COURT FILE No.: Central East - Newmarket 4911-998-12-02811-00
DATE: 2014·02·04

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

P[redacted] M[redacted]

Before Justice W.A. Gorewich
Oral Judgment given January 27, 2014
Written Reasons for Judgment released on February 4, 2014

S. Kumaresan ..... for the Crown
M. Montes ..... for the accused P. M[redacted]

Gorewich J.:

[1] P[redacted] M[redacted] is charged that on 25 February 2012 he operated a motor vehicle while his ability to drive was impaired by alcohol, in the city of Markham and, on the same day, in the same place, operated a motor vehicle, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood.

[2] This matter proceeded as a blended hearing, there being a *Charter* application alleging violations of the applicant's s. 8 and 10(b) rights. The applicant seeks relief under s. 24(2) of the *Charter* and asks this court to exclude evidence obtained as a result of the breaches.

Crown Evidence

Sana Bharwani

[3] Sana Bharwani testified that on 25 February 2012, at about 10:00 p.m., as she was driving her car north on Jane St. she observed a pickup truck in a ditch, on the west side of the road facing south. She was with her husband, Kassim Bharwani, and a friend, Jaffer Kermalli. The weather conditions were described as snowy and cold, the roads were icy and

the lighting was sparse. Adjacent to the ditch where the pickup truck was seen was a large open field. According to the evidence of this civilian witness, and others, because it appeared a person was in the vehicle the driver made a U-turn to offer assistance to that person. Ms. Bharwani testified the individual in the vehicle was behind the steering wheel and was bleeding badly around his nose and mouth area. He appeared as if he was just waking up; he was described as a bit delirious, as if he had hit his head. His head was kind of on or near the steering wheel and it appeared he wanted to get out of the truck. He was ultimately helped out through the driver's side window.

[4] The individual who had been behind the steering wheel said he had been involved in an accident and wanted to call his father, but did not want the civilians at the scene to call the police. Notwithstanding the request of the individual not to call the police, Ms. Bharwani did call as his injuries appeared to be serious and he appeared delirious. She agreed she told the 911 operator it did not seem as if this person had been drinking.

[5] The police arrived within minutes. Prior to the arrival of the police sirens were heard, at which point the individual who was helped from the truck ran off into what appeared to Ms. Bharwani to be a snow covered field to the right of them. The person who ran off was pursued by two officers. Ms. Bharwani saw the individual again when the police walked him out of the area to which he ran. He was covered in snow. He was walked to the ambulance which had arrived in the meantime.

[6] Through this witness photographs of the area and the vehicle in the ditch were introduced and were marked as exhibits. Ms. Bharwani also identified the individual who was helped from the vehicle in the ditch as the accused person before the court.

Dr. Kermalli

[7] Dr. Kermalli testified that, prior to the arrival of the police, the person he saw behind the steering wheel, the applicant in this matter, told him he had been drinking. As well, Dr. Kermalli detected an odour of alcohol on his breath. On arrival of the police, Dr. Kermalli pointed to them the direction in which the applicant ran.

P.C. Peter Tsuchiya

[8] P.C. Peter Tsuchiya, a member of the York Regional Police (YRP) arrived on scene at 10:12 p.m., the location being south of the King Sideroad on the west side of Jane St. The officer, on viewing the scene, did not notice anyone in the truck. The officer described Jane St., the north\south roadway, as icy. He indicated there were no street lights, there was minimal traffic and the road was flat. The officer was told by people at the scene that a male had to be helped from the truck. One of the people at the scene told the officer they thought the person who was helped from the truck had been drinking. The officer testified that he approached the applicant, who was standing outside the truck, at which point the applicant fled on foot through the adjacent field. The officer ran after him telling him to stop and that he was under arrest. He denied saying, "Stop or I will shoot." He testified in situations where a gun is drawn he was trained to say, "Police. Stop. Don't move." He also testified while he

did not make mention of the firearm in his notes, he did make out a use of weapon report that night. He is aware that such material is disclosed to the defence.

[9] The officer chased the applicant through a dark, snow-covered field. He described the area of the chase as being in complete darkness. He used his flashlight to provide some light during the pursuit. He radioed for another officer to assist. He testified that he formed reasonable and probable grounds to arrest the applicant after he had been told by the witness the applicant had been drinking. The officer arrested the applicant at gunpoint, ordering him to lie on the ground. The officer denied the applicant was already on the ground prior to the officer reaching him. He testified he arrested the applicant for impaired driving as well as careless driving. The officer testified it was dark, he was by himself and he did not know if the applicant had a firearm. He drew his firearm because the applicant was not obeying his command to stop and the officer needed to control the applicant. P.C Salomons then arrived to assist. P.C. Tsuchiya testified from the time he started running after the applicant until drawing his weapon roughly 5 to 10 minutes had passed.

[10] P.C Tsuchiya further testified that P.C. Salomons arrived and also arrested the applicant for impaired driving at 2217. He testified he told P.C Salomons that he had made the arrest for impaired driving, however, this was not noted in his notebook.

[11] After the arrest P.C. Tsuchiya observed blood on the applicant's face and an odour of alcohol coming from him. He noted the applicant wanted to stop when he was taking him to the police vehicle, indicating he wanted to lie down, he had blood shot eyes, slurred speech and he mumbled. The applicant was delivered by this officer to the ambulance attendants after being searched, about 5 to 10 minutes from the start of the chase. P.C Tsuchiya did not give the applicant his *Charter* rights up to that point in time. He testified he saw that the driver's side airbags of the truck had deployed and there was blood on the airbags. He later noted P.C. Salomons was in the back of the ambulance with the applicant. The applicant was transported to York County Hospital (YCH) in the ambulance.

[12] P.C. Tsuchiya then went to the YCH and met with P.C. Salomons and P.C. Williams in the quiet room there. He was not able to indicate the time. He testified that he and those officers were in the quiet room with the applicant. P.C. Salomons left the room shortly after. P.C. Tsuchiya, while in the room, heard the applicant say his injuries were caused by the arresting officer. The officer also stated in his evidence that he did not inflict any injuries to the applicant. While in the quiet room with the applicant the officer noted the applicant falling asleep in his chair and he was bleeding from the lip and nose. He noted the applicant wipe blood from his mouth. He described the quiet room as follows: it was in the emergency area; he estimated it to be 14 by 6 feet; there were two clear glass walls; and the door was closed. The officer was aware the family of the applicant was outside the room. He recalled there are chairs outside the quiet room. He was able to hear sounds from outside the room but was unable to hear what people outside the room were saying. He noted the applicant, while inside the room, became belligerent and used obscenities. Prior to being taken to another room the officer indicated that the applicant complained his rights were being violated. The officer testified the applicant complained not because he was asking for a lawyer but because he wanted water. The officer testified the doctor came to the treatment room at 0211 to stitch the ap-

plicant's cuts, but the applicant initially refused treatment. P.C Tsuchiya was unable to testify as to how long he was in the quiet room with the applicant, although he stated he stayed with the applicant in the quiet room for most of the time after he arrived, and if not in the quiet room then he was standing outside the quiet room until they left. He testified as well that P.C Williams was in the quiet room for a majority of the time.

P.C. Sydney Salomons

[13] P.C. Sydney Salomons testified he arrived on scene at 2216. He had received information from dispatch at 1008 that a vehicle had driven into a ditch on Jane St., north of Teston Rd., that a male was bleeding from the face, that the vehicle airbag had deployed and the male was out of the vehicle and was asking that police not be called. He saw P.C Tscuhiya and another person running across a field, so he joined the pursuit. He estimated they were 250 metres ahead when he stopped his cruiser. It was dark, no lights and the field was snow covered. He agreed the applicant was running pretty quickly over the snow, which took a certain level of coordination. He never lost eye contact with them. When he caught up, he saw P.C. Tscuhiya already had his gun drawn and a male party was proned out on the ground lying on his belly. P.C. Salomons did not see P.C Williams in the field until he himself had handcuffed the applicant.

[14] At 2217, P.C. Salomons advised the applicant, whom he identified in court, that he was under arrest for impaired driving, cuffed him to the rear, stood him up and, as he grabbed the left arm of the applicant, saw blood on his face and on the snow. The officer testified he made the decision to cuff and arrest him when he saw him proned out with P.C. Tsuchiya holding a gun on him. He agreed the applicant was face down in the ankle deep snow. The officer testified he already knew about the motor vehicle accident and he knew the applicant had asked the bystanders not to call the police. He also learned the applicant took off as soon as the police arrived and he was aware of the foot pursuit, thus he decided to arrest him. This officer never spoke to the civilians at the scene. Once he was cuffed the applicant said, "I am not going to run, I just want to speak to my Dad. I want to speak to my lawyer."

[15] P.C. Salomons noted the applicant's speech was slurred. The officer agreed that having a split lip would affect the way someone speaks. He expressed the opinion that alcohol does that as well and stated the slurred speech could have been a combination of both. The officer also testified the applicant was unsteady on his feet and he could smell an odour of the airbags on his person, as airbags have a distinctive odour. The officer agreed the stumbling could have been due to the accident or the snow, or the fact the applicant was tired. He walked him back to the area where the cruisers were parked and placed him in the rear of P.C. Tsuchiya's vehicle. He arrested the applicant for impaired driving because: he had been involved in a motor vehicle collision; there had been a foot pursuit involving P.C. Tsuchiya; there was an odour of alcohol on him; and he learned from dispatch he did not want the police called.

[16] The ambulance arrived within a few minutes of the applicant being placed in P.C. Tsuchiya's vehicle, but about 20 minutes after the arrest. P.C. Salomons testified the appli-

cant needed treatment for his facial injuries as he was bleeding quite badly from his mouth and nose. EMS attended to the applicant at about 2240, at which time P.C. Salomons read his rights to counsel from his notebook. The officer explained the delay from arrest at 2217 to reading his rights at 2240 when the applicant was in the ambulance as follows: they had to get him out of the field; they had to take him to the cruiser until EMS arrived; and he then needed to be attended to by EMS. When EMS advised he was fine medically, his rights were read after a passage of 23 minutes. The officer stated that while he and the applicant were waiting for the ambulance in the cruiser he might have had time to read the applicant's rights to him, but he wanted to make sure he was going to be treated medically. He agreed he knew timing is important in these types of cases. The officer testified, once in the ambulance, he had to read the rights several times as the applicant interrupted him repeatedly saying, "I want to speak to my Dad. I want to speak to my father, my father is my lawyer."

[17] At 2245 the officer read the applicant the caution. His evidence is that the applicant understood and did not want to say anything in relation to the charge. At 2250 the officer read both the breath and blood demands to the applicant, as the officer was uncertain as to whether the applicant would be able to provide a breath sample given his injuries. The grounds for reading the two demands were as follows: he was involved in a single vehicle collision; he was unsteady on his feet; there was an odour of alcohol on his person; and he was slurring his speech. The officer was unable to testify, other than to guess, as to the time of driving.

[18] At 2252 the applicant was taken from the scene to hospital by ambulance. P.C. Salomons rode with him in the ambulance. There was some conversation in the ambulance between the applicant and the officer. The applicant indicated his Dad was his lawyer and made a comment about allowing the officer to rape him in the ass, and then repeated he wanted his lawyer. He also made a comment about seeing how this will go in court.

[19] They arrived at YCH hospital at 2304, and the applicant was placed in the quiet room situated in a sectioned off part of the waiting room area. From the arrival at the hospital until being placed in the quiet room, the officer agreed he waited with the applicant in a corridor for a few minutes. He had no recollection of the applicant's father approaching and wiping the applicant's face with a cloth. He later testified it is not something he would have allowed. He also testified that in order to gain access to the area where he and the applicant were before entering the quiet room, someone would have to have an access card to get in from the public area. The quiet room was described as 10 by 15 feet, containing a couch, a couple of chairs and tables. He indicated there are two glass walls and two walls that are drywall. There are mesh wires running through the glass. There is a door, which was closed, allowing entry and egress from the room. P.C. Salomons testified he was in the room with the applicant and P.C. Williams as far as he was able to recall. P.C. Salomons testified that when in the quiet room one can hear what's going on outside the room, but not words. He described what could be heard as, "not as clear as day."

[20] P.C. Salomons testified the applicant's parents and uncle showed up at the hospital and the officer did give the applicant an opportunity to speak with his father in the quiet room. Only the applicant and his father were in the room at that time and the door was closed

for privacy. Given the applicant's earlier comments, the officer thought the father was the applicant's lawyer. They spoke from 2304 to 2308 in the quiet room. At the end of their conversation the door opened and the father left the quiet room.

[21] In reference to the father of the applicant going into the room, he told the officer he was not a criminal lawyer when asked by the officer when he came out of the quiet room. At 2309 the officer re-read to the applicant his rights to counsel, the caution, the secondary caution for the first time, and breath demand from his notebook. The applicant stated to the officer, "It's the same shit you read in the ambulance." The officer said he did that because he wanted the applicant to know he does not have a right to speak to anyone he chooses, given the father was not a lawyer. Further, he re-read these items because the applicant interrupted him several times the first time they were read to him and he wanted to ensure the applicant understood them. The officer was unable to say where the father was at that time. From arriving at the hospital at 2304 until 2311, the officer stated that a lawyer was not called because he wanted to make sure the applicant understood his rights.

[22] The officer agreed that while in the quiet room several people in the waiting room were visible. The officer again testified that in the quiet room it is possible to hear voices from the waiting area but not specific conversations. The officer agreed that there was a security/volunteer desk set up near one of the glass walls of the quiet room.

[23] The applicant did give P.C. Salomons the name of Jerry Herszkopf, a lawyer, after they entered the quiet room. At 2312 a nurse handed P.C. Salomons a portable phone brought to the quiet room and indicated the lawyer was on the line. The officer confirmed with the party on the phone who he was and then handed the phone to the applicant. The officer testified he was outside the quiet room a few feet or about 3 metres away from the door of the room while the applicant spoke to the lawyer. The other officers were 10 to 12 feet from the quiet room and the door to that room was closed while the applicant spoke with his lawyer. P.C. Salomons stated he did not want anyone entering the room while the applicant was on the phone with his lawyer. He testified the applicant was not disturbed during the telephone conversation with his lawyer. The officer testified he could not hear what was said between the applicant and the lawyer. He did recall hearing the applicant's voice during this conversation. He clarified this by saying he did not hear anything he was saying, or specific words, but he could hear people talking inside the quiet room. The call was over at 2315. The officer rejected the suggestion he stayed in the room with the applicant because he was a flight risk and did not trust him. He also rejected the suggestion that P.C. Williams was in the room during the phone conversation with the applicant's lawyer.

[24] The officer testified he did not know specifically where the other officers were during this time, but said they were not in the quiet room. The officer testified the waiting room area was busy that night and there was a constant hum coming from inside the waiting room.

[25] During the telephone conversation with the lawyer, P.C Salomons saw the applicant's parents outside the room and there was no expression of concern by anyone about privacy issues. There was as well no expression about privacy concerns by the applicant. The lawyer called back at 2317 to ask for particulars concerning the officer. Again, there was no

concern expressed to him about a privacy issue. The officer testified as well he had no concern that the applicant was not able to speak to his lawyer in private.

[26] The officer indicated he and the other officers had no problems in dealing with the applicant and the applicant's family.

[27] The officer testified that at 2320 he gave the grounds for arrest to the Intoxilyzer operator, P.C. Hodgins. Those grounds were: the applicant was involved in a motor vehicle collision; the odor of alcohol was present during the time of the arrest; he was unsteady on his feet; and he was slurring his words. The officer did not recall telling P.C. Hodgson, "Male in driver's seat when officers arrived." P.C. Salomons agreed the first time he saw the applicant was when he was on foot.

[28] P.C. Salomons understood P.C. Hodgson had brought the portable Intoxilyzer instrument to the hospital for the purpose of conducting a breath test on the applicant. The date and time of the incident was noted on the alcohol time sheet as 25 Feb. 2012 2200 hours. Because of the facial injuries the officer testified they decided at 0015 on February 26 to take blood samples. P.C. Salomons did not recall if he told the applicant prior to 0015 that they were going to take a breath sample for sure. He said he would have told him they were going to take blood as they were unable to take a breath sample. He conceded he may have told him they were going to take a breath test as a first option. A decision was then made that a breath test could not be done. That information was conveyed to the applicant closer to 0015 than 2320 according to P.C. Salomons.

[29] When the applicant was told they were going to draw blood he asked to speak to his counsel again. He was advised by the officer he had already spoken to his counsel. The officer indicated he did not recall why the applicant wanted to speak to his counsel again; he also did not recall any response from the applicant when he was told he could not. The officer testified that he had already given him the blood demand, prior to his speaking to counsel. The officer gave his reason for not allowing the applicant to speak to counsel again as being that he was not obliged to give him a second chance to do so once he had already spoken to counsel.

[30] P.C. Salomons described the applicant at the hospital as having a split lip that was bleeding quite badly. He noted blood was continuously leaking into his mouth. The officer testified that while the applicant was in the quiet room, the four officers who had been involved with him were in and out of the quiet room several times. The applicant and the officers remained in the quiet room for another 1 ½ hours, until 0145, when they moved to the room where the blood test was to be done. Dr. Fu attended in that room at 0211 to see the applicant. From 0145 until 0211, they waited in the treatment room. From his arrival at the hospital, the applicant had not yet received any treatment for his injuries. P.C. Salomons explained the delay was caused due to resistance from the medical staff about taking blood from the applicant.

[31] The applicant, according to the officer's evidence, made an utterance to Dr. Fu, saying, "I went unconscious and I have no idea what these officers did to me." Dr. Fu was in

the room until 0230. During this time blood was taken from the applicant. The applicant did not want to have his lip stitched. At 0230 the applicant was released to his father on a Form 9. The applicant refused to sign other documentation presented to him.

[32] The officer left the hospital at 0249, went to the station, prepared paper work and arranged to have the blood delivered to the Centre of Forensic Sciences (CFS).

Dr. Fu

[33] Dr. Fu did testify he attended to the applicant on February 26, 2012 at about 0200. He described the applicant as agitated, but oriented and coherent, and with an odor of alcohol on his breath. He described the injuries on the upper lip and to the nose. He ultimately sutured the lacerations.

Dr. Mayers

[34] Dr. Mayers of the CFS was the toxicologist who analysed the applicant's blood and testified as to one's sobriety at the time of a given accident. The facts of this case were put to him and he testified with the times he was given. Dr. Mayers analysed the applicant's blood and projected the blood alcohol reading of the applicant to be between 181 to 259 milligrams of alcohol in 100 millilitres of blood at the time of the incident. He also testified that someone's ability to drive a motor vehicle with these blood alcohol levels would be impaired by alcohol. Dr. Mayers' calculations were made based on an assumption that the incident occurred on February 25 between the hours of 9:30 p.m. and 10:12 p.m.

P.C. Hodgins

[35] P.C Hodgins, a qualified Intoxilyzer technician, was given instructions to perform breath tests on the applicant and attended YCH for that purpose. He took with him from 2 District an Intoxilyzer 8000C and items needed for its operation, as well as a blood kit. He was not certain if he would be doing a breath test or taking blood. He would ultimately make the decision to take blood based on the applicant's facial injuries. He arrived at YCH at 2310. He went into the quiet room on arrival and saw a male and P.C. Williams in the room but no one else. He recalled people sitting on chairs outside the quiet room. He testified before he went into the quiet room he saw a gentleman looking into the quiet room making gestures to the applicant. P.C. Hodgins told him not to communicate with the person inside the room. The officer then went inside the room and noted the male, whom he identified as the applicant before the court. He had a bandage over his nose, his eyes were red and watery and he had a fat red and bloody upper lip. It appeared he was bleeding from the inside of his mouth as well. This was of concern to P.C. Hodgins as he thought the blood from his mouth might go into the instrument. He was also concerned that with the fat lip the applicant might not be able to make a seal with his mouth on the mouthpiece of the tube into which he would be blowing.

[36] When P.C. Williams advised that the male would be speaking with his lawyer, P.C. Hodgins left the room. P.C. Hodgins stated at 2320 he spoke to P.C. Salomons outside the quiet room and obtained from him the grounds for the arrest, which were noted on the Alco-

hol Influence Report (AIR). He noted them as: there was a single car accident; the vehicle went into the ditch; witnesses put the accused behind the wheel as they related to police he was behind the wheel when they arrived; and when they approached the male he took off running. P.C. Hodgins was unable to explain why on the AIR it said "Male in driver's seat when officers arrived", as that was information he had received. P.C. Salomons indicated he noted a strong odor of an alcoholic beverage coming from the mouth of the person; he noted he had red and watery eyes and there was blood coming from his nose and mouth area; he was unsteady on his feet; blood was found on the air bag that was deployed in the applicant's truck and that he arrested the driver for impaired driving. The time of the incident was noted on the Alcohol Influence Report from the time sheet as 2200 hours.

[37] P.C. Hodgins was given other information by P.C. Salomons as well: time of arrest 2216; rights to counsel given at 2240; 2245 the applicant was given a caution; at 2250 he was given a breath and blood demand; at 2236 P.C. Salomons left the scene arriving at the hospital at 2250; and at 2306 he spoke with the applicant's counsel, Jerry Herszkopf. The officer said he did not pay much attention to the times given to him by P.C. Salomons, in reference to the 2306 entry. Reference to the 2306 entry was not explained by this officer as he was collecting information from other police personnel.

[38] P.C Hodgins re-entered the room at 2340 hours and had a conversation with the applicant for a few minutes. He then left the quiet room and at 2350 P.C. Hodgins returned to the quiet room. He set up the Intoxilyzer instrument at about 0006 hours. P.C. Hodgins spoke to a nurse at 0015, who advised a new doctor was coming on shift and they had to wait probably another hour for the doctor to attend. They had a discussion about whether it would be the police or a member of the medical staff who would extract blood. P.C. Hodgins testified a decision was made then, at 0015 or at some point thereafter, to draw blood. He disagreed that the decision was made at 2320 when he spoke to P.C. Salomons. He again spoke to that nurse at 0104 hours. He told the court that between 0015 and 0105 he was getting caught up on his notes. There was a further delay from 0104 to 0135 with respect to the medical staff. He used this further time to further update his notes. At 0151 the applicant was taken to the room where the blood would be drawn. Again they waited and during this time the officer continued updating his notes.

[39] The officer next had contact with the applicant at 0207, when he went to the room where blood was to be taken to calm him down as he was swearing in a loud voice. He was complaining of having his human rights denied; he was angry and was demanding water. The officer was of the view the reference to human rights was due to the applicant being hungry and thirsty as he complained about being denied food and water. The officer did not think when the applicant asked him if he had spoken to his lawyer that request suggested the applicant was uncertain about his rights with respect to a blood sample. The applicant received water at 0216, at which time the doctor also came in the room. When he was asked about the facial injuries, the applicant told the doctor the police knocked him out. At 0220 the officer read the blood demand to the applicant, because it was not practical to take his breath given his facial injuries.

[40] The officer was asked to repeat the blood demand by the applicant. He testified he

was not able to finish reading it the second time because the applicant said before he was finished, "I agree, I agree, I agree." He then finished reading it. When asked if the applicant understood, the applicant said, "Yes, I do."

[41] The officer observed the nurse insert the needle in the arm of the applicant and take the first sample of blood at 0226. The blood went into an approved container. A second sample of his blood was taken in the same fashion at 0227. The vials were labeled and marked as Exhibits 1(a) and 1(b). These vials were delivered that same morning by P.C. Hodgins to the CFS for analysis.

P.C. Justin Williams

[42] P.C. Justin Williams, a member of the YRP, testified. He attended the scene of a single motor vehicle accident on Jane St. near Teston Rd. on February 25, 2012, arriving at 2214. Another officer was there already. He arrived and saw P.C Tsuchiya in the adjacent field with a flashlight, so he went to assist. He arrived at the location in the field and noted P.C Salomons preceded him. He testified he saw a person being handcuffed. The officer noticed the person, identified as the accused before the court, was bleeding from the face. The officer described the field, indicating there was a lot of snow, about 18 inches deep, obstacles, a wire fence and things they had to navigate through with very little light to get the handcuffed applicant back to the road.

[43] This officer took a statement from Jaffer Kermalli, a witness, and then at 2245 went to the YCH, arriving at 2251. Once there the officer waited with the applicant and P.C. Salomons in the quiet room next to the main waiting area of the emergency department. When P.C. Salomons left the room another officer would come in, as there was a policy that an officer should never be left alone with an accused person. He said the applicant was taken to the quiet room by P.C. Salomons. He testified that at about 2315 the applicant spoke to his lawyer on the hospital phone while in the quiet room alone. During that time the officer stated he waited outside the quiet room with P.C. Salomons and no one else was in the quiet room while this conversation took place. The officer also said that while he waited outside that room, within 2 metres of the door, next to P.C. Salomons, he was unable to hear what was being said inside the room, but he could hear something. He said they were outside the room from 2 to 20 minutes, perhaps 15 minutes. When the applicant finished speaking with the lawyer, he and P.C. Salomons waited in the quiet room with the applicant. No complaint was made by the applicant about privacy while the applicant was speaking to his lawyer.

[44] P.C. Williams described the quiet room as having two glass walls. He was able to see the applicant while he was on the phone with his lawyer and saw him hang up the phone when he was finished speaking to the lawyer. He agreed the quiet room is not sound proof, as one inside the room can hear muttering coming from outside the room, but not really understanding what people outside the room are saying. He likened it to background noise of people talking. He said as well people outside the room would be able to see into it. He also agreed there was a TV in the main waiting room area, but he was unable to recall if he could hear it from inside the quiet room. He recalled an information desk situated about 15 to 20 feet around the corner from the quiet room, perhaps less. He made reference to the phone in

the room stating it was attached to a cord and the cord was into the wall. He did testify that there was a row of chairs up against the longer glass wall of the quiet room and some people he believed to be members of the applicant's family were waiting on those chairs. While in the quiet room the applicant's conversation was polite with him, but not with P.C. Salomons.

[45] He noted the injuries to the applicant's face stating he was bleeding from the nose and mouth. He had a fairly good cut to his upper lip that kept bleeding the entire time they were in the room. He also noted scratches and some bruising on his cheeks.

[46] This officer also recalled P.C Hodgins coming into the quiet room and setting up the Intoxilyzer instrument and then disassembling it. He did not recall P.C Salomons telling the applicant when he was first brought into the quiet room the breath technician is on his way.

[47] In cross-examination, photos of the applicant taken while he was in the quiet room were marked as Exhibits "a", "b", and "c" for identification on the *voir dire*.

Defence Evidence

[48] The evidence called by the defence at this point is strictly related to the *voir dire* on the *Charter* application.

P[redacted] M[redacted]

[49] The defence called P[redacted] M[redacted], the applicant. He testified he was working at his old boss' house on the day of the incident and after went to the home of A[redacted] G[redacted], a superintendent of his job site, to help him with some computer issue. He was there for about an hour or hour and a half. He admitted to consuming "a fair bit of alcohol" prior to the accident. He agreed with most of the evidence with respect to what occurred at the scene of the accident. He was injured; his nose was broken, but did not suffer a concussion. He said he did not feel overly intoxicated.

[50] At the hospital, he testified, he was in a corridor with maybe two officers, near what he later learned was the quiet room, for about 10 to 15 minutes. While he was there he told the court his father, whom he telephoned from the scene, handed him a rag so he could wipe his face, which was covered in blood. He had no further contact with his father at that point.

[51] He described the room as about 6 by 14 feet. He described the glass walls as being perfect squares about 2 ½ by 2 ½ feet and they were about ¼ of an inch thick. He also described frosting on the glass, which prevented anyone from seeing through the glass walls, except under the frosting between the frosting and the steel framing. The door to the room was described as a steel fame with glass inserts. There were some chairs and a table in that room, but the witness did not recall a phone in the room. The witness also testified that he could see everything outside the room, such as people outside walking back and forth. He was also able to hear people speaking to each other. He noted there was a television on in the waiting area about 12 to 14 feet from him. He could hear the commentator speaking about a

sports event and there was also background chatter. He said the television was a bit harder to hear at the beginning of the night but he still could hear it. He testified the people whose conversations he heard were 6 to 8 feet from him. The closer the people were to the quiet room the more he could make out their conversations. If you paid attention you could hear those conversations outside. There was one row of seats that was butted up against the window wall of the quiet room. He agreed in cross-examination on the night of the incident he was not actively trying to listen to any conversations outside the room.

[52] Mr. M[redacted] testified he was brought into the room by P.C.s Tsuchiya and Salomons. P.C. Williams came in at about the same time. He told the court that once in the room P.C. Salomons told him the breath technician and machine was en route. He also told the court that the police read to him a demand for both blood and breath. He agreed there were four or five officers in the room coming and going at various points, but not all there at the same time. The majority of the time there were two officers in the room. He testified P.C Williams was in the room the entire time or at least 98% of the time. He testified his father was never in the room. He testified there was never a time when there were no officers in the room.

[53] Once he was in the room, as noted earlier, he was told the Intoxilyzer was coming. It did arrive and was set up in the quiet room and after about 10 minutes it was disassembled and taken out. He was told either by P.C. Williams or Salomons the Intoxilyzer technician required him to give a blood sample because of the injuries to his face. He testified when he learned about the blood sample he wanted to call his lawyer again to discuss that, so as to ascertain if there were other steps he could take or what he should do. He was told by an officer he had already spoken to his lawyer and he was not permitted by the police to speak to him again. He testified as a result he was, as he described himself, "one big question mark."

[54] On the night of the arrest he felt he had very little privacy in the quiet room. He also told the court that during the conversation with his lawyer he did not focus on what was going on outside the room. He told the court that when he spoke to a lawyer he thought it was on a cordless phone, which he saw for the first time in P.C. Salomons' hands. He said he spoke to his lawyer, Jerry Herszkopf, for 2 to 3 minutes while P.C. Williams was sitting inside the room in the corner about 12 to 14 feet away, diagonally across from him. He said P.C. Salomons was 3 to 4 feet from him when he spoke on the phone to his lawyer; standing near the door to make sure nobody came in or went out while he was on the phone with counsel. The applicant felt that anyone within two to four feet of the room would be able to hear what he said to his lawyer. The applicant said he did not say much to his lawyer because he felt that the police would use what he was saying to his lawyer against him. He said he was talking under his breath, although not whispering. With privilege waived respecting that one phone call, he recalled his lawyer told him to provide a breath sample, to sign the papers and to be cooperative. The applicant testified he was not satisfied with the conversation when he got off the phone. He said he wanted to tell his lawyer about the injuries and the details of the arrest so he could get the proper advice, but did not advise counsel on those issues because of the police presence. He also testified that even if the police were not in the room he would not have had the privacy he wanted as the walls are glass and he could be seen speaking to his lawyer and could be heard from a range of two to four feet outside the room. He

testified there was a nurses' desk within two to four feet of the area where the smaller glass section of the room was. People were going to that desk to ask questions. He said there could have been police walking around within two to four feet of the room. He was unable to say if there were people trying to listen to his conversation, but he did see people peeking into the room.

[55] He did not raise the issue of the police being in the room while he was on the phone with his lawyer as he felt rushed. He said he saw P.C. Salomons tapping his foot while he was on the phone. He also did not know the police were not supposed to be in the room. He said he felt the longer he was on the phone with his lawyer the more information they could gather. It was nothing that was said or done by the police that made him feel that way, it was just his perception. He did not raise the issue of the blood sample with the lawyer as he had been of the view that the breath technician was on his way with the machine, thus his concern was not blood. He did concede in cross-examination that prior to speaking to his lawyer he had been given two breath demands and two blood demands, both of which he understood. Both demands, he agreed, had been given to him initially while still in the ambulance.

[56] Prior to being taken to the room where the blood was to be taken, he had not yet received any treatment. Once in the other room he asked P.C. Hodgins if he had spoken to his lawyer as he thought common sense dictated the police would if he had not been allowed to respecting the blood sample.

G[redacted] S[redacted]

[57] The defence called G[redacted] S[redacted] on the *voir dire*. He testified he is a friend of the applicant's father and attended the hospital on the night of the incident. He arrived at the same time as the applicant and the applicant's parents arrived. He saw the applicant in a hallway, cuffed, with a police officer at his side and blood on the applicant's face and on the floor. He testified he and the applicant's father, F[redacted], asked the police officer to get a nurse to wipe his face but that did not occur. Even though the officer said he could not recall, this witness testified F[redacted] did wipe blood from the applicant's face. The police officer also asked if they, that is he and the applicant's father, were his counsel, to which there was a negative response. They were told they could not speak to the applicant unless they were his counsel and to stay away from him. They were asked not to speak to the applicant. Nothing was done for the applicant at that time. This witness stated he saw the police escort the applicant to what has now been referred to as the quiet room. He described the room as having two walls of glass, chairs inside and out on the side of the glass and one door.

[58] He testified he was able to see the applicant enter the room with two officers and saw inside the room from a distance of about three feet. He told the court that while he was there he was not able to make out 100 per cent what the conversation was other than a few words. He heard voices. He said you could not understand the clarity of the conversation from the quiet room even though he was very near the glass wall. He testified he did not hear the police read a demand for a blood sample or a breath test, nor did he see a police officer read something to the applicant from a notebook, although he was not sure about that. He overheard the police talking about a hockey game while inside the quiet room. He thought

this was after the applicant spoke to the lawyer. He agreed if someone was speaking in a low voice or whispering he would not be able to hear them at all. He did not hear what the applicant was saying to his lawyer on the phone, although he tried to hear what he was saying. He testified there was no one else around the quiet room except himself and the applicant's parents, one officer who was outside the door to the room, and the other who was further down the hallway. The officer who was outside the door walked around but was outside the door most of the time. He recalled a television set in the waiting room area 40 to 50 feet away from the quiet room. He was unable to recall if the volume was on, but in any event it was not loud.

[59] He testified he saw the police bring a machine into the room and as well saw a nurse bring something else into the room after the applicant spoke to his lawyer. He was unable to hear what the police who were inside the room were saying about this machine as they were trying to set it up. He had a conversation with the father about getting a lawyer. He testified that later the applicant spoke to a lawyer. He did not recall the applicant's father going into the quiet room to speak to the applicant. He testified F[redacted] was right beside him all night.

[60] He testified he heard the officer say to the applicant, as the officer handed him the phone, "Your lawyer is on the phone." It was a wireless phone. He testified that during the entire time the applicant was on the phone with counsel two police officers were in the room with the applicant. He was certain about that. One officer was near the door, the other had his back to the glass. During the night there were mostly two officers in the room with the applicant, while the others were mostly in the hall. The applicant's parents were beside him when this witness made his observations. He said that he did not really discuss the event with the parents that night or subsequently.

[61] He said he knew the applicant got into an accident and he knew there were alcohol issues; he asked if anyone was hurt and that was all.

N[redacted] M[redacted]

[62] N[redacted] M[redacted], the mother of the applicant, was called by the defence on the *voir dire*. She testified that after receiving a call from the applicant she and her husband went to the scene of the accident and saw the ambulance and police cars. She spoke to no one there and then they proceeded to the hospital. At the hospital she saw the applicant in a corridor, bleeding from the face and handcuffed, standing with two officers. She did not speak to any police officer, but the applicant asked her to get his father, which she did. She did see F[redacted], her husband, wipe blood from the applicant's face and as well speak to the police prior to cleaning his face. He asked the officers if he could do that and one of them said yes. They were there with G[redacted] S[redacted]. She did not know if any officer asked her husband or G[redacted] if they were lawyers. She also described the room the applicant was moved to as having glass walls with some shading; it was see through and was furnished with seats inside and was equipped with a door that locked. Her husband did not enter that room. She testified the applicant was in the room for a few hours. While he was in the room there was one officer outside the door and two were inside. Other officers were in and out, but for the

majority of the time it was the same two officers in the room with him. She was asked several times about this and always replied there were two officers in the room while he was on the phone with counsel. She described chairs in front of the glass wall where she was sitting.

[63] While the applicant was in the quiet room she did not see an officer read anything to him, or hear a demand from an officer for his blood or breath, acknowledging she could have looked away for a moment or a split second. She testified to being able to hear vague conversations from inside the room, muffled. She thought there were a lot of officers there just to get a blood test. She was not sure who told her about a blood test.

[64] She testified that it looked like G took videos of the room where her son was, but she did not see the video and could not say if police officers would have been in that picture.

[65] She recalled a nurse bringing a phone to the quiet room and heard the nurse say to the officer who opened the door, "It's his lawyer." He handed the phone to the applicant. She testified there were two officers in the room when the phone was handed to the applicant. She said while he was on the phone the two officers were in the room with him during the entire conversation, one sitting and the other standing. The door was closed when he was on the phone. While he was in the room she only heard coughing, spitting up blood. She thought they were waiting for blood tests to be taken. She saw five officers in the hospital that night. She never left the area of the quiet room, nor did F or G. She was firm that no officer left the room while the applicant was on the phone with counsel.

[66] She agreed that she and her husband talked about the applicant's injuries after that night. They did not talk to each other about the police or the investigation or his charges. When they met with counsel they received instructions not to discuss the events of that night and early morning with the applicant or each other.

F M

[67] F M, the father of the applicant, was called by the defence on the *voir dire*. He testified he received a telephone call from the applicant about 10:00 p.m. on the night of the incident. He was told the applicant had driven into a ditch, he was stuck, and he was bleeding. So F and his wife went to the location where the applicant advised he was. On arrival he saw a police vehicle and an ambulance. He was advised by an officer on-scene that the applicant was in the ambulance and that he was charged with impaired. He was also advised there was no use going to the hospital as he would not be permitted to speak to his son. He nevertheless did go to the hospital. He called his friend G and proceeded to the hospital. Once there he was advised by his wife as to where the applicant was. He went to see him and noted him standing in a hallway with blood on his face. He was handcuffed behind his back and there was an officer standing beside him and another officer sitting at a desk on the other side of him writing notes.

[68] This witness testified he obtained a towel and wiped blood from his son's face, and he was then asked to leave by an officer as he was not permitted to talk to him. The witness

wanted the cuffs removed and some medical attention to be administered to his son. He saw the applicant taken to a room by two officers, the room being situated about 15 metres from where he was standing with the officers. The room, now referred to as the quiet room, was described as having frosted glass walls, through which one could see. The witness testified he sat, with his wife and G[redacted], in an area where there were chairs against one of the glass walls of the quiet room, about a metre away from the room. His back was to the glass and he faced the opposite way. They stayed in the area of the quiet room and moved no more than two feet here or there. He noted 25 to 30 people in the waiting room area about 15 to 20 metres away coming and going, on the left side where the triage desk was situated. He did not notice whether those people stopped to look inside the quiet room as they passed by. He also made reference to a television about 20 metres from where he was sitting, and recalled there was no sound coming from it.

[69] Aside from the two officers who escorted the applicant to the room, this witness testified he saw up to four officers that night with the applicant. While at the hospital the witness contacted a lawyer, Jerry Herszkopf, and later he saw a nurse bring a phone to the quiet room, saying there was a lawyer on the phone to speak to the gentleman as she handed the phone to an officer. This occurred about 20 minutes after the applicant was brought to the room. The officer took the phone and the witness saw him give the phone to the applicant. The witness told the court that he was on one side of the glass and the applicant was on the other side of the glass wall just centimetres from him. He also said that one of the officers inside the room was about 5 or 6 feet away at the back wall to the far left of the small room, which was about 10 by 12 feet, and the other officer was right beside the applicant, almost shoulder to shoulder with him when the applicant was talking on the phone. He later reaffirmed he was not mistaken about the officers being in the room at that time as he was looking in the room the entire time. He did have to turn sideways to look inside the room and agreed he was not facing the room the entire time. The phone call lasted three minutes. He testified there were no officers outside the room at that time. His wife and G[redacted] were beside him throughout.

[70] He testified he heard some mumbling; he heard the words "yes" and "no", multiple times, come from inside the room. While the applicant was on the phone with his lawyer the witness said he was not able to make out a conversation, but he heard mumbling, "yes" and "no", and said it was quite audible. He was trying to hear what the applicant was saying to the lawyer on the phone from inside the room. He said the room was not soundproof. He did not think anything was out of the ordinary about the fact the police were in the room with the applicant while the applicant was on the phone with his lawyer at that time. He later learned about the right to privacy when someone speaks to a lawyer. He was firm in cross-examination there were two officers in the room with the applicant while the applicant was on the phone with the lawyer. He did wonder, however, why there were all these police officers standing beside him when all his son did was go into a ditch.

[71] After about an hour more or less in the quiet room, the witness testified he saw the applicant moved to another room. He later learned it was to draw blood, after it was taken. After that a doctor came to stitch up the applicant. Through this witness, photos taken by G[redacted] showing the applicant's nose, lip, face and sweatshirt were entered as Exhibits 7, 8

and 9. He could not say exactly when G took those pictures, but disagreed that the photos were taken when the applicant was on the phone with the lawyer while in the quiet room. He testified that about a week later he and his wife, along with the applicant, went back to the quiet room area in the hospital. The applicant went inside the room and spoke to his father, who remained outside the room. He testified he could hear what his son was saying, but when he moved a few metres further away he could not hear too much. He agreed he was paying more attention on the second visit and it was a little clearer than it was the first day.

[72] He stated in cross-examination he did not discuss this event with his wife, as they are not on the best of terms. He also said he only discussed with G the aspect of seeing where the matter goes. He did discuss the incident briefly with the applicant, that is, about the applicant's physical well-being as a result of the incident. He said, "Everyone knew and seen everything so there was no need to discuss it." He did speak to the lawyer about it.

[73] The issues in this case have been outlined by counsel. There are numerous *Charter* issues that have unfolded during the course of the evidence and I shall deal with them, firstly under s. 8, then under s. 10(b).

The *Charter* Issues

[74] Under s. 8 there are four separate issues. The blood samples taken in this case were obtained as a result of a warrantless search, and thus the onus is on the Crown to establish that seizure of the applicant's blood was reasonable and the police had reasonable and probable grounds to make demands for blood.

[75] The first issue as set out by counsel is whether P.C. Salomons had reasonable and probable grounds to believe the applicant's ability to drive a motor vehicle was impaired by alcohol, as required, and were the demands that were made for breath samples permitted by law. The evidence has been set out above in some considerable detail. I find that on February 25, 2012, the applicant, the driver of his vehicle, was involved in a single vehicle accident whereby he drove it into a ditch on Jane St. near Teston Road. I find after the accident and upon seeing the police arrive the applicant ran from the scene and was pursued by P.C. Tsuchiya. I find that P.C. Tsuchiya did receive information from people who saw the applicant in the vehicle and who thought the person who had been in the driver's seat had been drinking. The applicant was pursued and was arrested by P.C. Tsuchiya at gunpoint for impaired driving, based on the information the witnesses thought he had been drinking. The fact that P.C. Tsuchiya drew his revolver once he had caught up to the applicant is not material for these purposes. I find he was acting properly in so doing given the desolate, unlit field through which this pursuit took place. However, with respect to P.C. Tsuchiya, I find his grounds for making an arrest for impaired driving were based on the information from a civilian who thought the applicant had been drinking, the fact of a single vehicle motor vehicle collision, the pursuit and the fact the applicant did not want the police to be called. It is noteworthy that P.C. Tsuchiya did have to chase the applicant through a snow-covered field, the snow being of a depth from ankle deep to 18 inches, according to the evidence of P.C Williams. When considering the evidence of P.C. Tsuchiya, any other *indicia* referred to is

post arrest.

[76] Section 254(3) requires that an officer have reasonable and probable grounds to believe that within the preceding three hours the accused committed, or is committing, an offence under s. 253. The onus is on the Crown to prove the officer had reasonable and probable grounds to make a demand because the Crown seeks to rely on the breath samples obtained as a result of a warrantless search (*R. v. Shepherd*, [2009] S.C.J. No. 35 at para. 16). The officer need not have anything more than reasonable and probable grounds to believe the driver committed the offence before making the demand. The officer does not have to demonstrate a *prima facie* case for conviction before pursuing his investigation (*R. v. Shepherd, supra*, at para. 23). A trial judge merely has to find facts sufficient that objectively support the officer's subjective belief that the motorist was driving while his ability to do so was impaired, even to the slightest degree (*R. v. Wang*, [2010] O.J. No. 2490 (ONCA)). The question is whether the total of the evidence offered provided reasonable and probable grounds on a subjective and objective basis (*R. v. Huddle* (Alta. C.A.), [1989] A.J. No. 1061). I have considered each of these principles in this matter. Did P.C. Tsuchiya have a subjective belief that the subject committed an offence and was that belief supported by the objective facts? On a review of the totality of P.C. Tsuchiya's evidence stated above, I find the officer had objective facts to support his subjective belief to make the arrest for impaired driving.

[77] P.C. Salomons arrived at the accident scene at 2216. I find on his evidence the roads in that area were partially snow covered. I find he received information the vehicle had gone into a ditch on Jane St. north of Teston Road, that a male was bleeding from the face, that the airbags from the applicant's vehicle had deployed and the male driver had asked civilians at the scene not to contact the police. P.C Salomons went into the field where P.C. Tsuchiya had arrested the applicant for impaired driving. He stated he smelled an odour of alcohol on the applicant when he arrived at the arrest location at 2217. I find P.C Tsuchiya told P.C Salomons he had made this arrest, notwithstanding it was not noted in P.C Tsuchiya's notebook. I find on the evidence that P.C Salomons had not yet had the opportunity to hear the applicant speak, nor had he observed any unsteadiness as the applicant was prone on the snow at the time he made the decision to arrest him, but acted on information he had received and what he observed in the field and the odor of alcohol when he arrived at the arrest scene. Prior to arrest, while P.C. Salomons joined this brief pursuit he agreed that running over the snow-covered terrain required a certain level of coordination. Any later reference to balance as *indicia* is post arrest, as is his reference to slurring, and cannot by definition on this evidence be included as grounds for arrest. Those *indicia* may have been noticed subsequently, but that evidence does not form part of the grounds for arrest. Additionally, the officer did note the applicant had a smell from the airbags, which had deployed, and later observed blood on the air bags in the applicant's vehicle, which will be factored into these reasons in due course. I conclude, nevertheless, that the officer on this evidence formed subjectively reasonable grounds to arrest for impaired driving based on the objective facts to which he testified to believe the applicant had committed an offence under s. 253 of the *Criminal Code*. Those factors have been enumerated above.

[78] It should be noted that the driving conditions and the impact of the air bag hitting the applicant in the face were not factored into any decision as to whether or not to arrest the

applicant for impaired driving. While the test is not onerous, the officer must take into account all information available to him and is only entitled to disregard information which he has good reason to believe is unreliable, as enunciated in *R. v. Bush*, [2010] O.J. No. 3453 (ONCA). I find P.C Salomons made the arrest for impaired driving based on the information available to him. In the short period he had to make his assessments, even making assumptions about the time of the driving, the arrest was not lacking in reasonable and probable grounds. The arrest was initially made by P.C Tsuchiya, which I found to be on reasonable and probable grounds in any event.

[79] While P.C Salomons made the arrest at 2217, it was not until 2240 that rights to counsel were read and the demands for breath and blood were read at 2250. This was done by P.C. Salomons, after he removed the applicant from the police cruiser, while he and the applicant were in the ambulance, a passage of time of 23 minutes from the time he made the arrest. I find on the evidence of this officer himself that he could have read the rights to counsel and given the proper demand while waiting for the ambulance to arrive as they waited in the police cruiser. The officer testified he waited because he wanted to ensure the applicant would be treated medically, but there is no evidence the applicant was not capable of receiving this information. I find the reading of rights and administering the proper demand could have been made while waiting for the ambulance to arrive, even if the ambulance arrived shortly after the applicant was taken to the police vehicle. He was arrested, he was taken out of the field, he was placed in a police car, and yet while the officer said he wanted to make sure the injuries were going to be treated or even assessed prior to giving *Charter* rights and the demand, there was nothing to prevent the officer from administering the applicant's right to counsel to him or administering the proper demand while waiting for the ambulance to arrive. There is no evidence that the accused did not understand why he was being arrested, therefore the question is begged as to why not administer rights and demands either when and where the arrest took place or as soon as they got to the police car.

[80] The officer's reason for the delay is not adequate, nor does it resonate in terms of reasonableness in my view. As noted, the officer said in his own evidence that it was possible he had time to do it while waiting for the ambulance to arrive. The applicant, in my view and on the evidence, was no longer a flight risk; he was in secure police custody and was not so badly injured that rights and the appropriate demand could not be made. The reading of his rights and demands in the circumstances of this this case did not conform to the statutory requirements as per the *Charter* and the *Criminal Code*. The *Charter* mandates that an accused be given rights to counsel on arrest or detention; a part of which right is to retain and instruct counsel without delay. On the facts of this case, the decision by the police to take the applicant to the police car before giving his rights I find was reasonable, but I do not find the actions of the police were reasonable in yet waiting for the ambulance to arrive before giving him his rights. While rights were given after some delay, some delay was necessary in the circumstances of this arrest, but not to the extent it was. There was nothing to prevent the officer from reading the *Charter* rights once the applicant was in the police car. Some 23 minutes passed after the arrest before the applicant's rights were given in the ambulance. Even allowing the passage of five minutes to take the applicant from the field to the police car, it leaves another 18 minutes of delay before rights were given.

[81] Further, the demands for breath and blood samples were not given until 2250, some 33 minutes after the arrest, in the ambulance. Again, deducting time to take the applicant from the field to the police cruiser, the result would be 28 minutes before a demand for breath and or blood was made. Allowing a minute or two to read rights to counsel still leaves a substantial period of time before any demand was made. Any demand for a bodily substance could have been made to the applicant while in the police car awaiting the arrival of the ambulance. As I found above with respect to the rights to counsel, the condition of the applicant was not such that required the demands be delayed to the extent it was. The demand need not to be read immediately, but rather as soon as practicable. Even on the officer's evidence the demand or demands could have been made while waiting in the police car. I find the demand and or demands were not administered as soon as practicable in this case.

[82] Central to this entire discussion is the issue of time of when the applicant was driving. P.C. Salomons' evidence, taken in conjunction with the evidence of the civilian witnesses, addresses the issue of time but only the time when the applicant was either behind the wheel or standing by his motor vehicle. Sana Bharwani's evidence on this point is that she saw the applicant behind the steering wheel of the vehicle at about, or a little after, 10:00 p.m. She was unable to testify as to the time of the accident, nor was she questioned about this by P.C Salomons or any other officer. In fact the officer never inquired from the applicant while waiting for the ambulance to arrive when it was he drove off the road. P.C. Salomons in his evidence offered a guess about the time of the accident without any degree of accuracy stating, "So chances are, you know, it happened a few minutes before the witnesses, the complainant called in that they had come across this accident." The question is thus asked by the applicant as to how the officer could have formed reasonable and probable grounds to believe the applicant had committed an offence within the preceding three hours. It is clear the officer must address his mind to that issue and make inquiries in that regard. I find P.C. Salomons did address his mind to when the accident happened. At least subjectively he had a belief based on the report from dispatch and from information from the civilians. He had no actual information as to when the accident happened, but he did receive information from P.C Tsuchiya, who affected the initial arrest.

[83] Wolder J. in *R. v. Ellis*, [2003] O.J. No. 6147 (OCJ), at para. 15, and the ruling in *R. v. Oleksiuk*, [2008] O.J. No. 1549, held the arresting officers in those cases did not receive any information about the time of the accident when they made the breath demand. I would adopt the reasoning as expressed in those cases that the act of arriving at the scene of an accident following a radio dispatch does not lead to a logical inference to believe that offence had been committed within the preceding three hours. However, given the information P.C. Salomon had from dispatch and from P.C Tsuchiya, it was his belief the accident occurred a few minutes prior to the call from the civilian and he had a belief that an offence under s. 253 had been committed within the preceding three hours and thus does not impact negatively on the applicant's s. 8 *Charter* rights.

[84] The next issue to be addressed is whether P.C. Salomons had subjectively formed reasonable grounds to believe the applicant may have been capable of providing a breath sample or, in the alternative, in his mind whether it would have been impracticable to obtain

a breath sample and thus make a blood demand. At 2250 he administered both a breath and blood demand. As I reviewed the evidence on this point, it is clear P.C. Salomons was not sure if the applicant had the ability to provide a breath sample because of the condition of the applicant. Thinking a breath sample might have been impracticable, P.C. Salomons gave both a breath demand and a blood demand. The statutory scheme as set out in s. 254 (3) does not provide for making a demand for both procedures at the same time. The section provides an officer with a choice as to which demand to give. The section gives clear guidance when it uses the word "or" as opposed to "and" when it sets out what an officer is mandated to do. The officer in this case was of two minds and had not determined which of the two options at hand were appropriate, so he administered both demands.

[85] The officer must have reasonable and probable grounds to believe the condition of the applicant rendered him incapable of providing a breath sample, before a blood sample demand can be made. He was not sure, thus I find he had no objective basis for making the blood demand. If he had assessed the situation once he had an opportunity to view the applicant and had determined the applicant was not able to provide a breath sample, it would have been appropriate to administer the blood demand. Even after waiting for the ambulance, having had an opportunity to at least make a cursory assessment, he was unsure. Given the evidence as it unfolded, I conclude P.C. Salomons could not have formed a subjective belief that the applicant was either incapable of providing a breath sample, or that it was impracticable to obtain a breath sample. The reading of both demands clearly demonstrates his uncertainty. Thus, in layman's terms, he thought, "Maybe it is a breath sample we need, or maybe it is a blood sample, I'm just not sure."

[86] Further, the evidence reflects no clear decision was made to draw blood until 0015 and thus, when P.C. Salomons read the breath and blood demands to him at 2250, the officer could not have had a subjective belief that the accused was incapable of providing a breath sample. In my view the demands do not conform to the statutory requirement, and thus the demand for breath and or blood was made contrary to the statutory scheme and is a violation of the applicant's s. 8 *Charter* rights. Having made that finding, I do not find there was either good faith or bad in reading both demands. I find they were made as a result of uncertainty.

[87] With respect as to whether P.C. Hodgins' demand for blood made at 0220 on February 26 was made as soon as practicable, I find the following. There are actually three times in the evidence which could be the operative times, remembering the time of arrest was 2217. I have found the statute does not provide for breath and blood demands to be given simultaneously. Assuming the original demands made at 2250 were contrary to the statutory requirement, does the decision to draw blood at 0015 change the requirement at law? I find the decision to draw blood was made at 0015. Notwithstanding the problems encountered as a result of the hospital authorities making a decision to draw blood, the decision to draw blood was made because it was apparent the applicant could not provide a breath sample. Even if 0015 is the starting point, as opposed to when the original demands were given, I find the demand for blood should have been given as soon as the decision by the police was made to take blood as the taking of a breath sample was not possible, that decision being made at 0015. P.C. Hodgins said the decision to draw blood was made at 0015 or at some point after. The evidence of P.C. Salomons, however, reflects the decision by the police was

made at 0015, even though the hospital only agreed to draw the blood at 0135. The fact the hospital agreed to draw blood at 0135 is not material as to when the police ought to have given the applicant the blood demand. Even if the operative time is 0135, when according to one officer the decision was made by the hospital to draw blood, a demand for blood was not made until 0220. I find on the evidence there was nothing to prevent that demand from being made either at 0015 or 0135. I make this finding when reading the evidence of P.C. Salomons on that point that the decision to draw blood was made at 0015. Notwithstanding the decision to draw blood was made at 0015, the blood demand was not read to the applicant until 0220, and blood was taken at 0226. The evidence only reflects that in the intervening period, between 0015 and 0220, P.C. Hodgins updated his notes as they waited for the hospital to decide it was going to draw blood. At 0200 or 0211, Dr. Fu came in to treat the applicant. Even after the decision was made by the hospital at 0135, no demand was made until 45 minutes after that time. There was nothing to prevent the officer from making the blood demand at 0015, or at various times thereafter, but certainly not after a passage of 2 hours and 5 minutes, or even at any time within the 45 minutes after 0135, or at least prior to Dr. Fu's attendance at 0200 or 0211. I find the reasons for this delay unacceptable and they do not amount to a demand being made as soon as practicable, and were not made within the framework as set out by s. 254, thus creating a breach of the applicant's s. 8 *Charter* rights.

[88] The issue as to whether the applicant should have been given another opportunity to consult with counsel after P.C. Hodgins decided to have blood drawn from the applicant was raised. The evidence is that he was not permitted to re-consult with counsel. I find the decision of P.C. Salomons not to allow this to occur, as he said he already gave the applicant an opportunity to speak to counsel, did not cause further jeopardy to the applicant. I ask whether the change in circumstances were such that re-consultation would be required. Would the initial advice be altered in some way, or would it be rendered insufficient, or was the choice to be made by the applicant because of a changed circumstance significantly altered thus necessitating a re-consultation, as contemplated in *R. v. Sinclair,* [2010] 2 S.C.R. 310 (SCC)? I find the applicant knew about the possibility of blood being drawn from 2309, notwithstanding my finding on that issue. He did not raise it with counsel; he could have. The police are not responsible about what an accused person discusses with counsel. The applicant's jeopardy was not affected in any way, in my view, as a result of the officer's refusal to allow a re-consultation in these circumstances.

[89] With respect to the issue as to whether the applicant was provided an opportunity to consult with counsel in private, the evidence has been reviewed above. The applicant, the parents of the applicant and G[redacted] S[redacted] all testified two police officers were in the room with the applicant when he spoke to counsel on the phone. Of significance in terms of assessing the evidence of the applicant and his witnesses, I find it is noteworthy that two of these witnesses were his parents; they were there at the hospital to see to their son's condition. They raised no concerns about privacy at that time. I find none of the defence witnesses, including the applicant, knew at that time anything was improper about police being in the room when the applicant was speaking to counsel on the phone. I do not find it of consequence that no complaint about lack of privacy was made.

[90] The police officers testified they were not in the room when the applicant spoke to

counsel. The evidence of P.C. Williams was that he and P.C. Salomons were within two metres of the door to the room. I find it significant that P.C. Salomons did not know the whereabouts of the other officers while the applicant was on the phone with counsel, as he rejected the suggestion that P.C Williams was in the room. I find that P.C Salomons was unable to say where the other officers were, thus could not say that P.C. Williams was not in the quiet room. His evidence indicates he did not even know that P.C Williams was within two metres of him when P.C. Salomons testified he was outside the quiet room. There is an internal inconsistency in the Crown evidence on this point.

[91] With respect to the evidence called by the applicant, there were differences as to the location of the officers in the room, but all were firm that two officers were in the room during this phone call. The applicant testified he could not properly communicate with counsel because of the police presence in the room. In this scenario, it is not a simple matter of strictly accepting the evidence of the officers over that of the applicant and witnesses, as is suggested by the respondent. As noted above, two of the applicant's witnesses were his parents. They were at the hospital because of the accident in which their son was involved. Is this court simply to reject their evidence? It may be they saw exactly what they said they saw. The fact that each of the applicant's witnesses testified as to the police having different positions in the room in my view is a hallmark of truthfulness, an indication they did not get together and synchronize their evidence. I find they made their observations in stressful circumstances. It cannot be forgotten that the applicant had been taken down at gun point at the outset, and was potentially seen as a flight risk by the police. It is not a stretch to conclude the police, particularly in the hospital environment, which lacked the security that would be found in a police station, would want to make sure the applicant was secure and was not going to flee, thus kept a presence within the quiet room during the conversation with counsel. When contemplating the evidence called by the applicant as against that called by the Crown on this point, on a balance of probability I find the police did not provide the applicant with privacy when he spoke to counsel.

[92] With respect to the issue of the being able to hear the conversation the applicant was having, through the glass walls of the quiet room, I find it would be impossible to make out the actual conversation between the applicant and counsel. I find there would be a combination of garbled voices and some actual words from inside the quiet room that could be heard by people outside the quiet room. While the facilities for such conversations were far from ideal, that is, being in a hospital setting rather than in a police station, the facilities were inadequate for the purpose of allowing an accused person to consult with counsel in private. It is not only the actual conversation between the applicant and counsel that factors into this discussion; I find that the applicant would not have had a sense his conversation with counsel would be private and secure. Even on the scenario placing the officers about three metres outside the quiet room during the conversation with counsel, they were able to watch the applicant through the glass walls as he spoke to counsel, and further were able to hear some words uttered by the applicant in that process. I find this would have comprised the applicant's ability to properly consult with counsel. I find the applicant, even on that scenario, would not have confidence that his comments to counsel were made in private. Throughout this process he was watched by police officers, who were in close proximity, even if only just

outside the quiet room and, while the conversation could not be heard clearly, the applicant's ability to consult with counsel in private was compromised. The police made no effort to find another more private place where the applicant could have privacy, and I find the very nature of the quiet room did not lend itself to any person in police custody being able to have a conversation in private with counsel. I make these observations with the knowledge that the hospital setting is not a police station, and is not set up for such consultations. On either scenario the applicant's right to privacy in speaking to counsel was infringed and thus there was a s. 10(b) *Charter* violation.

[93] The other s. 10(b) issue raised in the evidence upon which I have commented is that of the giving an accused upon arrest rights to counsel without delay. I find that segment of this particular *Charter* right was not complied with and thus is another violation of the applicant's s. 10(b) *Charter* rights.

[94] Having found *Charter* violations as noted, I turn to the s. 24(2) analysis. In *R. v. Grant*, [2009] S.C.J. No. 32 (SCC) at para. 71, the court articulated the following:

> 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.

[95] In this case the applicant seeks to have this court exclude all observations of the applicant by the police subsequent to his detention and, subsequent to the issuance of the blood demands, utterances by the applicant to police while he was detained, the blood samples and analysis of those samples and expert opinion relating to those samples. Included in this application under s. 8 of the *Charter* is the issuing of the blood demand not as soon as practicable.

[96] The application as well refers to breaches of s. 10(b) of the *Charter* which, if it survives the *Grant* analysis, would exclude the blood samples and its subsequent analysis.

[97] I will deal with each category individually.

1. The seriousness of the breach.

[98] I find the following with respect s. 8. The breaches as described above with respect to the unlawful demand for breath and blood, at the very least, are serious. I find these are serious breaches as P.C. Salomons, while not acting in good faith or bad, made an improper demand for breath and blood samples in the first instance and, in any event, the demands were not made as soon as practicable. As well the demands did not conform to the statutory scheme as set in s. 254 of the *Criminal Code*. I find these breaches are serious and the stand-

ard of investigation was below what should be not only expected but demanded by the public. The several breaches respecting the issuance of the demands, not only after the arrest but as well as at 0220, suggests the officers were either not cognizant or not thinking or mismanaged time requirements dictated by statute. As just noted, the breach under s. 8 also has to do with the demand made by P.C. Hodgins, which I found to be made not as soon as practicable. It adds to the seriousness of the breach of the applicant's s.8 *Charter* rights. Thus it is yet another breach in a situation that easily lent itself to the officer giving this demand without the delays the evidence reflected, for this invasive procedure of taking blood in a timely fashion, even if the operative time was 0015. The taking of blood has been characterized as a very invasive interference into an individual's liberty in *R. v. Pavel* (Ont. C.A.), [1989] O.J. No. 2307 at p.12, and the demand was unlawful given the excessive amount of time it took to give, without an adequate explanation. These several breaches offend s. 8 and operate to exclude the blood readings and analysis thereafter.

[99] The finding, on a balance of probability that the officers remained inside the quiet room while the applicant was on the phone with his counsel, in my view is a serious breach of the applicant's s. 10(b) *Charter* rights. The detainee has a right to consult counsel in private as articulated in *R. v. Playford,* [1987] 40 C.C.C. (3d) 142 (O.C.A.), amongst numerous other cases standing for the same proposition. Section 10(b) of the *Charter* has been described as having "superordinant importance" in *R. v. McKane* (Ont. C.A.), [1987] O.J. No. 557. In terms of seriousness, this is a most serious breach of the applicant's right to consult with counsel in private. It is so fundamental and self-explanatory that little need be said, other than it is a most serious breach and weighs heavily in exclusion of the evidence.

2. Impact of the breaches

[100] Even on the second scenario, I find that the rights of the applicant were sacrificed on the altar of expediency, in that the police did not make any effort to find a more private area for this conversation to take place. This impacted on the applicant's *Charter* protected right to have a private consultation with counsel and operates in favour of exclusion of evidence that followed.

[101] The impact of the breaches on the applicant's *Charter* protected interests have been outlined in the evidence. The more serious the incursion on the interests protected by the infringed right, the greater the risks that the admission of evidence would bring the administration of justice into disrepute. There were breaches of the statutory requirement both shortly after the arrest and at 0220, regarding the "as soon as practicable requirement, and as well a breach of the applicant's s. 10(b) rights. As noted in *Grant* at para. 109, the taking of blood is a serious intrusion with a person's privacy, integrity and dignity. I find the resulting drawing of the applicant's blood was unlawful, it was invasive and impacted on the applicant's privacy, integrity and dignity, which should have been protected by the *Charter*, and thus weighs heavily in the exclusion of evidence.

3. Society's interest in adjudication on the merits of the case

[102] The last area of consideration in the *Grant* analysis is society's interest in adjudica-

tion on the merits of the case. As a starting point, it is well accepted that society has an interest in seeing cases decided on their merits. There is an equally important principle to consider in society's interest and that is having matters investigated with thought and consideration given to citizens' *Charter* rights. The Supreme Court, at para. 82 of *Grant*, stated,

> The fact that the evidence obtained in breach of the *Charter* may facilitate the discovery of the truth and the adjudication of a case on its merits must therefore be weighed against factors pointing to exclusion, in order to "balance the interests of truth with the integrity of the justice system": *Mann*, at para. 57, *per* Iacobucci J. The court must ask "whether the vindication of the specific *Charter* violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial": *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, *per* Doherty J.A.

[103] At para. 75 the Court continues,

> The importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry. ... 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.

[104] That being said, the Court in the next paragraph notes the seriousness of the allegation is a factor to consider in this analysis. This analysis should include consideration of the long term consideration of the repute of the justice system, which is the focus of s. 24(2).

> And as Lamer J. observed in Collins, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[105] In dealing with bodily evidence such as breath, or indeed as in this case blood, the effect of admitting the evidence on the public interest in having the case adjudicated on its merits – "will usually favour admission in cases involving bodily samples." The rationale behind that principle as gleaned from para. 110 of *Grant* is that such evidence "is generally reliable, and the risk of error inherent in depriving the trier of fact of the evidence may well tip the balance in favour of admission."

[106] Thus, when considering this third line of inquiry, *Grant* requires that the Court bear in mind the long term and prospective effect upon the fair administration of justice, focussing less on the particular case than on the impact over time of admitting evidence obtained by infringement of the constitutionally protected rights of the accused. Fish J. in *R. v. Morelli*, [2010] S.C.J. No. 8 (SCC) stated,

> Justice is blind in the sense that it pays no heed to the social status or personal characteristics of the litigants. But justice receives a black eye when it turns a blind eye to unconstitutional searches and seizures as a result of unacceptable police

> conduct or practices.

[107] Thus returning to my comment above about the confidence the public must have in properly conducted police investigations, I note Ducharme J. in *R. v. Au-Yeung*, [2010] O.J. No. 1579 at para. 69 stated,

> ...the public should expect that when they are stopped by the police their *Charter* rights will be expected. Certainly, the public must have confidence in the competence of the police and in the fact that they will not detain or arrest drivers without the requisite grounds. Even more importantly, the public must have confidence that those officers who are charged with exercising the important powers under s. 254 of the *Criminal Code* have the necessary skills and training to do so in a matter that complies with both the *Criminal Code* and the *Charter*.

[108] I adopt the above reasoning in *Grant* and in *Au-Yeung* and apply those principles to the case at bar and exclude evidence of the results of blood samples taken and the evidence of the toxicologist in interpreting samples and even referring them back to the time of driving and or care and control. Incidentally, the time of driving was never established in any event. The applicant was however placed behind the steering wheel of the vehicle. The charge of impaired driving and driving with over 80 milligrams of alcohol in 100 milligrams of blood are dismissed. The included offence of care or control cannot be determined on any blood alcohol reading as I have excluded that evidence.

Care or Control

[109] With respect to the included offence of having the care or control of a motor vehicle, I find that the accused was placed in the driver's seat in the vehicle by the civilians. I therefore find he occupied the driver's seat of the vehicle.

[110] *R. v. Boudreault*, [2012] 3 S.C.R. 157 (SCC) at para. 33 set out the three essential elements of care or control:

> (1) an intentional course of conduct associated with a motor vehicle;
>
> (2) by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit;
>
> (3) in circumstances that create a *realistic* risk of danger to persons or property.

[111] I adopt the comments of Fish J. in his explanation of "realistic risk" as he stated in *Boudreault* in para. 34;

> The risk of danger must be realistic and not just theoretically possible: *Smits*, at para. 60. But nor need the risk be probable, or even serious or substantial.

[112] At para. 39 the Court held the presumption of care or control due to the occupancy of the driver's seat is not conclusive of guilt, and the realistic risk of danger must be proven by the Crown even where the presumption applies. Fish J. expressed the majority view as follows:

> Put differently, s. 258(1)(a) indicates that proof of voluntary inebriation and voluntary occupancy of the driver's seat do not by their coexistence alone conclusively establish "care or control" under s. 253(1) of the *Criminal Code*. Something more

> is required and, in my view, the "something more" is a realistic risk of danger to persons or property.

[113] He said at para. 42,

> In the absence of a contemporaneous intention to drive, a realistic risk of danger may arise in at least three ways. First, an inebriated person who initially does not intend to drive may later, while still impaired, change his or her mind and proceed to do so; second, an inebriated person behind the wheel may unintentionally set the vehicle in motion; and third, through negligence, bad judgment or otherwise, a stationary or inoperable vehicle may endanger persons or property.

[114] On the evidence in this case, I find the following. The vehicle in this case could not constitute a danger to property or persons. It was nose first in the ditch, and common sense dictates no realistic danger could be caused by that vehicle in that position. I find as well that even if the accused had been performing an act involving the vehicle's fittings, they are not defined. He had facial injuries as a result of the accident. His injuries were consistent with his head being struck by the air bags in his vehicle. The symptoms, as described by the officer who escorted him from the field, I find could be attributable to the accident. The officer agreed the symptoms exhibited could have been from causes other than alcohol. I also note the evidence of P.C Williams indicated the depth of the snow as being ankle deep up to 18 inches deep, and P.C. Salomons agreed that running over such terrain, as the accused did, required a certain degree of coordination. I do not find his utterances necessarily indicative only of being impaired by alcohol; certainly the utterances were rude and uncouth, and could have been said as a consequence of being intoxicated, but not exclusively. Dr. Fu described the accused as agitated, but alert, oriented, coherent, alcohol on his breath. One of the most important aspects of concluding that the accused was driving or had the care or control of the vehicle is evidence that would be proof beyond a reasonable doubt the accused was impaired by alcohol. It may be he was, but on the evidence before me, I am not convinced beyond a reasonable doubt that the only conclusion I can draw is that he was impaired by alcohol while behind the steering wheel of the vehicle. There is no evidence as to his condition when he was behind the wheel, only the suspicion by the civilians that he had been drinking. After the arrest, this court heard about slurring, and poor balance as he was escorted through ankle deep snow to the police car. The field was unlit, the depth of snow was at least ankle deep to 18 inches deep, the field was described as having obstacles, the accused had been involved in an accident causing head injuries, he was bleeding from his nose and mouth, and continued to bleed at the hospital. I find the airbag from his vehicle hit him in the face causing these injuries. The blood from his nose and mouth injuries was flowing or dripping into his mouth. I find this would impact on his ability to properly articulate words, as P.C. Salomons reluctantly agreed. I did not specifically exclude this evidence as the arrest was proper. It seems trite, but even if the accused did not rebut the presumption that he occupied the seat normally occupied for the purpose of setting the car in motion, the condition precedent is the court making a finding beyond a reasonable that he was impaired by alcohol. *Boudreault*, amongst a legion of other cases, requires that the court must find the accused is impaired by alcohol or has more than 80 milligrams of alcohol in 100 millilitres of blood for a conviction. I find the Crown has not proven impairment by alcohol beyond a reasonable doubt.

[115] Mr. M[redacted] is acquitted on the charges.

Released: January 29, 2014

Signed: "Justice W.A. Gorewich"