. Acreman noted that the accused was slurring her speech as if she was speaking with a thick tongue. The accused's face was quite flushed and Cst. Acreman smelled alcohol.

[16] Cst. Acreman confirmed that the accused had just washed her car. When asked where she was driving to, the accused stated that she was going home to England Crescent. Cst. Acreman was of the opinion in all her conversations with the accused, that Ms. Harrigan responded appropriately and that her responses made sense. Cst. Acreman observed that Ms. Harrigan's walk was "perfectly fine."

[17] After speaking to her and observing the smell of liquor, slurred words and flushed face, Cst. Acreman said to the accused that she was being detained for an impaired investigation. After detaining the accused, Cst. Acreman placed Ms. Harrigan in the back seat of the police truck with the door open and Cst. Acreman standing beside her. Prior to this point, Cst. Acreman felt that she did not have the grounds for a breath demand. Cst. Acreman noted that the odour of alcohol was stronger when the accused was in the back seat of the police truck.

[18] Prior to the detention, Cst. Acreman formed the opinion that Ms. Harrigan "was intoxicated and had been driving a vehicle." It was on this basis that Cst.

Acreman detained Ms. Harrigan for an impaired driving investigation. After smelling the alcohol from Ms. Harrigan's breath in the police truck, Cst. Acreman formed the opinion that Ms. Harrigan "was impaired and she had been driving a vehicle." It was on this basis that she made the breathalyzer demand.

[19] At the time that Cst. Acreman was interacting with Ms. Harrigan, all of the approved screen devices in the possession of the RCMP were inoperable because they required calibration.

[20] At 4:44 p.m., which was approximately a minute after Cst. Acreman detained the accused, Cst. Acreman arrested Ms. Harrigan for impaired driving. Cst. Acreman read the accused her *Charter* rights and police warning. Cst. Acreman also read the breath demand to the accused.

[21] The accused was driven to the detachment. She arrived in the observation area at 5:07 p.m. and Cst. Acreman began her observation period at that time. The first sample was taken at 5:31 p.m. The second sample was taken at 5:53 p.m. Ms. Harrigan was picked up by her husband at 6:35 p.m. after being served with a Promise to Appear, a Notice of Intention to Produce, the Certificate of Qualified Technician, a Notice to Seek Greater Punishment and a 24 Hour Suspension.

C. ISSUES

C.1 Did Cst. Acreman have reasonable grounds to make the breathalyzer demand?

[22] At 4:44 p.m., Cst. Acreman made a demand to Janet Harrigan pursuant to section 254(3) of the *Criminal Code*. Section 254(3) states:

> 254(3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person
>
> (a) to provide, as soon as practicable,
>
> (i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood

[23] Section 254(3) required Cst. Acreman to have reasonable grounds to believe that Janet Harrigan was driving while her ability to operate the motor vehicle was impaired by alcohol or while the concentration of alcohol in her blood exceeded 80 mg. of alcohol in 100 ml. of blood. Based on the evidence before the Court, Cst.

Acreman appears to have been dealing with the first branch of the test, i.e., the impairment of Ms. Harrigan's ability to drive.

[24] There are two parts to the analysis of determining whether or not Cst. Acreman complied with section 254(3). Firstly, was Cst. Acreman using the right test? i.e., that Janet Harrigan was driving while her ability to operate the motor vehicle was impaired; and secondly, were the grounds for this belief reasonable?

[25] If Cst. Acreman was not using the right test and did not have these reasonable grounds, then the taking of samples of breath was not authorized by law and therefore is a breach of Ms. Harrigan's right to be secure against unreasonable search or seizure pursuant to section 8 of the *Charter*. As stated by Sopinka J. for the majority in *R. v. Bernshaw,* [1994] SCJ 87 at ¶ 51:

> The requirement in s. 254(3) that reasonable and probable grounds exist is not only a statutory but a constitutional requirement as a precondition to a lawful search and seizure under s. 8 of the *Canadian Charter of Rights and Freedoms*. Section 8 requires that reasonable and probable grounds exist in fact and not that their presence can be deemed to exist notwithstanding the evidence.

[26] The evidence that this Court has with respect to the test that was being used comes solely from the testimony of Cst. Acreman. Cst. Acreman testified that prior to detaining Ms. Harrigan for an impaired investigation, she believed that Ms. Harrigan "was intoxicated and had been driving a vehicle." At the point when Cst. Acreman gave the breathalyzer demand, she believed that Ms. Harrigan "was impaired and she had been driving a vehicle."

[27] The difficulty with Cst. Acreman's testimony is that she did not state her belief in the words specified in the *Criminal Code* or in words that indicated she was using the same test as required by the *Criminal Code*. For the breathalyzer demand to be compliant with section 254(3), there must have been reasonable grounds to believe that Ms. Harrigan's ability to operate a motor vehicle was impaired by alcohol.

[28] It may be that Cst. Acreman meant that since Ms. Harrigan "was impaired", it was her belief that Ms. Harrigan's ability to operate a motor vehicle was impaired. On the other hand, the plain use of the word "impaired" when applied to an individual does not necessarily imply that his or her ability to operate a motor vehicle is impaired.

[29] The determination of whether or not Cst. Acreman was using the right test is further complicated by her testimony that when she believed that Ms. Harrigan "was intoxicated", this level of alcohol consumption was not sufficient to make the demand.

[30] It is clear that in order for a Judge to convict an accused of impaired driving, the judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. See *R. v. Stellato (1994)*, 90 C.C.C. (3d) 160 (SCC). Cst. Acreman's distinction between an accused who "was intoxicated" versus an accused who "was impaired" is confusing and a significant warning that she may be using the wrong test for impaired driving.

[31] If Cst. Acreman was using the wrong test, for example, a level of alcohol consumption that was less than an impairment of the ability to operate a motor vehicle, then the grounds she had, although reasonable for that incorrect test, would not have been sufficient for the test required in section 254(3).

[32] Now, I recognize that Cst. Acreman read the breathalyzer demand to Ms. Harrigan, and that the demand starts with the words, "I am satisfied that your ability to operate a motor vehicle is impaired." This is the correct test, however, given, Cst. Acreman's testimony which is inconsistent with this statement; I am unable to accept that this was a correct statement of Cst. Acreman's belief. In my view, it was simply a verbatim reading of a card to the accused.

[33] I find that Cst. Acreman was not using the correct test as is required under section 254(3) of the *Criminal Code*. In order for me to determine that Cst. Acreman had reasonable grounds to believe that Ms. Harrigan had been committing an offence under section 253, I must be satisfied as stated by the Supreme Court of Canada in *R. v. Bernshaw (1994)*, 95 CCC (3d) 193, "Section 254(3) of the *Code* requires that the police officer subjectively have an honest belief that the suspect has committed the offence and, objectively, there must exist reasonable grounds for this belief." The evidence is that Cst. Acreman believed that Ms. Harrigan was impaired and she had been driving a vehicle. Based on this evidence, I am unable to find that Cst. Acreman had an honest belief that the suspect had committed an offence under section 253.

[34] If I am incorrect in this finding, and that Cst. Acreman was, in fact, using the correct test, the Court must assess if there were reasonable grounds to believe that Ms. Harrigan's ability to operate a motor vehicle was impaired by alcohol. This assessment is done by looking at all of the circumstances as a whole. See *R. v. Shepherd*, 2009 SCC 35 at paragraph 21. It is also an assessment which does not have to result in a *prima facie* case being established against the accused. See *R. v. Shepherd*, *supra*, at paragraph 23.

[35] Let me begin my assessment by stating that I have a number of concerns with the reliability of Cst. Acreman's evidence. One concern involves her explanation for the reasons for the traffic stop, which I will explain later. With

respect to grounds for the breathalyzer demand, my concern arises from the following inconsistencies.

[36] Cst. Acreman testified that when she started talking to Ms. Harrigan at the side of the road, "her [Ms. Harrigan's] face was quite flushed and her eyes were a bit watery." Later, Cst. Acreman described this interaction again and said that "her eyes were watery and her face was flushed." After her description of events at the detachment, Cst. Acreman was asked, "Q. Okay. There was [sic.] no observations particular to her eyes at the roadside; correct? A. No, there wasn't." Then the following exchanged occurred with the Court:

> Q. When did you observe watery eyes?
>
> A. When we got into the detachment, we were processing her. When the – when it got warmer in the building. They were dry at the roadside. I – they weren't red and watery."

[37] Another inconsistency is with Ms. Harrigan's inability to open the driver's window. On first telling of the events, Cst. Acreman stated as follows:

> A. Okay. The car stopped. Constable Brouwer was attempting to speak with the lady, but she couldn't get her window down – or Ms. Harrigan. And she couldn't get her window down, so eventually she got her window down, and we got her out of the vehicle.

[38] Later on, the Court had the following exchange with the witness:

> A. And nothing was happening, so Constable Brouwer just opened the door and asked her to get out of her vehicle.
>
> Court: So the – Ms. Harrigan never opened the window?
>
> A: No, she did not.

[39] Although I have no reason to believe that Cst. Acreman was intentionally changing her testimony, I consider these types of reversals of testimony to be an indication that her actual memory of the events of the day may have faded with time. Consequently, it also causes me concerns about the accuracy of the other observations.

[40] Cst. Acreman's grounds for the breath demand can be best analyzed by first starting with her summary grounds for detaining Ms. Harrigan. Cst. Acreman testified as follows with respect to the reasons for detaining Ms. Harrigan:

> A. I just confirmed that she had washed her car and where she was travelling to. She stated she was going home. The more – the longer I spoke to her – the few minutes that I spoke to her, I noticed some distinct – like, her voice was – her words were slurred, and just talked like her cheek – her tongue was quite thick. And her eyes

> were watery, and her face was flushed. And I could really smell alcohol coming from her breath at the time – or liquor coming from her breath.
>
> Q. And you stated earlier that you advised her she was being detained?
>
> A. It was at that time, I did, I advised her.
>
> Q. Was that before or after you made those observations?
>
> A. After

[41] As stated earlier, she resiled from the observation that Ms. Harrigan's eyes were watery, but in summary, Cst. Acreman stated that she relied upon the following grounds in deciding to detain Ms. Harrigan for an impaired driving investigation:

(a) Ms. Harrigan's speech was slurred and she talked as if her tongue was quite thick;

(b) Ms. Harrigan's face was flushed; and

(c) There was the smell of alcohol coming from her breath.

[42] These observations were made while Cst. Acreman spoke to Ms. Harrigan at the side of the road with Cst. Brouwer. Cst. Acreman testified that these grounds were not sufficient to make a breath demand. It was not until Cst. Acreman put Ms. Harrigan in the back seat of Cst. Dunphy's truck with Ms. Harrigan seated and Cst. Acreman standing in front of the open door, that Cst. Acreman determined the smell of alcohol was stronger and more concentrated, and there were sufficient grounds to make a breath demand. In other words, her grounds were as stated above with the added observation that the smell of alcohol was stronger and more concentrated.

[43] In going through the analysis of whether these grounds were objectively reasonable, I am also taking into account the following circumstances. It appears that Ms. Harrigan was responsible for placing the floor mat in the incorrect position and that she would have likely just driven from the car wash, out of the parking lot and onto the road with the mat in that position. Given Cst. Acreman's description of the placement of the mat, it is likely that Ms. Harrigan would have had trouble driving the vehicle immediately on leaving the war wash unless the mat somehow moved after she started driving. I also take into account Ms. Harrigan's inability to roll the window down. These are actions of someone whose ability to physically move or to make sound judgments could be impaired by alcohol. On the other hand, both of these difficulties occur in the factual context of someone who is driving a new car which may be unfamiliar to them.

[44] On an objective basis, there are situations where a flushed face, slurred speech, odour of alcohol and the driving pattern and decision making of Ms. Harrigan would be reasonable grounds under section 254(3). But in assessing how slurred her speech was, or how flushed her face was or how strong the odour of alcohol was, I have to rely on Cst. Acreman's testimony. She testified that up to the point of smelling the stronger alcohol odour while Ms. Harrigan was seated in the police truck, she did not have grounds for the breathalyzer demand.

[45] I cannot see how the addition of the observation that the smell of alcohol on Ms. Harrigan's breath was stronger and more concentrated would be enough to transform what Cst. Acreman felt to be insufficient grounds into reasonable grounds for a breathalyzer test. In my view, there were not sufficient grounds that a reasonable peace officer would believe that there were reasonable grounds for a breath demand.

[46] Given my finding that Cst. Acreman was using the wrong test and that objectively, there were not sufficient grounds; I find that there were not reasonable grounds to conclude that Ms. Harrigan committing an offence under section 253 and that therefore, the taking of breath samples was not authorized by law.

C.2 Was the breathalyzer demand pursuant to section 254(3) of the Criminal Code made "as soon as practicable"?

[47] Given my finding that there were not reasonable grounds for making a breathalyzer demand, this question has no application. If I am incorrect on this finding, it is necessary to analyse the steps that were taken in the stop and arrest of Ms. Harrigan.

[48] When Cst. Acreman came upon Ms. Harrigan, Ms. Harrigan was being stopped by Cst. Dunphy. Neither Cst. Dunphy; nor Cst. Brouwer was called as a witness so it is not entirely clear what transpired between Cst. Dunphy and Ms. Harrigan. Presumably, Cst. Dunphy would have heard the same radio call as Cst. Acreman and engaged his emergency flashers to stop Ms. Harrigan. This is a more likely scenario than Cst. Dunphy putting on his emergency lights because he had come across a motorist who needed assistance.

[49] In any case, Ms. Harrigan was detained when stopped by Cst. Dunphy. The Supreme Court of Canada in *R. v. Grant*, [2009] 2 S.C.R. 353 at ¶ 44 summarized the meaning of psychological detention:

> ... In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

> (a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.
>
> (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[50] In my view, the answer to the question of "whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand" as stated in *Grant* at ¶ 31, is clear. Cst. Dunphy had activated his emergency lights which was an indication that Ms. Harrigan had to stop. Cst. Acreman and Cst. Brouwer required Ms. Harrigan to speak to them and Cst. Brouwer opened the door. Cst. Acreman's request to get into the car and move the vehicle did not give Ms. Harrigan any option. Ms. Harrigan then had to accompany Cst. Brouwer to the side of the road and provide her driving documents.

[51] In her testimony, Cst. Acreman initially gave the impression that she was not conducting an impaired driving investigation when they first dealt with Ms. Harrigan and that it did not "come together" until she got into the car and drove it to the side of the road and smelled alcohol. The creation of this impression may have been inadvertent. In any case, given the circumstances, it is clear to me that Cst. Acreman was conducting an impaired driving investigation from the moment she saw Ms. Harrigan's car.

[52] When Cst. Acreman arrived at the scene, she was responding to an impaired driving complaint regarding an impaired driver leaving the Monkey Tree Gas Bar Car Wash. She had been provided with a description of the car including type, colour and licence plate number. The car driven by Ms. Harrigan was on the road immediately in front of the Monkey Tree Gas Bar Car Wash. It was stopped by Cst. Dunphy. Cst. Acreman must have been aware that this was the car that she was coming to investigate. If not, she would have left Ms. Harrigan with Cst. Dunphy and looked for the subject matter of the impaired driving complaint. I am of the view that Cst. Acreman treated Ms. Harrigan as the subject of an impaired investigation from the moment she arrived on scene.

[53] The moving of Ms. Harrigan's car was not a necessary part of the investigation. The investigation continued as Cst. Brouwer walked with Ms.

Harrigan to the side of the road and checked her documents. Cst. Brouwer had the opportunity to observe Ms. Harrigan's speech, appearance and movement during the three or four minutes while Cst. Acreman parked the car. Had the grounds been present, Ms. Harrigan should have been arrested by Cst. Brouwer and given the breath demand. That Cst. Brouwer did not arrest Ms. Harrigan leads to two possibilities. Either Cst. Brouwer felt that the grounds did not exist, in which case, this further weakens Cst. Acreman's assertion that reasonable grounds were present. Alternatively, Cst. Brouwer felt that the grounds did exist, in which case, the delay in waiting for Cst. Acreman to speak to Ms. Harrigan and put her in the police truck, indicates that the breath demand was not given "as soon as practicable".

C.3 Was there a violation of the section 10(a) and 10(b) *Charter* rights of the accused?

[54] Ms. Harrigan was first advised that she was detained for an impaired driving investigation after Cst. Acreman had spoken with her at the side of the road. She described Ms. Harrigan's reaction as:

> A. She was quite surprised. I don't remember what she said, but I just remember her – she was taken quite aback. Like, "Really"? I'm not . . .

[55] As I indicated in the previous section, Ms. Harrigan was legally detained from the moment that her vehicle was stopped. Also, Ms. Harrigan was being investigated for impaired driving from the moment she was stopped. Yet she was told why she was stopped only after she exited her vehicle, after Cst. Acreman drove her vehicle to the side of the road, after she spoke with Cst. Brouwer for 3 or 4 minutes and after she spoke again with Cst. Acreman.

[56] Sections 10(a) and 10(b) of the *Charter* require that:

> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;
>
> (b) to retain and instruct counsel without delay and to be informed of that right

[57] Ms. Harrigan should have been informed of the reason for her detention when the officers approached her and she was sitting in the car. The failure to so inform her means that her section 10(a) *Charter* right has been breached.

[58] The purpose of section 10(a) of the *Charter* is to provide the accused with sufficient information to allow the accused to make a decision with respect to whether or not to submit to a detention or an arrest or to exercise his right to

counsel. In *Evans v. The Queen* (1991), 63 C.C.C. (3d) 289, McLachlin J. speaking for the majority said at p. 302:

> l. Section 10(a) of the Charter
>
> > The right to be promptly advised of the reason for one's detention embodied in s. 10(a) of the Charter is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it: *R. v. Kelly* (1985), 17 C.C.C. (3d) 419 at p. 424, 44 C.R. (3d) 17, 12 C.R.R. 354 (Ont. C.A.). A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(b) of the Charter. As Wilson J. stated for the court in *R. v. Black* (1989), 50 C.C.C. (3d) 1 at p. 12, [1989] 2 S.C.R. 138, 70 C.R. (3d) 97, "[a]n individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy". In interpreting s. 10(a) in a purposive manner, regard must be had to the double rationale underlying the right.

[59] The *Criminal Code* provisions dealing with the investigation of impaired driving allows for the brief stop of a motorist for the purpose of an investigation of his or her sobriety. Provided the stop is brief and the investigative procedures are performed in the requisite time frame, the Supreme Court of Canada in a number of cases including *R. v. Elias; R. v. Orbanski*, [2005] 2 S.C.R. 3 has found that the lack of a section 10(b) right to counsel is a reasonable limit prescribed by law. Ms. Harrigan was given her right to counsel when she was given the breath demand. Despite my finding that there was an unacceptable delay between the initial stop and the breathalyzer demand and that the demand was not given "as soon as practicable", I do not find that her right to counsel was breached.

C.4 Was there an arbitrary detention of the accused contrary to section 9 of the *Charter*?

[60] Cst. Acreman arrested Ms. Harrigan for impaired driving pursuant to section 495 which authorizes a peace officer to arrest without warrant "a person who has committed an indictable offence or who, on reasonable grounds he believes has committed or is about to commit an indictable offence." If the reasonable grounds for the breathalyzer demand pursuant to section 254(3) of the *Criminal Code* did not exist, then neither would the reasonable grounds under section 495 and the arrest would not be authorized by law.

[61] Although I find that the arrest was unlawful, this finding does not end the analysis with respect to section 9 of the *Charter*. Not every unlawful arrest is an arbitrary detention. The Ontario Court of Appeal in *R. v. Duguay, Murphy and Sevigny*, [1985] O.J. No. 2492 at paragraph 25 stated:

> It cannot be that every unlawful arrest necessarily falls within the words "arbitrarily detained". The grounds upon which an arrest was made may fall "just short" of

> constituting reasonable and probable cause. The person making the arrest may honestly, though mistakenly, believe that reasonable and probable grounds for the arrest exist and there may be some basis for that belief. In those circumstances the arrest, though subsequently found to be unlawful, could not be said to be capricious or arbitrary. On the other hand, the entire absence of reasonable and probable grounds for the arrest could support an inference that no reasonable person could have genuinely believed that such grounds existed. In such cases, the conclusion would be that the person arrested was arbitrarily detained. Between these two ends of the spectrum, shading from white to grey to black, the issue of whether an accused was arbitrarily detained will depend, basically on two considerations: first, the particular facts of the case, and secondly, the view taken by the court with respect to the extent of the departure from the standard of reasonable and probable grounds and the honesty of the belief and basis for the belief in the existence of reasonable and probable grounds on the part of the person making the arrest.

[62] In dealing with Cst. Acreman's testimony in an earlier section of this decision, I came to the conclusion that she had adopted the incorrect test for the purpose of section 254(3) and that even if she had adopted the correct test, there were not reasonable grounds to believe that Ms. Harrigan had committed an offence under section 253. In the end, I had no issue with the honesty of Cst. Acreman's belief that Ms. Harrigan was breaking the law. The departure from the standard of reasonable grounds was significant but was not so far from the correct standard, that I consider the arrest to have been "capricious or arbitrary".

[63] Consequently, I do not find there to have been a breach of section 9 of the *Charter.*

C.5 If there have been *Charter* breaches, should the results of the breath analysis be excluded?

[64] Ms. Harrigan's rights under section 8 and section 10(a) of the *Charter* have been breached. Once a breach has been established, the onus is on the accused to show that the evidence obtained, in this case, the results of the breath analysis including the certificate of analysis, should be excluded under section 24(2) of the *Charter*.

[65] Section 24(2) of the *Charter* states:

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

[66] The approach to be taken by the Court when dealing with an application to exclude evidence under s. 24(2) was set out by the Supreme Court of Canada in paragraph 71 of *R. v. Grant* (2009), 245 C.C.C. (3d) 1 (S.C.C.):

> … When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute …

The seriousness of the *Charter*-infringing state conduct

[67] As stated earlier, the law with respect to the investigation of impaired driving has resulted in a temporary suspension of the right to counsel provided that such investigations are conducted efficiently and within requisite time limits as prescribed in the *Criminal Code*. There is no such suspension with respect to the right of a detained motorist to know why he or she is being detained. If anything, this right is more important given the lack of a right to speak to counsel

[68] A motorist who, such as in the case of Ms. Harrigan, is being stopped for the purpose of being observed for signs of impairment should know the reason for her detention. In the circumstances of this case, it could have appeared to her that she was simply receiving the assistance of the police in resolving her difficulties with driving her vehicle.

[69] This is not a situation where the police came upon a stranded motorist and in lending their assistance; they realized that the motorist's ability to drive was impaired. In this case, Ms. Harrigan was the target of their investigation, yet under the guise of assisting her, they were actually investigating her. There was no reason offered; nor can I infer any reason from the evidence for this failure to simply tell Ms. Harrigan that she was being detained for investigation of impaired operation of a motor vehicle when Constables Acreman and Brouwer approached the car.

[70] With respect to the section 8 *Charter* breach, the failure of the police to use the correct test in determining whether to demand a breath sample is troublesome. In the context of a well-established legislative framework for investigating impaired driving, this lapse is alarming and hence serious.

[71] The evidence before the Court was that Cst. Acreman had four years of experience with the RCMP and had been involved in five impaired driving investigations prior to the one involving Ms. Harrigan. The work experience of the other two officers involved was not presented to the Court. The relative lack of experience may account for the failure to provide Ms. Harrigan with her section

10(a) right or the failure to use the correct test under section 254(3) of the *Criminal Code*. What is important, however, in determining the seriousness of the conduct of the police is that the section 10(a) *Charter* right and the grounds for a breathalyzer demand are basic to the investigation of impaired driving. The law is established in these two areas and every officer should be aware of the law. Since the requirements are so fundamental and well known, their breach is serious.

The impact of the breach on the *Charter*-protected interests of the accused

[72] Cst. Acreman indicated that she was observing Ms. Harrigan for signs of intoxication from the moment of her first interaction. Cst. Acreman was obliged to let Ms. Harrigan know why she was detained. All the evidence of impairment to the point in time where Cst. Acreman actually told Ms. Harrigan that she was detained was obtained while Ms. Harrigan thought she was being assisted by the police. There was no direct evidence that Ms. Harrigan would have conducted herself differently had she known she was under investigation for impaired driving. It is likely that Cst. Acreman would still have observed a flushed face and smelled alcohol on Ms. Harrigan's breath. However, it is also reasonable to assume that Ms. Harrigan would have chosen to speak less and her speech pattern would not have been noted by Cst. Acreman.

[73] With respect to the taking of breath samples, clearly the impact of the breach of section 8 is significant. But for the breach, Ms. Harrigan would not have been obliged to give the breath samples. It is recognized that the giving of breath samples is not physically intrusive; however, Ms. Harrigan was arrested and taken to the detachment. She was deprived of her liberty for a period of time.

Society's interest in the adjudication of the case on its merits

[74] The Supreme Court of Canada in *Grant*, *supra* at paragraph 79 stated that "Society generally expects that a criminal allegation will be adjudicated on its merits. According, the third line of inquiry . . . asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion."

[75] The evidence seeking to be excluded is pivotal to the Crown's case on the over 80 charge. The readings of 260 and 250 milligrams of alcohol in 100 millilitres of blood are reliable and would result in a conviction. The social problems which arise from drinking and impaired driving are significant and serious.

[76] Recognizing that society's interest is to have this case adjudicated on its merits, it is also important to recognize this interest is no greater in this case than

many other cases. This interest must be also balanced with society's interest to have a justice system that is above reproach

D. CONCLUSION

[77] In deciding whether or not the results of the breathalyzer test should be excluded, the Court must consider the combination of the three factors referred to above with a view to determining whether admission would bring the administration of justice into disrepute.

[78] The manner in which I am to weigh these factors was suggested by the Supreme Court of Canada in *R. v. Harrison*, [2009] S.C.J. No. 34 at ¶ 36:

> The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[79] The admission of breath sample evidence was discussed under this third heading in *Grant, supra* at ¶ 111: "on the other hand, where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-invasive."

[80] In presenting the section 24(2) *Charter* analysis, I have dealt with the two *Charter* breaches as if they occurred at the same time. I recognize the analysis of the effects of the breach of each of the section 10(a) and section 8 *Charter* rights could be treated separately. This would result in a slightly different outcome. Upon a finding that the evidence discovered after the breach of the section 10(a) *Charter* right (i.e., after the initial contact with Ms. Harrigan in her car) should be excluded, then all evidence of slurred speech, flushed face and odour of alcohol would be excluded. Then there would simply be no grounds for a breathalyzer demand and very little evidence on the impaired driving charge. I have performed the analysis with the two breaches in this way since I consider the effect of either of the two breaches sufficient to result in an exclusion of evidence.

[81] In this case, for the reasons that I have stated above, the section 10(a) *Charter* breach and the unauthorized taking of breath samples (the section 8

Charter breach) are such that the Court must distance itself from these police actions to ensure the long-term repute of the administration of justice.

[82] The application to exclude from evidence the samples of Ms. Harrigan's breath, and all evidence derived from the fact of her detention to provide samples including the certificate of analysis is granted.

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest Territories, this 24th day of January, 2014.

Date: 2013 01 24
File: T1-CR-2013-000696

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JANET COLLEEN HARRIGAN

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

[Sections 253(1)(a) and 253(1)(b) of the *Criminal Code*]

[*Ruling on a voir dire*]