

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JEFFREY WILFRED JACKSON

**REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE**

Heard at: Norman Wells and Yellowknife
Date of Decision: April 5, 2019 (Yellowknife)
Date of Trial: January 24, 2019 (Norman Wells)
Counsel for the Crown: Levi Karpa (Trial), Andreas Kuntz (Decision)
Counsel for the Accused: Scott Cowan

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A. INTRODUCTION

A.1 Introduction

[1] Jeffrey Jackson is charged with operating a motor vehicle when the level of alcohol in his blood exceeded the legal limit. After Mr. Jackson had been in a motor vehicle accident, the police obtained a search warrant to seize samples of his blood which had been taken by medical personnel and which were stored at the hospital. The Crown's case against Mr. Jackson is based on the results of the analysis of the blood.

[2] Mr. Jackson asserts that certain of his rights under the *Canadian Charter of Rights and Freedoms* have been breached. As a result, he asks the Court to exclude the evidence of the blood and the analysis of the blood.

A.2 Factual Summary and Issues

[3] On August 7, 2017 at approximately 1:32 a.m., the RCMP were called to the scene of a single motor vehicle accident involving an all-terrain vehicle near the gun range outside of Norman Wells. Two uniformed police officers with two nurses drove to the site in a police truck. The accused, Jeffrey Jackson, was at the scene. He was seriously injured. He was transported on a stretcher in the box of the police truck to the health centre in Norman Wells. Then Mr. Jackson was medevaced to Yellowknife.

[4] While Mr. Jackson was lying in the box of the police truck, he told Cst. Shea that he had drunk five shots; that he messed up and that he should not have been

driving the ATV. On August 8, 2017, Cst. Shea swore an Information to Obtain a Search Warrant pursuant to section 487(1) of the *Criminal Code*. The search warrant was granted on August 8, 2017 and allowed the RCMP to seize blood samples of Jeffrey Jackson that had been collected at the Norman Wells Health Centre and transported to Stanton Territorial Hospital in Yellowknife.

[5] On April 6, 2018, counsel for Mr. Jackson filed a Notice of Motion on Constitutional Issue requesting three different prayers for relief. Subsequent to the filing of the Notice, the Ontario Court of Appeal ruled in the case of *R. v. Culotta*, 2018 ONCA 665. As a result, when this matter came to trial on January 24, 2019, counsel for Mr. Jackson had narrowed its application to the following remedy:

- 2) Declaring that any information obtained by police directly from the accused, before he had been given an opportunity to speak to counsel, was obtained in violation of his right to be informed that he was detained in connection with a drinking and driving offence and of his right to retain and instruct counsel contrary to section 10 of the *Canadian Charter of Rights and Freedoms*.

[6] Accordingly, both Crown and defence counsel agree that the Court must address the following issues:

- (a) Was the accused detained when he was in the back of the police truck and therefore should have been advised of his section 10 *Charter* rights before speaking to Cst. Shea?
- (b) If the utterances of the accused to Cst. Shea are excised from the Information to Obtain a Search Warrant, are there grounds to issue the search warrant?
- (c) If the search warrant would not have been issued in the absence of the utterances by the accused, should the evidence of the analysis of the blood samples be excluded?

[7] Before dealing with each of these issues in turn, it is necessary to summarize the evidence presented at the trial.

B. THE TRIAL

B.1 Organization and Admission

[8] The trial took place in Norman Wells on January 24, 2019. Counsel agreed that it should proceed by way of a blended *voir dire*.

[9] The following admission was made:

If the Court does not exclude the blood samples as evidence, then the analysis of his blood shows that Mr. Jackson had a blood alcohol content reading of 330 mg. of alcohol per 100 ml. of blood at the time that he was operating the motor vehicle, an all-terrain vehicle, in Norman Wells on August 7, 2017.

[10] One RCMP officer, Cst. Brydon Shea, testified for the Crown. The defence did not call evidence on either the *voir dire* or the trial. The Information to Obtain a Search Warrant sworn by Cst. Shea on August 8, 2017 and the search warrant issued on August 8, 2017 were introduced as exhibits on the *voir dire*.

B.2 Evidence of Cst. Brydon Shea

[11] Cst. Shea testified as follows. On August 7, 2017, he was posted in Norman Wells with the RCMP. He received a call regarding a motor vehicle rollover on Jackfish Road. He called out a second RCMP member, Cst. McKenzie, to assist him. After hearing someone was injured on top of a hill, they went next door to the health centre and picked up two nurses and a backboard with the police truck. Cst. Shea is not aware if there is an ambulance service in Norman Wells.

[12] The four of them went to the area where the accident was reported to have taken place. The accident site was just over the hill where the gun range was located. Cst. Shea saw Mr. Jackson laying on the ground on his right side at the bottom of a steep hill. Mr. Jackson had blood on his hand and a cut on the back of his head. The nurses started treating Mr. Jackson. He was placed on the backboard and then in the bed of the truck for transportation down the hill. The road was an unkempt road.

[13] Cst. McKenzie drove the truck. The two nurses and Cst. Shea were in the bed of the truck with Mr. Jackson. Mr. Jackson's head was toward the cab of the truck. Cst. Shea was at his feet at the tailgate end. The nurses were providing care to Mr. Jackson. Cst. Shea was there to make sure that Mr. Jackson did not move around in the back of the truck. Cst. Shea was also trying to keep talking to Mr. Jackson and make sure he was awake because the nurses did not want him to go to sleep.

[14] Initially, Cst. Shea asked Mr. Jackson his date of birth. Mr. Jackson was incoherent and said he was 140 years old. He eventually said the correct birthdate and Cst. Shea checked CPIC to confirm the date. As they were going down the hill, the nurses and Cst. Shea were asking Mr. Jackson questions but he was not really giving answers. Cst. Shea asked Mr. Jackson, as they were on the way down

the hill, if he consumed any alcohol and Mr. Jackson said that he had consumed five shots. After they got down the hill and were closer to town, Cst. Shea moved up by Mr. Jackson's head and could smell liquor emanating from his breath. Cst. Shea asked again about alcohol. Mr. Jackson said that he had consumed five shots; that he had messed up and should not have been driving.

[15] Initially, as they left the site where they found Mr. Jackson, Cst. Shea was concerned about getting Mr. Jackson to a place where he could be safe. Then, when Cst. Shea was more comfortable to move from where he was in the truck, he started asking about why the accident happened. Cst. Shea asked the question about alcohol to see if it was factor in the event and as part of the investigation to see what happened.

C. ANALYSIS

C.1 Was the Accused Detained?

[16] Section 10 of the *Charter* states:

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;

[17] When Mr. Jackson was speaking to Cst. Shea, Mr. Jackson had not been arrested. However, if he was "detained" as that term is used in the *Charter*, he should have been told why he was detained and should have been informed of his right to retain and instruct counsel.

[18] The factual context in which the accused interacted with Cst. Shea adds complexity to the analysis of whether or not the accused was detained. Mr. Jackson was strapped to a backboard in the bed of the police truck. He was attended to by two nurses and Cst. Shea. Physically, Mr. Jackson was obliged by his injuries to stay where he was. His physical movements were restricted by his medical condition and the medical personnel, not by any action on the part of the police. He did not have the option of "walking away" from Cst. Shea. On the other hand, it was not Cst. Shea who was physically or psychologically restricting that choice of Mr. Jackson.

[19] Physically, Mr. Jackson was restrained and could not move; however, he was physically detained as a result of his injuries and the treatment of his injuries; not by the imposition of the will of Cst. Shea. Cst. Shea was present in the bed of

the truck to assist the nurses in treating Mr. Jackson and to insure that he did not fall out of the truck. This was a physical restraint but not a “detention” as the term is used in the *Charter*.

[20] The Supreme Court of Canada case, *R. v. Grant*, [2009] S.C.J. No. 32 is the leading case on detention and explains the difference between a physical and a psychological restraint. At paragraph 44, the Court stated:

44 In summary, we conclude as follows:

1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual’s liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
2. 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 focussed 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.

[21] To respond to the question, “Was Mr. Jackson detained?”, the issue is not whether or not Mr. Jackson could physically walk away from Cst. Shea’s questioning. The issue is whether or not a reasonable person in Mr. Jackson’s place would feel he had no choice but to respond to Cst. Shea.

[22] From Mr. Jackson’s point of view, it should have been apparent that he was being treated for his injuries and that he was being transported to a medical centre and that he was physically restrained for that purpose. Nothing had been said to him by Cst. Shea to indicate that he was detained or arrested. Although Cst. Shea was restraining Mr. Jackson physically, it would have been clear to Mr. Jackson

that this would be for his physical safety while being transported to the health centre, as opposed to a police detention.

[23] The issue of psychological detention still needs to be addressed. Would the reasonable person in Mr. Jackson's circumstances conclude that he had no choice but to respond to Cst. Shea's questions?

[24] This is not the situation of a roadside stop where the police officer briefly detains the motorist; asks the motorist for his or her licence, registration and insurance; and then says, "Have you had anything to drink this evening?" In those situations, the law is clear that the detention is brief enough that it does not require that the police give the motorist his or her section 10 *Charter* rights. See *R. v. Orbanski* (2005), 196 C.C.C. (3d) 481 (S.C.C.).

[25] What were the circumstances surrounding Mr. Jackson's interaction with Cst. Shea? From Mr. Jackson's point of view, he found himself in the bed of a police truck attended to by two nurses and a uniformed police officer. According to Cst. Shea, Mr. Jackson was injured seriously enough that he required medical treatment and that he could not give a breath sample. Cst. Shea stated in the Information to Obtain:

19. It was impracticable to obtain a breath or Blood sample at the time as I felt that based on the totality of my observations Jeffrey JACKSON needed to be immediately brought to the hospital and that any delay could put Jeffrey JACKSON's life in danger as in my experience Jeffrey JACKSON had a severe injury to his head and collar bone.

[26] In the bed of the truck, the nurses were treating Mr. Jackson's injuries. Questions were being posed to Mr. Jackson by the nurses in the context of his medical treatment. On the other hand, Cst. Shea was in the bed of the truck "holding him the whole time, like, to make sure he wasn't flip flopping around or anything." He was not there to provide first aid. There was no medical reason for Cst. Shea to be asking questions. Any questions asked by Cst. Shea were in the context of investigating an accident and to determine if alcohol was involved; not for the purpose of treating his injuries.

[27] The Court often looks at psychological detention in the situation where the accused is not physically detained by the police but he feels that he has no choice but to comply with the direction of the police. In Mr. Jackson's case, he was actually physically detained in the sense that he was physically restricted from moving because he was being treated for serious injuries. Although this was not a police physical detention, the physical restraint of Mr. Jackson is a factor in determining whether he was psychologically detained by Cst. Shea. Cst. Shea was asking questions of someone who could not move. The serious injuries of Mr.

Jackson were also a factor in determining whether he was psychologically detained by Cst. Shea.

[28] So what is the effect of Cst. Shea asking questions of Mr. Jackson, who was injured and immobilized? A reasonable person would conclude that he had no choice but to answer the questions. The questions were being asked by a police officer who was transporting him to the health centre and who was persistent in his questioning. Mr. Jackson had nowhere to go to avoid Cst. Shea's questions. Cst. Shea was staying in the bed of the truck with him until it reached the health centre. In this respect, Mr. Jackson would have felt obliged to respond.

[29] Another way of approaching the question of whether there was a detention is to ask if the questioning by Cst. Shea was focussed on Mr. Jackson for the purpose of determining his involvement in a criminal act such that Mr. Jackson should have been made aware of his right to consult with and to instruct counsel. Cst. Shea was aware that there had been an ATV rollover; that Mr. Jackson was injured as a result of the accident; that Mr. Jackson was having difficulty speaking and that Mr. Jackson appeared confused and disoriented. Based on what is contained in the Information to Obtain, it appears that Cst. Shea needed two pieces of information in order to form the opinion that Mr. Jackson was operating a motor vehicle while his ability to do so was impaired by alcohol. First, that Mr. Jackson had been consuming alcohol and second, that he had been driving the ATV.

[30] It was in this context that Cst. Shea asked the question about alcohol consumption. In my view, given the circumstances and the purpose of the questioning, Mr. Jackson should have been made aware of his right to counsel and that Cst. Shea was investigating whether or not Mr. Jackson had been operating a motor vehicle while impaired. This was the type of interaction where an ordinary citizen is in the control of the state and should be provided with the opportunity to speak to legal counsel.

[31] As stated in *Grant, supra* at paragraph 22:

22 "Detention" also identifies the point at which rights subsidiary to detention, such as the right to counsel, are triggered. These rights are engaged by the vulnerable position of the person who has been taken into the effective control of the state authorities. They are principally concerned with addressing the imbalance of power between the state and the person under its control. More specifically, they are designed to ensure that the person whose liberty has been curtailed retains an informed and effective choice whether to speak to state authorities, consistent with the overarching principle against self-incrimination. They also ensure that the person who is under the control of the state be afforded the opportunity to seek legal advice in order to assist in regaining his or her liberty.

[32] The scenario of a motorist stopped by the police in a traffic stop is known to and understood by most drivers. The more complicated scenario in which Mr. Jackson found himself is precisely the situation where he needed to be informed of and be provided the right to counsel in order to make “an informed and effective choice whether to speak to state authorities.”

[33] The Court was provided with cases involving the interaction of police officers with accused persons in ambulances *R. v. Culotta, supra* and *R. v. LaChappelle, 2007 ONCA 655*. In *Culotta*, the police were investigating a boating accident where a motor boat with five woman on board had struck a rock. The women were injured and brought to shore to ambulances. The three least-injured women were in the same ambulance where they were sheltered from the rain and treated by paramedics. A police officer came to speak to them. He smelled an odour of alcohol. He asked who was driving and whether there had been drinking. The Ontario Court of Appeal agreed that Ms. Culotta was not detained in the ambulance and that the police officer was simply asking questions as part of a preliminary investigation into the accident.

[34] In *LaChappelle*, the police officer rode in the ambulance with the injured accused where she noticed an odour of alcohol. The officer did not speak to the accused in the ambulance. At the hospital, after thirty minutes, the officer started speaking to the accused. The Court of Appeal stated, at paragraph 42, “Constable Randall did nothing to detain the appellant. She did not make any demand or give any direction that resulted in his physical or psychological detention. The appellant was “detained” by his injuries from the collision.”

[35] Both of these cases are factually different that the case involving Mr. Jackson. In *Culotta*, Ms. Culotta was one of three persons in the ambulance and one of five persons in the boat. She was inside the ambulance because of the rain and being treated for injuries. The police officer was asking general questions and not focussing on Ms. Culotta. In *LaChappelle*, the officer was suspicious of the accused’s involvement in a criminal offence, but was simply observing the accused. There was no questioning by the police officer.

[36] In summary, I find that the accused was detained in the bed of the police truck when Cst. Shea was asking him questions and that Mr. Jackson should have been provided his section 10 *Charter* rights.

C.2 Grounds for Search Warrant

[37] In the Information to Obtain a Search Warrant, Cst. Shea referred to the following utterances made by Mr. Jackson:

17.3 Jeffrey JACKSON stated he had consumed 5 shots of alcohol;

17.4 Jeffrey JACKSON said that he messed up and he shouldn't have been driving the quad;

[38] As indicated above, I have found that these utterances were made in a situation where Mr. Jackson was detained and should have been provided with his section 10 *Charter* rights. Given this finding, the proper approach is to excise these utterances from the Information to Obtain, and determine if the search warrant could have been issued based on the excised Information to Obtain. (See paragraph 38 of *R. v. Wu*, 2015 ONCA 667).

[39] In pursuing this approach, I adopt the standard of review referred to by this Court in *R. v. Michael Byland (2)*, 2017 NWTTC 06 in paragraphs 27 to 29:

[27] In their submissions, counsel have pointed to a number of judicial sources for the proper standard of review to be used to determine if an ITO is sufficient. The starting place is from *R. v. Garofoli (1990)*, 60 C.C.C. (3d) 161 (S.C.C.) per Sopinka J. at para. 56:

The reviewing judge does not substitute his or her view for that of the authorizing judge. If based on the record which was before the authorizing judge as amplified on 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.

[28] In *R. v. Araujo*, 2000 SCC 65, reference is made at para. 57, to *Church of Scientology and The Queen (No. 6) (1987)*, 31 C.C.C. (3d) 449 (Ont. C.A.). At pp. 528-29, the Ontario Court of Appeal stated:

[T]he function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false and taking into consideration the facts found to have been omitted by the informant, upon which the justice could be satisfied that a search warrant should issue.

[29] Finally, stated another way. The reviewing court may find section 8 of the *Charter* has been breached only if the court determines that there was “no basis upon which the authorizing judge could be satisfied that the preconditions for the granting of the authorization existed.” [*R. v. Garofoli*, supra, at pp. 187-188; *R. v. Pires*; *R. v. Lising* (2005), 201 C.C.C. (3d) 449 (S.C.C.), per Charron J. at para. 8; *R. v. Araujo*, 2000 SCC 65, at paras. 51-53]

[40] One of the requirements to a valid search warrant is to establish that there are “reasonable grounds for believing that an offence has been committed.” The following is from *R. v. Sanchez*, [1994] OJ No. 2260 at paragraph 20:

A search warrant information drafts person or affiant is obliged to state investigative facts sufficient to establish reasonable grounds for believing that an offence has been committed, that the things to be searched for will afford evidence, and that the things in question will be discovered at a specified place.

[41] “Reasonable grounds” requires grounds which rise above a mere suspicion but are less than the civil standard of a balance of probabilities. This was discussed in *R. v. Ha*, 2018 ABCA 233 at paragraph 70:

70 In summary, “reasonable grounds to believe” requires a factually based likelihood that there are grounds for the arrest, rising above mere suspicion, but not necessarily demonstrating grounds on a balance of probabilities. The test must be applied in a common sense manner, having regard to the circumstances in which the police find themselves, and the entire constellation of facts. The court must ask if there are objectively verifiable facts that would have caused a reasonable person with the training and experience of the police officer, who was aware of the information known to the officer, to believe in the facts supporting the arrest.

[42] The excised Information to Obtain contains the following grounds:

- (a) On August 7, 2017 at 1:32 AM, Cst. Shea responded to a complaint of an ATV roll-over where there were injuries to the driver. The complainant reported that she was flagged down by a male on a quad stating his father had injured his head;
- (b) At 2:10 AM, Cst. Shea observed Mr. Jackson lying on his right side at the bottom of a steep hill and the back of Mr. Jackson’s head cut open;
- (c) Mr. Jackson spoke incoherently, with difficulty, and seemed confused and disoriented;
- (d) Cst. Shea detected an odour from Mr. Jackson’s breath;
- (e) Cst. Shea was told by Tina Spilchak that Mr. Jackson smelled like alcohol;
- (f) Cst. Shea was told by Tina Spilchak that “they” had been drinking;
- (g) Cst. Shea has had considerable experience dealing with impaired operators of motor vehicles and formed the belief that Mr. Jackson had operated a vehicle while his ability to do so was impaired by alcohol.

[43] In asking myself, “Is there sufficient reliable information to support an authorization?” (the test set out in *R. v. Bisson*, [1994] 3 S.C.R. 1097 (S.C.C.) at p. 1098), I am troubled by the sufficiency of the evidence in the excised Information to Obtain on two issues. First, whether Mr. Jackson’s ability to operate a motor vehicle was impaired by alcohol; and second, whether he was operating a motor vehicle.

[44] In *R. v. Stellato*, [1993] O.J. No. 18 (Ont. C.A.) affd, [1994] S.C.J. No. 51 (S.C.C.), the Court, in referring to impairment of the accused’s ability to drive, stated “If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.” This does not mean, however, that a person’s ability to drive is impaired simply because he has consumed alcohol. There must be other indications such as behaviour which is a marked deviation from normal conduct (*R. v. Andrews*, [1996] A.J. No. 8 (Alta C.A.)) or the circumstances of an accident (see paragraph 18 of *R. v. Rhyason*, 2007 SCC 399) before an officer has reasonable and probable grounds to arrest an individual for impaired driving.

[45] Even recognizing that the “reasonable grounds to believe” standard is a relatively low standard and my comments above, I am unable to find, in the excised Information to Obtain, sufficient grounds to reasonably believe that Mr. Jackson’s ability to drive was impaired by alcohol. Mr. Jackson was found at the bottom of a “steep hill”. He was suffering from a “severe injury” to his head and collar bone. There are no other circumstances about the accident. An ATV roll-over on a steep hill is not unusual. Nor is it unusual to have confusion and disorientation as a result of a severe head injury.

[46] On the issue of whether Mr. Jackson was driving the ATV, there is no reliable evidence in the Information to Obtain on this point. The only reference in the excised Information to Mr. Jackson being the driver is that Cst. Shea states in the Information that the complaint received by the RCMP was that “there were injuries to the driver.” The complainant never saw Mr. Jackson driving. Rather, she was flagged down by “a male on a quad stating his father had injured his head.” There is no substantiation in the Information as to why the complaint mentioned the “driver”. Without Mr. Jackson’s admission that he was driving the quad, Cst. Shea provides no basis in the Information to Obtain to find that Mr. Jackson was operating a motor vehicle.

[47] If the excised Information to Obtain does not support the issuance of the search warrant and the search warrant is no longer valid, then the search and seizure was warrantless and presumptively a breach of section 8 of the *Charter*.

[48] The next step is to determine whether or not the blood samples should be excluded.

C.3 Section 24 Analysis.

[49] The accused seeks to exclude the evidence of the blood samples under section 24(2) of the *Charter*. Section 24(2) states:

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

[50] 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, supra*:

... 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

[51] In this case, there were *Charter* breaches involving sections 8 and 10 of the *Charter*. As indicated above, the section 8 *Charter* breach follows in time and in consequence of the section 10(b) *Charter* breach. Let me deal briefly with each of factors in the section 24(2) analysis.

C.4 The seriousness of the Charter-infringing state conduct

[52] As stated at paragraph 72 of *R. v. Grant, supra*, "The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to disassociate themselves from that conduct, by excluding evidence linked to the conduct." The provision of section 10 *Charter* rights on detention is a basic and well understood right. It is one that is part and parcel of every police officer's training and daily interaction with the public.

[53] In this case, as indicated by the earlier analysis, whether or not the accused was detained in the bed of the truck while being transported to the health centre is a complex legal question and in the absence of other factors, it may be a situation where a police officer simply made the wrong call.

[54] On the other hand, there was an additional factor in this case. Mr. Jackson was seriously injured. Cst. Shea recognized the seriousness of the injuries yet took advantage of the situation. He persistently questioned Mr. Jackson when Mr. Jackson was vulnerable and when the focus should have been on his medical treatment. The questioning by Cst. Shea had one purpose. It was to determine whether Mr. Jackson was drinking and driving.

[55] Furthermore, there were alternatives to the direct questioning of Mr. Jackson in order for Cst. Shea to investigate what happened. There were witnesses to the accident and there was the complainant who had made the initial call to the police. Although there were time constraints to the investigation, there was no urgency to the questioning of Mr. Jackson. Cst. Shea knew that he was not going to make a demand for breath or blood samples.

[56] In my view, there should have been no confusion on Cst. Shea's part. This was a reckless disregard of Mr. Jackson's *Charter* rights and not a situation where the officer could have been confused about the state of the law and could nevertheless be said to be acting in good faith.

C.5 Impact of the Charter Breach on the Protected Interests

[57] There is a high expectation of privacy with respect to health records and blood samples. That the state has accessed the blood samples in breach of section 8 of the *Charter* is a serious breach of this interest.

[58] In stating that there is a serious breach of a privacy interest, but not a serious breach of bodily integrity, I am basing this statement on a finding that the blood samples were drawn strictly for medical purposes. This finding is based on the following logic.

[59] The purpose for which the blood samples were taken by the medical personnel is not clear from the Information to Obtain. The Information states as follows:

- 22.1 On August 07, 2017 at 03:35 am AZARES drew blood from Jeffrey JACKSON's left arm by herself and STROBELL had taken blood from JACKSON's right arm;
- 22.2 AZARES advised me that temporarily the blood taken from Jeffrey JACKSON would be kept in the Health Centre laboratory, a secure room which required only authorized personal [sic.] to enter;
- 22.3 AZARES advised me that blood taken from Jeffrey JACKSON would transported [sic.] with him to Yellowknife and then be kept for 7 days in the Stanton Territorial hospital laboratory, a secure room which required only authorized personal [sic.] to enter;

22.4 AZARES said no medication was administered before the blood samples had been drawn from Jeffrey JACKSON.

27. I am seeking an authority through this document to obtain the blood collected from Jeffrey JACKSON by the medical staff at the Stanton Territorial Hospital in order for the blood to be sent to the RCMP laboratory, so an analysis can be done to determine the concentration if any, of alcohol in his blood.

[60] These paragraphs do not state clearly why the blood was collected. Was it for a medical purpose or was it at the request of Cst. Shae? In the absence of Cst. Shae indicating that the blood was collected as his request, the Information to Obtain leaves the impression that it was collected for the purpose of medical treatment. The statement that the blood would be sent to the RCMP laboratory for analysis seems, however, to indicate that it was not analyzed at the Hospital.

[61] The issue of why the blood was collected was not questioned by defence counsel. Since this is Mr. Jackson's application, I will proceed on the basis that it was for valid medical reasons and not at the bequest of Cst. Shae. Therefore, this was not a situation where there was an unauthorized taking of blood samples. The blood samples were taken in the course of medical treatment and not for the purposes of furthering the investigation.

[62] The impact upon the accused with respect to bodily samples was addressed in *R. v. Grant, supra*, as follows:

111 While each case must be considered on its own facts, it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's privacy, bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability. 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-intrusive.

[63] In this case, there is no indication in the Information to Obtain, that the blood was collected for any reason other than a medical reason. Accordingly, there was a serious breach in the accused's privacy interest, but not in his bodily integrity and dignity.

[64] With respect to the breach of the accused's section 10 *Charter* rights, however, the analysis is different. As I indicated above, Cst. Shea needed two pieces of information to justify his application for a search warrant: that the accused was drinking and that he was driving. Both of the pieces were obtained from the accused and then used as grounds for the search warrant. The breach of his right to counsel had a significant impact on his *Charter*-protected rights

because but for his admissions, there would have been no basis for the search warrant.

C.6 Value of a Trial on the Merits

[65] The evidence provided by the analysis of the level of alcohol in the seized blood is highly reliable. As indicated in *Grant, supra*, there is a strong societal interest in the adjudication of serious charges on reliable evidence.

[66] Further, this evidence is essential to the Crown's case. As stated in *Grant*:

83 The importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry. Like *Deschamps J.*, we view this factor as corollary to the inquiry into reliability, in the following limited sense. The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.

[67] 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 para. 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.

[68] In *R. v. Carter*, 2013 NWTSC 32, the police put the accused in the back seat of the police vehicle to ask questions about an accident. It was cold outside. He was not arrested but detained. The police officer asked questions and Mr. Carter admitted that he had been drinking alcohol and that he had been driving. He was given an ASD demand and subsequently a breathalyzer demand. The Court found that he should have been given his section 10 *Charter* rights and that the evidence was excluded. The NWT Supreme Court stated:

[82] There is no doubt that drinking and driving continues to be of serious concern in our communities. Society has a clear interest in those cases being decided on their merits. However, it is equally true the long term repute of the administration of justice suffers where law enforcement officials act in ways that disclose ignorance of well-established tenets of our legal system, and of their obligations under our law.

[69] The same can be said of the circumstances of this case.

D. CONCLUSION

[70] Mr. Jackson was detained when he was in the bed of the police truck being transported to the health centre. Cst. Shea should have provided Mr. Jackson with his section 10 *Charter* rights prior to questioning him. If the utterances made by Mr. Jackson are excised from the Information to Obtain a Search Warrant, the Information to Obtain does not contain sufficient reliable evidence to authorize the search warrant. Hence, the blood samples were obtained contrary to section 8 of the *Charter*.

[71] Sections 8 and 10 of the *Charter* have been breached. I find that the admission of the blood samples as evidence would bring the administration of justice into disrepute.

[72] Mr. Jackson is therefore acquitted of the offence before the Court.

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 5th day of April,
2019.

**IN THE TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JEFFREY WILFRED JACKSON

**REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE**

[Section 253(b) *Criminal Code*]