On appeal from a summary conviction in the Provincial Court on November 22, 2022.

Date: 20231016
Docket: CR22-01-39338
(Winnipeg Centre)
Indexed as: R. v. Yanke
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:	)	
	)	
HIS MAJESTY THE KING,	)	
respondent,	)	Nick Reeves
	)	for the respondent
- and -	)	
	)	Mark Wasyliw
GARRY A. YANKE,	)	for the appellant
	)	
(accused) appellant.	)	
	)	Judgment Delivered:
	)	October 16, 2023

INNESS J.

I. INTRODUCTION

[1] This is an appeal from convictions for operating a motor vehicle while impaired, contrary to s. 320.14(1)(a) of the *Criminal Code*, and for having a blood alcohol concentration equal to or exceeding 80 mg of alcohol in 100 mL of blood within two hours after ceasing to operate a motor vehicle, contrary to s. 320.14(1)(b) of the *Criminal Code*.

[2] On a *voir dire* the learned trial judge found no violations of ss. 8 and 10(b) of the *Charter*, ruling all blood samples admissible.[1] At trial she found the presumption of care/control pursuant to s. 320.35 applied and was not rebutted. She was satisfied the

[1] Analysis of the blood samples obtained by demand from the investigating officer indicated a blood alcohol level of 226 mgs %. Analysis of the blood sample taken by medical staff at the hospital, obtained by search warrant, indicated a blood alcohol level of 231 mgs %.

evidence proved impairment and that the blood alcohol levels exceeded the legal limit. She convicted the appellant of both offences and, with agreement of counsel, entered a conditional stay on the impaired operation conviction pursuant to the *Kienapple* principle. The appellant was sentenced to a fine of $3,250.00 (including surcharge) and a one-year driving prohibition.

[3] The appellant says the learned trial judge erred in finding:

1) the arresting officer had reasonable grounds for arrest and for making a blood demand;
2) the arresting officer was not required to re-advise the appellant of his s. 10(b) *Charter* right to counsel prior to making the blood demand;
3) the search warrant for the appellant's hospital blood samples was valid;
4) the manner of the search in obtaining the appellant's hospital blood samples did not violate s. 8 of the *Charter*;
5) the appellant was in care/control of the vehicle;
6) the appellant was in care/control within the previous two hours; and
7) by rendering an unreasonable verdict that was unsupported by the evidence.

[4] For the following reasons I have determined that none of the grounds of appeal can succeed and that the appeal is dismissed.

II. EVIDENCE

[5] On March 7, 2021 at 6:53 p.m., Beausejour RCMP received a call about a truck that had run off a bridge on Highway 44 east, just south of Beausejour, Manitoba. Fire

and emergency medical services (EMS) were already on scene when Cst. Vidal arrived. He surveyed the area and noticed tracks from a vehicle going off onto the dirt shoulder and disappearing. The tracks continued at the bottom of a small incline to the river, where a truck was stopped and appeared to have broken through the ice. From his observations, Cst. Vidal concluded the truck appeared to have been travelling at a high rate of speed when it left the roadway, took flight and continued onto the river. He noted the road was straight with no turns or corners. The pavement was bare, with no snow. Although it was evening, the area had good, clear visibility. The traffic was light.

[6] Cst. Vidal was told that due to concerns about a possible head injury, the appellant would be transported to Beausejour Hospital. He was unable to speak to the appellant but did speak to Steve Modrzejewski, who was the first responder on scene (a volunteer firefighter in Beausejour) and a firefighter in Winnipeg. Cst. Vidal was familiar with him from prior dealings and found him to be credible. Mr. Modrzejewski told him that the appellant had difficulty standing and walking and admitted to drinking. He also testified that Mr. Modrzejewski told him that he believed the appellant was intoxicated. This fact was contested by the appellant and was inconsistent with Mr. Modrzejewski's evidence.

[7] Cst. Vidal followed the EMS vehicle to the hospital, arriving at 7:38 p.m. At 8:10 p.m. he spoke to a medical doctor who informed him that they wanted to send the appellant to the Health Sciences Centre in Winnipeg for treatment. The appellant initially refused but ultimately agreed. Cst. Vidal confirmed with the doctor that the appellant was medically competent to understand a blood demand and that obtaining a sample would not be medically harmful. Based on the information he received from Mr.

Modrzejewski, combined with his own observations of the accident scene, Cst. Vidal determined that he had reasonable grounds to arrest the appellant for impaired operation of a motor vehicle and to make a blood demand.

[8] Cst. Galloway-Booth was contacted by Cst. Vidal to bring a blood collection kit to the hospital. When he arrived at approximately 8:20 p.m. he observed the appellant in a room with a nurse who was drawing blood for medical purposes. Cst. Vidal briefed him. Cst. Galloway-Booth never entered the room. He followed the nurse to the lab and confirmed the existence of extra hospital samples in the event police obtained a search warrant ("hospital blood samples").

[9] At 8:31 p.m., while at the hospital, Cst. Vidal was able to speak to the appellant for the first time. He arrested him for impaired operation of a conveyance and read him his s. 10(b) *Charter* right to counsel. The appellant responded that he did not want to speak with counsel. The blood demand and police caution were then read to the appellant. He agreed to provide samples. The first sample was taken at 8:49 p.m. Subsequent analysis demonstrated a blood alcohol level of 226 mgs% ("police blood samples"). The appellant volunteered that he drank three glasses of wine. Cst. Vidal noted an odour of alcohol coming from the breath of the appellant while he spoke.

[10] On March 26, 2021, Cst. Vidal took a formal statement from Mr. Modrzejewski. Further information was obtained as to his observations of the appellant at the scene. Utilizing that additional information, along with the blood alcohol reading of 226 mgs% from the police sample, on June 16, 2021, Cst. Vidal swore an Information to Obtain a

Search Warrant ("ITO") to seize the hospital blood samples. The warrant was authorized and the samples were seized. Analysis indicated a blood alcohol level of 231 mgs%.

[11] At trial, Mr. Modrzejewski could only guess about the time he arrived on scene as he made no note. He was paged to respond to the accident. In his experience, he receives a page within five minutes of a 911 call. It would only have taken him about a minute or so to get there after being paged as he lives nearby.

[12] Mr. Modrzejewski testified that when he arrived, the appellant was seated in the driver's seat and was trying to get out of the vehicle. He had his left hand on the door handle, one foot out the door and his right hand on steering wheel. Mr. Modrzejewski told him to stay put so he could make sure he was okay. The appellant said he had been drinking that evening. He said that he lived down the road and just wanted to walk home. The appellant's speech was quite slurred. He needed help from Mr. Modrzejewski to get out of the truck. He had a hard time standing on his own and was falling into the ice and water. His pants were undone and he had difficulty doing them up so Mr. Modrzejewski helped him. He also required help from Mr. Modrzejewski to go up the embankment as his gait was unsteady. He noticed the appellant had a laceration on his forehead, which could have been from striking the windshield, but had no other obvious medical concerns.

[13] Mr. Modrzejewski testified that he had personal and professional experience in dealing with intoxicated people. On an scale of 0-10 for intoxication, he placed the appellant at a seven. He formed the opinion the appellant was intoxicated. However, Mr. Modrzejewski agreed in cross-examination that he only told Cst. Vidal the appellant

admitted to drinking and did not give him his opinion he was intoxicated. He also stated in re-examination that he did not have a complete recollection of the events. Whether Mr. Modrzejewski told Cst. Vidal he believed the appellant was intoxicated was a contentious fact on the *voir dire*.

III. STANDARDS OF REVIEW

[14] The trial judge's articulation of the applicable legal principles is reviewed on a standard of correctness. Factual findings on which the decision is based are entitled to deference unless there is palpable and overriding error. The application of the law to the facts is a question of law, reviewable on a correctness standard. See ***R. v. Farrah (D.)***, 2011 MBCA 49; and ***R. v. Denys (C.D.)***, 2009 MBCA 39.

[15] A trial judge's verdict will be unreasonable in two circumstances: (1) where the verdict cannot be supported by the evidence because the verdict is one that a properly-instructed judge or jury, acting reasonably, could not render; or (2) where the verdict is vitiated by illogical or irrational reasoning (***R. v. Beaudry***, 2007 SCC 5; ***R. v. Sinclair***, 2011 SCC 40).

IV. ISSUES

[16] The appellant does not challenge the finding that he was impaired by alcohol. On this appeal, his main complaint focuses on the issue of care/control. Had he been successful, both verdicts would have been set aside as each required proof of care/control to convict.

[17] Because I am dismissing the unreasonable verdict and care/control grounds of appeal, the impaired operation conviction must be upheld. This renders any decision on the *Charter* grounds of appeal moot since those grounds relate solely to the admissibility of the blood alcohol readings relevant only to the .08 conviction. However, since both counsel argued all grounds, I will address each of them in the order in which counsel argued them.

Unreasonable Verdict

[18] The appellant broadly alleges that the trial judge made a number of factual findings that were not supportable and failed to assess the evidence in relation to the issues. He also alleges a misapprehension of evidence.

[19] The appellant does not strenuously advance unreasonable verdict as a stand-alone ground in his factum or at the appeal hearing. As I understand his argument, his complaints overlap with, and are mainly subsumed within, the ground of appeal alleging error in finding care/control had been proven.

[20] My review of the evidence at trial, submissions of counsel and reasons for conviction demonstrate no material misapprehension of evidence or errors in the reasoning process leading to the convictions. Furthermore, the verdicts are ones that a properly-instructed judge or jury, acting reasonably, could have rendered.

[21] This ground of appeal is dismissed.

Care or Control

[22] The appellant focuses his argument on the finding of the learned trial judge that the presumption of operation (care or control) pursuant to s. 320.35 of the *Code* applied

and was not rebutted. In such circumstances, the absence of danger affords no defence (***R. v. Burbella***, 2002 MBCA 106, at paras. 16 and 22).

[23] Section 320.35 states:

> In proceedings in respect of an offence under section 320.14 or 320.15, if it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a conveyance, the accused is presumed to have been operating the conveyance unless they establish that they did not occupy that seat or position for the purpose of setting the conveyance in motion.

[24] The appellant argues the presumption is not applicable because the evidence is incapable of supporting the conclusion he "occupied" the seat or position ordinarily occupied by the driver. The legislation, however, does not require that the entire body of the person be situated in the seat ordinary occupied by the driver in order for the presumption to apply. Each case must be assessed on its own facts to determine whether the person "occupied" the driver's seat in a manner that triggers the applicability of the presumption. The appellant was seated in the driver's seat. Most of his body was within the driver's seat area of the vehicle. I cannot find error with the trial judge's conclusion that the presumption of operation pursuant to s. 320.35 was triggered on these facts.

[25] The appellant further argues that the learned trial judge erred in conducting no meaningful review of the law or the evidence prior to concluding the presumption had not been rebutted. He argues she failed to consider his actions in attempting to leave the vehicle and his expressed desire to walk home.

[26] Upon my review of the reasons, the learned trial judge correctly articulated the law. For the presumption to be rebutted, the appellant must establish on a balance of probabilities that he did not occupy the driver's seat for the purpose of setting the vehicle

in motion. The appellant is correct that the provision does not require testimony from the accused to rebut its application, however, I find no misdirection by the trial judge on this point. I am satisfied that when the trial judge said there was "no evidence that he occupied the driver's seat for any other purpose than setting the truck in motion", she was articulating that there was no evidence led at trial that was *capable* of rebutting the presumption. I am also persuaded by the Crown's argument that there was no evidence adduced to rebut the presumption that the appellant had care/control of the motor vehicle when he occupied the driver's seat *before* he tried leaving the truck.

[27] The offence pursuant to s. 320.14(1)(b) requires that the Crown prove that within two hours *after* ceasing to operate a conveyance, the blood alcohol level of the accused exceeded the legal limit. The appellant argued that the time the appellant was in care/control was not established, thereby precluding proof of the charge.

[28] The learned trial judge found as a fact, relying on the direct and circumstantial evidence, that Mr. Modrzejewski observed the appellant was in care/control of the vehicle at 6:57 p.m. The first police blood sample was obtained at 8:49 p.m. These findings supported the conclusion that the appellant's blood alcohol readings exceeded the legal limit within two hours after he ceased to have care/control of his truck.

[29] In any event, s. 320.31(4) sets out a formula to allow for extrapolation of the readings when the first blood sample is obtained outside of the two-hour timeframe from when the person ceased to operate a motor vehicle. This provision eliminates the need for expert evidence on the issue. Given the blood alcohol readings in this case, and the

evidence before the trial judge, I am satisfied the learned trial judge's conviction on the s. 320.14(1)(b) offence was correct.

[30] This ground of appeal is dismissed.

Reasonable Grounds for Arrest and Blood Demand

[31] The learned trial judge correctly stated the applicable law. She instructed herself on the two-part test as set out in ***R. v. Storrey***, [1990] 1 S.C.R. 241, requiring the existence of a subjective belief in reasonable grounds that is objectively justifiable. The application of this test was discussed further by the Manitoba Court of Appeal in ***R. v. Jacob (J.A.)***, 2013 MBCA 29, which set out the following factors to be considered in determining the existence of reasonable grounds (para. 35):

- whether the officer had a subjective belief, honestly held, that they had reasonable grounds to arrest or to demand a sample of breath/blood, and whether a reasonable person in the position of the officer would conclude same;
- the totality of circumstances must be assessed;
- the question is not whether the facts, circumstances and inferences ultimately prove to be true, but whether it was reasonable for the officer to believe, at the time, that the facts and circumstances were true, to draw the inferences they did, and to rely on them at the time of arrest or demand; and

- the standard of proof for reasonable grounds to believe is not high or onerous – on a continuum, it requires more than reasonable suspicion but less than a *prima facie* case.

[32] The trial judge referred to the following factors articulated by Cst. Vidal in forming his subjective belief that he had reasonable grounds to arrest the appellant for impaired operation and to make a blood demand:

- The vehicle was in the ditch on a dry road and clear night with no environmental factors;
- The road was straight with no curves;
- There was light traffic;
- The tracks left by the vehicle stopped at the top of the embankment, then started again at the bottom at more than one vehicle-length distance, suggesting a high rate of speed and that the vehicle left the ground;
- The first responder to the scene, Mr. Modrzejewski, advised that Mr. Yanke was in the driver's seat and that he admitted he had been drinking; and
- Mr. Modrzejewski told him that it was his belief that Mr. Yanke was intoxicated.

[33] While not referenced by the learned trial judge in her decision, Cst. Vidal also testified to the following facts conveyed to him by Mr. Modrzejewski, which formed part of his grounds:

- He had to assist the driver in getting out of the vehicle as he had trouble doing so; and

- He had to assist the driver in getting up the hill and he had difficulty doing so while Mr. Modrzejewski did not.

[34] Despite being vigorously challenged on cross-examination, Cst. Vidal maintained that Mr. Modrzejewski told him he believed the appellant was intoxicated. Mr. Modrzejewski testified that he only told Cst. Vidal that the appellant admitted to drinking. The appellant alleges the trial judge committed a misapprehension of the evidence relevant to his subjective grounds and erred when she accepted Cst. Vidal's testimony on this issue.

[35] The learned trial judge was well aware of the discrepancy in the evidence and dedicated five paragraphs in her *Charter* ruling to consideration of it. Ultimately, she accepted Cst. Vidal's evidence on this point. She commented on Mr. Modrzejewski's evidence that, notwithstanding what he said to Cst. Vidal, he did believe the appellant was intoxicated. He also testified that his memory was not complete as to what he may have said to Cst. Vidal at the scene. Whether a different trier of fact would have resolved the factual dispute differently is not the test. The learned trial judge was entitled to decide what evidence she accepted. I cannot find palpable and overriding error. As such, there is no basis to interfere with her finding of fact on this point.

[36] The appellant further argues the grounds for the arrest and blood demand are not objectively justifiable. He says the trial judge failed to consider that the officer had a "duty to investigate" the cause of the accident, as well as other potential explanations for the indicia relied upon to support the grounds for the arrest/blood demand. When considered "in totality", he argues the grounds fall short.

[37] Similar arguments advanced by the appellant were the subject of comment in ***R. v. Bush***, 2010 ONCA 554 (CanLII), at paras. 56-57:

> An assessment of whether the officer objectively had reasonable and probable grounds does not involve the equivalent of an impaired driver scorecard with the list of all the usual indicia of impairment and counsel noting which ones are present and which are absent as the essential test. There is no mathematical formula with a certain number of indicia being required before reasonable and probable grounds objectively existed: Censoni, at para. 46. The absence of some indicia that are often found in impaired drivers does not necessarily undermine a finding of reasonable and probable grounds based on the observed indicia and available information: ***R. v. Costello***, [2002] O.J. No. 93, 22 M.V.R. (4th) 165 (C.A.), at para. 2; Wang, at para. 21.
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> Consideration of the totality of the circumstances included the existence of an accident. However, that the accident could have caused some of the indicia relied upon when they could also have been caused by the consumption of alcohol does not mean the officer has to totally eliminate those indicia from consideration: ***R. v. Duris***, [2009] O.J. No. 4403, 2009 ONCA 740, at para. 2. They have to be considered along with all the other indicia in light of the fact there may be another explanation.

[38] Upon consideration of all of the evidence, in totality, I conclude the learned trial judge's finding as to the existence of objectively-justifiable, reasonable grounds for arrest and for the blood demand is correct.

[39] This ground of appeal is dismissed.

The Right to Counsel

[40] At 8:31 p.m., while at the hospital, Cst. Vidal had the opportunity to speak with the appellant for the first time. He arrested him for impaired operation and provided him with his s. 10(b) *Charter* right, which the appellant understood and subsequently declined counsel. The officer immediately read the appellant the blood demand, which he understood, and agreed to provide samples. Without prompting, he said he drank three glasses of wine and was driving home after that. The officer detected an odour of alcohol

coming from the appellant's breath. The first sample of blood was drawn at 8:49 p.m., followed by the second one at 8:50 p.m.

[41] The appellant argues that Cst. Vidal was required to "re-advise" him of his right to counsel prior to the blood demand despite there being no delay and no new events arising. He relies upon the Supreme Court of Canada decision in ***R. v. Sinclair***, 2010 SCC 35, where the Court gave examples of when re-consultation with counsel may be required, including new procedures involving the detainee; a change in jeopardy; or a reason to question the detainee's understanding of their right to counsel. The appellant does not argue there was a change in jeopardy, or a basis on which to question his understanding of his right to counsel. I agree that neither of those situations arise on the facts. Instead, he argues that a demand for blood is an intrusive, non-routine procedure that required Cst. Vidal to re-advise him of his right to counsel, notwithstanding the earlier, constitutionally-compliant provision of the right.

[42] In ***Sinclair***, the Supreme Court of Canada stated that the initial advice of counsel will be "geared" towards the nature of information police would seek from a detainee relative to the investigation undertaken. The appellant reasonably conceded that if Cst. Vidal had made a demand for breath, no s. 10(b) breach would arise because it would be reasonable for detainees in impaired driving investigations to anticipate a demand for breath samples. He says the same cannot be said for blood samples.

[43] The appellant argues that the demand for blood in an impaired driving investigation is akin to a "non-routine" procedure referred to in ***Sinclair***, such as a line-up or polygraph. While blood demands occur less frequently than breath demands (owing

to the legislative requirements of incapacity or impracticality), and are more invasive, does this mean they fall within the category of a "non-routine" procedure as contemplated in ***Sinclair***?

[44] Participation in a line-up or polygraph is non-compellable and entirely voluntary, with the potential of generating incriminating evidence. Breath and blood demands are on the same legal footing. The demands for each are authorized by law and statutorily compellable within the provisions of the *Code*. There are penalties for non-compliance, including the offence of refusal. Furthermore, blood samples give rise to no greater jeopardy than breath samples as both provide police with forensic evidence of blood alcohol levels.

[45] In ***R. v. Schmautz***, [1990] 1 SCR 398, the Supreme Court of Canada had occasion to deal with a similar issue in the context of a breathalyzer demand. In that case, police attended to the accused's home and advised him they were investigating a hit and run accident. He was provided with his right to silence and right to counsel. At that point he was not detained. He chose not to contact counsel. Ten minutes later, after the accused answered questions pertaining to the accident and alcohol consumption, police made a breathalyzer demand and the accused refused to provide samples. He was charged with the offence of refusal. The accused argued that the s. 10(a) *Charter* warning he was initially given was insufficient to inform him about the nature of the investigation so he could make a meaningful decision about whether to call a lawyer and that he ought to have been re-advised of his right to counsel when the breath demand was made. The Court commented on the interplay between ss. 10(a) and 10(b) of the *Charter* and

emphasized the importance of a close factual connection or linkage between each to ensure the purpose of the right is achieved. On the facts of that case, re-advisement of s. 10(b) was not required because the police alerted the accused to the fact that he was suspected of being involved in a serious offence and the breathalyzer demand was directly connected to the investigation. Furthermore, the accused did not request a lawyer at the time the breath demand was made and no evidence was led that he would have contacted counsel if he was re-advised of a right to do so.

[46] In ***R. v. Budarick***, 2016 ONSC 3841 (CanLII), the accused argued that he ought to have been re-advised of his s. 10(b) *Charter* right when police changed their mind from a breath demand to a blood demand, after he had contacted counsel. The Court disagreed and found no breach of the right to counsel in that case. See also ***R. v. Fogarty***, 2015 NSCA 6 (CanLII); and ***R. v. Boyer-Lafond***, 2018 SKQB 342, where s. 10(b) was found not to be violated in similar circumstances.

[47] In ***Budarick***, however, the Court declined to create a "bright line rule" regarding the applicability of s. 10(b) in future blood demand cases. It held that in accordance with ***Sinclair***, each case needed to be assessed on its own particular facts and in context (paras. 84 and 89). I agree with that approach and with the Court's comment that there would have been nothing wrong with the police providing a further opportunity to consult with counsel, and there may be cases in which they would be required to do so (para. 90).

[48] I am unable to conclude that the learned trial judge erred in finding that the appellant's s. 10(b) *Charter* rights were not breached in the particular context and circumstances of this case. The appellant's interaction with the officer and his responses

to the questions posed suggest that he had no difficulty in understanding his right to counsel while being arrested for an impaired driving offence while being treated at the hospital. He voluntarily waived his right to counsel. Immediately thereafter, without any hesitation or expression of misunderstanding, he consented to the blood demand which was directly connected to the impaired operation investigation. Cst. Vidal was not required to re-advise the appellant of his right to counsel in the circumstances of this case.

[49] This ground of appeal is dismissed.

The Validity of the Search Warrant

[50] The review of the warrant is conducted by way of a second-level appeal. As such, the standard of review is a deferential one. The Manitoba Court of Appeal articulated the standard in ***R v. Pilbeam***, 2018 MBCA 128, as follows (at para. 9):

> Appellate deference will be afforded to a decision made on a *Garofoli* review absent a failure to apply the correct standard or other error in principle, a misapprehension of the evidence, or a failure to consider relevant evidence (see *Evans* [*R v Evans (ED)*, 2014 MBCA 44] at para 20; *R v K (T)*, 2014 MBCA 97 at para 8; and *R v Do*, 2018 MBCA 50 at para 16).

[51] The appellant argues that if the results of the police blood samples were found to be unlawfully obtained, once excised from the ITO, there is insufficient remaining evidence to support the issuance of the search warrant for the hospital blood samples. He further argues that Cst. Vidal omitted reference to any head injury suffered by the appellant, which deprived the issuing justice of the ability to consider alternative explanations for the indicia of impairment observed by Mr. Modrzejewski and Cst. Vidal.

[52] The learned trial judge correctly instructed herself on the law respecting a ***Garofoli*** review of a search warrant, as articulated in ***R. v. Vu***, 2013 SCC 60 (at para. 16):

> The question for the reviewing judge is "whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge": *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis deleted); *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 40. In applying this test, the reviewing judge must take into account that authorizing justices may draw reasonable inferences from the evidence in the ITO; the informant need not underline the obvious: *R. v. Shiers*, 2003 NSCA 138, 219 N.S.R. (2d) 196, at para. 13; *R. v. Sanchez* (1994), 1994 CanLII 5271 (ON SC), 93 C.C.C. (3d) 357 (Ont. Ct. (Gen. Div.)), at pp. 364-65; *R. v. Allain* (1998), at para. 11.

[53] Having ruled the police blood samples were lawfully obtained and admissible, the learned trial judge concluded this evidence was properly put before the issuing justice. Furthermore, the learned trial judge held that even if the results of the police blood samples were excised from the ITO, the remaining evidence justified the granting of the search warrant.

[54] The learned trial judge rejected the appellant's argument that there was material non-disclosure in the ITO. It contained a reference to the paramedics transporting the appellant to the hospital due to concerns of a possible head injury. I agree with the learned trial judge that reasonable inferences may be drawn by an issuing justice on the evidence before them and that there was sufficient information in the ITO on which a justice could issue a warrant.

[55] This ground of appeal is dismissed.

Manner of Search

[56] The appellant argues the manner in which the hospital obtained and stored his blood samples, and how it interacted with the investigators to provide his medical information violated his s. 8 *Charter* rights.

[57] First, the appellant argues that the hospital staff were acting as agents for the police. The question, therefore, is whether the hospital staff would have performed the actions they did, but for the intervention of police. Voluntary participation in the detection of crime by private actors or general encouragements by police will not usually be sufficient to trigger the application of the *Charter* (***R. v. Buhay***, 2003 SCC 30 at paras. 29-30).

[58] Allowing Cst. Galloway-Booth to be present as a passive observer and confirming that extra blood samples had been taken did not render the hospital staff agents of the state. There was no evidence that the appellant's blood was drawn contrary to his consent or drawn for any purpose other than medical reasons. Furthermore, information regarding the continued existence of the hospital blood samples and the fact they would not be destroyed that day or the next was provided in response to police inquiries, not at their direction or request. I agree with the findings of the learned trial judge that on the evidence before her, there was no basis on which to conclude that the hospital staff acted in response to a direction or request by police such that an agency relationship was created.

[59] Next, the appellant argues that police ought not to have been permitted to attend certain areas of the hospital in which they could observe the staff taking his blood, and

enter the lab to confirm extra samples of blood were drawn. He asserts that by allowing this to happen, the hospital breached its own policies and protocols.

[60] Despite the argument of the appellant that the officers received preferential treatment insofar as what they were allowed to do and where they were allowed to go, no evidence was led to support that argument. In the absence of such evidence, the Court is unable to come to conclusions about the existence of hospital policies or protocols and whether they were complied with or not.

[61] Finally, the appellant argues that the hospital staff acted contrary to *The Personal Health Information Act*, C.C.S.M. c. P33.5 (*PHIA*), which protects the confidentiality of his personal health information.

[62] With respect to the information obtained by police from hospital staff, the learned trial judge rejected the appellant's argument that he had a reasonable expectation of privacy in that information. She found that the mere fact that blood samples were taken was not information protected by s. 8 of the *Charter*, relying upon ***R. v. Robert***, 2021 MBPC 64, where the same argument was advanced in a similar situation. The information conveyed to police consisted only of the fact that samples of blood were drawn, not the results from any analysis of the samples. Police then obtained a valid search warrant to obtain the samples.

[63] Finally, s. 22(2)(k.1) of *PHIA* allows for the disclosure of personal health information without the consent of the individual if it is "required in anticipation of or for use in the prosecution of an offence". I do not agree with the appellant's argument that this provision only applies when an ITO alleging a criminal offence has been sworn. I am

satisfied that the words "in anticipation of" encompasses the investigatory stage of a criminal proceeding.

[64] A review of the evidence, legislation and applicable case law satisfies me that the manner in which the information pertaining to the hospital blood samples was obtained by police in their investigation was *Charter* compliant and that the learned trial judge was correct in her decision on this issue: see ***R. v. Dyment***, [1988] 2 S.C.R. 417; ***R. v. Dersch***, [1993] 3 SCR 768; ***R. v. Lachappelle***, 2003 CanLII 16205 (ON SC), aff'd 2007 ONCA 655 (CanLII), leave refused 2008 CanLII 6386 (SCC).

V. CONCLUSION

[65] The appellant's appeal from convictions is dismissed. The verdicts rendered by the learned trial judge are upheld.

_____J.