SC 96 14 020

CR 02518

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROGER WALLACE WARREN

VOIR DIRE RULINGS

Rulings on the admissibility in law at trial of certain evidence tendered by the Crown, including rulings on motions made by the accused to exclude evidence pursuant to s.24(2) of the *Canadian Charter of Rights and Freedoms*.

Heard at Yellowknife from September 3rd 1994 to October 14th 1994.

Judgment filed: October 21st 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

PUBLICITY BAN

PUBLICATION AND BROADCASTING OF THESE RULINGS AND THE REASONS FOR THEM HAVE BEEN PROHIBITED BY ORDER OF THE COURT DATED OCTOBER 3RD 1994 PENDING CONCLUSION OF THE PROCEEDINGS BEFORE THE COURT IN THIS CASE.

Counsel for the Crown: Peter W.L. Martin, Q.C.
David W. Guenter

Counsel for the Accused: Glen Orris, Q.C.
Gillian Boothroyd

CR 02518

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROGER WALLACE WARREN

VOIR DIRE RULINGS

At issue in this *voir dire* is the admissibility at trial of evidence of statements allegedly made by the accused to police officers and, in one instance, to a psychologist employed by the police.

The evidence consists of audio and video tape recordings in addition to some documentary material and the testimony, including testimony given by the accused. Together with the submissions of counsel, the reception of this evidence has taken up the best part of five working weeks in a *voir dire* which has set a record here in the Northwest Territories for its duration.

This evidence, or at least certain parts of it, appears crucial to the Crown's case against the accused on the nine counts of first degree murder in the indictment, arising out of an underground explosion at Giant Mine near Yellowknife on September 18th 1992, for which it is alleged that the accused was directly and solely responsible.

It is apparent that the statements of the accused made before October 15th

1993 are all exculpatory. Counsel for the accused has invited me to rule that the evidence of those statements is admissible at trial. Crown counsel has however submitted that the evidence of all the accused's statements should be ruled admissible, both those made on and after that date as well as those made before then.

5 There is, therefore, an issue as to the admissibility under common law rules of evidence in respect of the evidence of statements made by the accused on and after October 15th 1993. Those statements include certain demonstrations or re-enactments made by the accused on October 16th 1993 as captured on video tape.

6 If the Court should rule any of the contested evidence to be admissible at trial under common law rules of evidence, it is moved on behalf of the accused that the Court should nevertheless exclude this evidence pursuant to s.24(2) of the *Canadian Charter of Rights and Freedoms*. It is submitted, in support of that motion, that the admission of this evidence at trial would bring the administration of justice into disrepute since the statements made on and after October 15th 1993 were obtained by the police in violation of ss.7, 9 and 10 of the *Charter*.

7 It is self-evident that this defence motion need only be considered if the evidence in contention is ruled otherwise admissible at trial under the common law.

Common Law Admissibility

1. Events before October 15th 1993

The following chronology provides a skeletal outline of these events:

Date	Event	Exhibit Nos.
1992		
Sep. 18	Explosion kills the 9 miners.	-
Sep. 25	Audio-recorded interview of the accused by police.	1, 1A
Sep. 25	Map marked by accused to show his whereabouts on the night of the explosion.	1B
Sep. 27	Audio-recorded re-interview of the accused by the police.	2, 2A
Oct. 16	Police photograph a pair of boots shown to them by the accused, along with clothing worn by him on the night of September 17th to 18th 1992.	3
Oct. 16	The accused completes a police form describing his appearance on the night of September 17th to 18th 1992.	3C
Oct. 16	Police photograph the accused, in clothing he had shown them, while walking on the highway adjacent to Giant Mine where he said he had been in the early morning of September 18th 1992.	12
Oct. 16	The accused gives a written "warned" statement to police denying all involvement in the explosion.	3B
Oct. 19	Audio-recorded interview of the accused by the police.	4, 4A
Oct. 19	The accused signed a written form of consent to a police polygraph test.	6B
Oct. 19	Audio-recorded interview of the accused by a police polygraph operator but no test held.	6, 6A
Nov. 5	Audio-recorded interview of the accused by police.	13, 13A
Nov. 5	Sketch drawn by the accused of a person seen by him on the night in question.	13B
Nov. 7	Audio-recorded interview of the accused by a police artist.	9, 9A

Date	Event	Exhibit Nos.
1992		
Nov. 7	Sketch drawn by the artist as directed by the accused.	9B
Nov. 7	Audio-recorded interview of the accused by the police.	14, 14A
Nov. 7	Sketch drawn by the accused of two persons seen together by him on the night in question.	14B
Dec. 3	The accused completed a questionnaire in writing at the request of the police.	15
Dec. 3	Audio-recorded interview of the accused by a police polygraph operator.	7, 7A
Dec. 5	The accused signed a written form of consent to a police polygraph test.	10B
Dec. 5	The accused provided a written biographical outline to the police.	10C
Dec. 5	Audio-recorded police polygraph test and interviews of the accused.	10, 10A
1993		
Feb. 2	Audio-recorded interview of the accused by the police.	16, 16A
Feb. 14	The accused signed a written form of consent to a police polygraph test.	8B
Feb. 14	Audio-recorded police polygraph test and interviews of the accused.	8, 8A
Feb. 16	Form of police caution and "Charter rights" statement.	17B
Feb. 16	Audio-recorded interview of the accused by the police.	17, 17A
Feb. 17	Audio-recorded interview of the accused by a psychologist employed by the police.	11, 11A
June 18	Search warrant issued to police.	19

Date	Event	Exhibit Nos.
1993		
June18	Seizure of a pair of boots from the accused's residence at Yellowknife pursuant to the search warrant.	18
Aug. 6	Audio-recorded interview of the accused by the police.	5, 5A, 5B, 5C
Oct. 13	Newspaper coverage of labour negotiations regarding the dispute at Giant Mine.	34

The exhibits mentioned include both tapes and transcripts of those tapes. The only dispute as to the admissibility at trial of any of these exhibits is in respect of Exhibits 18 and 19. That dispute is the subject matter of a separate motion yet to be heard. Those exhibits have therefore been mentioned here only to complete the background of events leading up to the statements made by the accused on and after October 15th 1993. They are not included otherwise in the Court's present rulings.

Beginning with the written "warned" statement given to the police by the accused on October 16th 1992, the police made it their invariable practice to commence their interviews by giving him the customary police warning to the effect that he was not in any way obliged to say anything, that he had nothing to hope from any promise and nothing to fear from any threat which may have been held out to him by any person in authority in relation to him, but that anything which he chose to say might be used in evidence. I am satisfied that the accused at all times understood these frequently repeated cautions and that he made his statements to the police nonetheless, being well aware that he was not in any sense compelled to do so.

11 It is also noteworthy that the accused from the beginning gave every appearance of always co-operating fully and actively with the police during their investigation. As the chronological outline shows, he gave them over a dozen interviews during the period before October 15th 1993, provided them with sketches, allowed them to photograph him dressed and walking as he told them he had been and done in the early morning of September 18th 1992, and even underwent police polygraph tests and related interviews, completing a written questionnaire (which alone took him an hour and a half) and other documents, all of which occupied a great many hours of his otherwise private time and even included trips away from home to Winnipeg and Edmonton at the request of the police.

12 The evidence of the police is that the accused came to see them whenever requested by them to do so. And he does not seem ever to have complained about their persistence, or about the very considerable time taken up by him in answering to their many requests of him.

2. The Accused

13 Aged 48 years at the time of the explosion, the accused is a married man who has resided with his wife at Yellowknife since 1978. They have two daughters, now in their early twenties, one of whom resides with them. The other daughter is married and resides at Peace River in Alberta.

14 The accused completed a grade 12 level at school in Ontario, leaving before

having completed grade 13 in order to find employment at age 17. He has been employed in construction and other work in addition to mining, in central Canada, and worked as a miner in northern Manitoba before moving with his wife and children to Yellowknife in 1978. He is part owner of a small garage and service station at Winnipeg, where he worked for a period in 1987 before returning to Yellowknife to re-enter the mining industry at Con Mine, where he stayed for about a half year and then hired on again as a miner at Giant Mine in the Spring of 1988. He had spent over a dozen years as a miner at Giant, all told, at the time of the explosion on September 18th 1992.

15 The Court has had the advantage of having seen and heard the accused during the *voir dire*. His manner throughout has been quietly observant, and he has evidently taken a close interest in the proceedings. Described by witnesses (including a former close associate) as intelligent, the accused confirmed that impression during his testimony. He acknowledged that he reads a good deal, keeping up with current economic and political affairs - more especially in relation to gold mining - and the evidence shows that he is an avid crossword puzzle solver, possesses a remarkably good vocabulary for a person employed primarily in manual work, and that he is possessed of all his mental faculties.

16 As a young man, the accused acknowledged that he had been in trouble with the law, acquiring a minor criminal record and experiencing a short term in prison. He appears to have left petty crime behind him as he has matured and has become a devoted family man, an active participant in team sports until more recently, and now a senior and undoubtedly very experienced hard-rock miner. He was earning well in excess of

$100,000 a year as a miner prior to the labour dispute at Giant in 1992.

17 There is nothing in the accused's relations with the police throughout their investigation to suggest that he has ever harboured any antipathy towards them in general, in spite of their many repeated calls upon him for assistance in their investigation. Indeed, his relationship with several of the officers appears to have been quite cordial and even relaxed. There are two late exceptions to this general state of affairs, namely his feelings now towards Sergeant Gregory McMartin and Corporal Michael Brandford; but there is nothing before me to suggest that those feelings are now (or ever were) characteristic of the accused's attitude to police officers in general.

18 The accused strikes one as being outwardly quiet and well in control of himself, even when under severe stress in the course of testifying. And the evidence strongly suggests that this observation could be extended to his conduct throughout the police investigation.

19 To sum up, the accused appears to be a mature and intelligent individual, quiet in manner, knowledgeable in matters of concern to people in the gold mining world, competent and experienced in his chosen field of work, evidently quite literate, and well capable of expressing himself forcefully by word of mouth when he chooses to do so. Furthermore, by October 15th 1993 he had become quite familiar with a number of police investigators and their methods of inquiry, more particularly in relation to interviewing witnesses, including potential suspects, in connection with the explosion at Giant Mine on September 18th 1992.

3. The October 15th 1993 Statements

(a) From 2.00 p.m. to 3.45 p.m.

20 As arranged by telephone when he was called the day before by Cpl. Dale N. McGowan of the Homicide Task Force of the Royal Canadian Mounted Police at Yellowknife, the accused attended at the Task Force offices in a major commercial and office building in the downtown core of the city, shortly after 2.00 p.m. on October 15th 1993. In his telephone call Cpl. McGowan had told the accused that the police now had results from their forensic examination of a pair of the accused's boots which they had seized from his home under a search warrant, while the accused was absent on vacation on June 18th 1993. It is apparent that the accused was curious to hear what those results were.

21 Cpl. McGowan, who had dealt with the accused on numerous earlier occasions, answered the bell when the accused rang at the entrance to the Task Force offices on the second floor of the building. As usual, Corporal McGowan was in plain clothes. He ushered the accused to an area in the offices known to the police as "the staging area", and left him alone there while entering an adjoining room. A minute or two later, Cpl. McGowan returned and escorted the accused into the room, where he introduced the accused to Sgt. McMartin, a member of the Royal Canadian Mounted Police visiting Yellowknife from Calgary.

22 On the last occasion when Cpl. McGowan had seen the accused, that is to say on August 6th 1993, Cpl. McGowan had informed the accused that the boots were

in the hands of police experts for forensic examination and that the accused would be informed when the results were known. The staging area, where the accused had been left for a brief few moments before being taken into the adjoining room, had been set up specially so that the accused could not help but notice a number of photographic enlargements which were prominently displayed in that area. These included pictures of the boots, with various markings indicating certain features of the soles.

23 In addition, there were several large boxes in the area, marked respectively "TIM BETTGER", "ROGER WARREN", "AL SHEARING" and "COURT DOCUMENTS". Tim Bettger and Al Shearing were members of the Canadian Association of Smelter and Allied Workers, Local 4, the union to which the accused belonged and which was engaged in the labour dispute in the course of which the explosion had taken place at Giant Mine. The obvious implication of the names on the boxes was that the police were putting together a case against those two individuals and also the accused, presumably in connection with the deaths of the nine miners in the explosion.

24 On October 13th 1993, "Yellowknifer" (a newspaper published and circulating in Yellowknife) carried a front page main headline: "CHARGES FIRST, TALKS LATER", with a sub-head reading "CASAW members may be implicated in mine deaths, says Peggy Witte". Ms. Witte was the President of Royal Oak Mines, Inc., the operator and owner of Giant Mine. There was more on an inner page of the newspaper under a headline "Talks hinge on arrests - Witte" with a sub-head reading "Royal Oak president says negotiations with CASAW at "impasse"." These headings generally give the sense of the story which appeared under them. The accused was aware of the story and of the

concern which was felt generally by members of the striking union besides himself, as a result, over the poor prospects for any settlement of the labour dispute.

25 It is within the foregoing context that the events which followed are to be understood. Photographs of the Homicide Task Force offices, including the room into which the accused had been brought by Cpl. McGowan and where he had been introduced to Sgt. McMartin, show that these offices were generally bright and uncluttered, with wall decorations including a polar bear skin in the outer office area.

26 The evidence is that the main door through which the accused had been admitted was locked from the outside but opened freely from inside. The door to the inner room where the accused met Sgt. McMartin ("the interview room") was unlocked at all times in what followed. The interview room contained a desk, three chairs and a telephone (on the floor against a wall away from the desk). The desk was arranged so that there was a chair on each side of it with a third slightly off to one side. Apart from a few loose sheets of paper, a three-ring binder and a stapler, the desk was clear. The general atmosphere was casual and not in any way intimidating.

27 Sgt. McMartin, like Cpl. McGowan, was also in civilian attire; and neither he nor Cpl. McGowan carried a weapon. The accused was casually dressed and appeared friendly to Sgt. McMartin, whose assessment was that he was neither sick nor tired, and that he did not appear to be nervous in any way. According to Cpl. McGowan, the accused did not show any reluctance about coming to the Homicide Task Force offices on this occasion for an interview. Cpl. McGowan had told the accused that they had a

forensic laboratory report on the boots, when Cpl. McGowan had called the accused the day before to arrange for him to come to the offices on October 15th 1993.

28 Having completed the introduction, Cpl. McGowan once again (as on so many previous occasions) informed the accused of his rights to counsel, pointing out the telephone on the floor in the interview room, to which the accused responded to the effect that he understood his rights but did not want to exercise them at that time. In addition, Cpl. McGowan also gave the accused the usual police warning in the form of a secondary "clearing" or "purge warning", together with some words of explanation, as to all of which the accused indicated that he understood, whereupon Cpl. McGowan left him alone with Sgt. McMartin (whom Cpl. McGowan had identified as a police officer) in the interview room.

29 There is no evidence indicative of the police having informed the accused that the interview room was being monitored electronically, so that everything said in that room would be audio-recorded. It is the evidence of the accused, however, that he had come to that conclusion, since nothing was being taken down in writing during his interview with Sgt. McMartin. And it must have been by then apparent to him, as it is to the Court, that several of his previous interviews by police officers had been audio-recorded.

30 The interview which followed was conducted entirely between Sgt. McMartin and the accused. No one else came into the room. And it continued until 3.45 p.m. when the accused announced that he had to take his daughter to the hospital for

therapy and left the room and the Task Force offices, without any attempt on the part of Sgt. McMartin to hold him. The accused indicated that he would return later, as he in fact did entirely of his own accord. It is apparent that he was in fact free to leave, terminating the interview at any time, also that he understood this and that he acted on that understanding.

31 During the interview between about 2.08 p.m. and 3.45 p.m., the accused was seated on the side of the desk nearest the door. The accused's posture, as observed throughout by Sgt. McMartin, remained virtually unchanged from start to finish. There was very little eye contact between them, as observed by Sgt. McMartin, who noticed that the accused sat with his legs and arms crossed, hardly moving at all, and with his eyes cast downwards almost the entire time. When eye contact did occur, it was not maintained, the accused choosing instead to look away downwards or to the side. The accused chewed gum during most of the interview.

32 Asked by Sgt. McMartin to describe the events of September 18th 1992, as he remembered them, the accused spoke without interruption by Sgt. McMartin for about half an hour, recounting a history of his actions and observations in great detail. This was followed by a series of questions posed by Sergeant McMartin with answers given by the accused, after which Sgt. McMartin told the accused point blank that he simply did not believe what the accused had been saying, that what the accused had said was not the truth.

33 It is Sgt. McMartin's evidence, which is not contradicted in this respect by

the accused, that the accused did not show the slightest sign of surprise or offence when this accusation was made. According to Sgt. McMartin, and the tape recording reveals nothing to the contrary, the accused showed no reaction whatsoever, remaining in the same closed-up posture in his chair, chewing gum and looking away, so that Sgt. McMartin continued to press him by saying that "we all know what happened, but it is why, and why things happen ...", leading up to the further accusation that "you are the person that did this". But, even then, according to all the evidence before me, the accused showed no reaction.

34 Sgt. McMartin continued to press the accused along lines calculated to elicit a reaction, but without any success until, at long last, the accused asked him: "In other, you guys arresting me, you mean?" This was answered by an assurance that he was not being arrested, followed by more conversation. It was after this that the accused left the interview room of his own volition, telling Sgt. McMartin that he would return that day at 5.30 p.m.

35 It is well established in law in Canada that the silence of an accused in the face of an accusation by a person in authority is not admissible in evidence against him; and I see no need to cite authority for that proposition. Sgt. McMartin was not only a member of the Royal Canadian Mounted Police, and known as such to the accused, but he had somewhat enhanced his status in the eyes of the accused by adopting the ruse that he was working closely with the senior prosecutor known to be in consultation by the police in the investigation of the mine explosion. That the accused accepted this is reflected in his language during his first phase of the interview, there being almost no

resort then by him to the four-letter and other expletives which were so liberally scattered throughout his later conversation with police in October 1993, but which made no appearance in his testimony before the Court in this *voir dire*.

36 The police followed the accused after he left the Homicide Task Force offices, picking up his trail at the hospital where he evidently had taken his daughter for therapy as he had told Sgt. McMartin he intended doing. It is the accused's evidence, which seems to be factually correct on this point, that he thereafter took her back home and picked up his wife returning downtown where they had a coffee together before he went back up to the Homicide Task Force offices at 5.30 p.m., leaving his wife downstairs to wait for him.

37 In his testimony, the accused informed the Court that it had in the meantime crossed his mind to telephone Sgt. McMartin to say that he was not, after all, going back to continue their interview. But his curiosity got the better of him, as to what the police had to say about the boots and as to why Sgt. McMartin was so adamant in accusing him of having been responsible for the explosion. It is the accused's testimony that these were his reasons then for returning to the interview and not any sense of being under compulsion or obligation to do so.

38 It is apparent that there is nothing in the evidence of the interview with Sgt. McMartin, up until the return of the accused at 5.30 p.m. on October 15th 1993, to suggest that the accused's participation in the discussion with Sgt. McMartin was other than free and voluntary. Were that all, I should nevertheless be obliged to rule the

evidence of that portion of the interview inadmissible at trial on the basis that the accused was entitled to remain silent in the face of Sgt. McMartin's accusations, so that any evidence of his having done so cannot be used against him. But there is much more to it than this, as will appear in what follows.

(b) From 5.30 p.m. to 9.30 p.m.

39 Before leaving the interview room at 3.45 p.m. to take his daughter to the hospital, the accused had not only heard Sgt. McMartin accuse him of having lied to the police and of being the person responsible for the explosion. He had also heard Sgt. McMartin's lengthy and emotionally pitched exhortations to tell him why the accused had done what he did to bring about the explosion. And this was done in a very quiet but very persistent manner by Sgt. McMartin suggesting not only by his words but also by the tone and flow of his words that he (and by inference the police investigators and the Attorney General's agent with whom Sgt. McMartin had claimed to be in consultation) had also come to the unshakeable conclusion that the accused was the guilty party. All that was left open then was "how" and "why?"

40 At about 5.30 p.m., when the accused returned as he had said he would when he left at 3.45 p.m., the interview resumed with a few brief remarks about the accused's rights still remaining in effect and about the accused's daughter's condition requiring therapy. This led Sgt. McMartin then to refer to "where all this is going or what, what it is leading up to?" To which the accused responded that "of course, I am concerned". A lengthy soliloquy followed on the part of Sgt. McMartin in which he

suggested that "it probably wasn't done with the thought in mind that it's going to take lives"; on the contrary, it was only intended to "screw up the mine", so as to "show them ... the owners of the mine that ... we're to be reckoned with", and "we don't want anything to happen to those guys" (the miners then at work underground at Giant Mine). It was emphasized, but without Sgt. McMartin raising his voice, that it had become important to show that the accused did "give a shit" for those miners; and that he had never had any intention of causing serious harm to them.

41 Already, just before he left the interview room at 3.45 p.m., the accused had responded to Sgt. McMartin's accusations by saying: "If you guys that convinced of, of this stuff, I am just wondering why I am not arrested." Again, after Sgt. McMartin's lengthy soliloquy, which ended with the question "What do you feel is that best way to deal w', Roger?", the accused answered, after a long pause, "Well, if I was convinced somebody's guilty of something I'd just arrest em and lock em up." This led to an even longer series of monologues by Sgt. McMartin, barely punctuated at long intervals by an occasional cough, or a one-word response, from the accused, until finally the accused broke in to make remarks (with more pronounced use of expletives than before) to the effect that no one would feel sorry for anyone who was responsible for the deaths of the nine miners. Clearly enough, what Sgt. McMartin had said was affecting the accused emotionally. And Sgt. McMartin continued on, reiterating the importance of the truth being known as to what the accused's intention actually was when the explosion was set up to go off underground on September 18th 1992.

42 The accused's response, after several of these long and rambling

exhortations by Sgt. McMartin, was to say: "Well, you are wrong there, I didn't say I affected a lot of people's lives, because I never did, only you can say that." Sgt. McMartin then, in terms which can only be regarded as an obvious inducement to the accused, outlined the alternatives which he said were open to the accused, either to continue denying all involvement or to show that he had never intended to harm the nine miners (or anyone) and that he did accept responsibility for the tragic mistake he had made which resulted in their deaths. To quote Sgt. McMartin: "You know where I'm coming from. You know what's happening. But I would hope that you wouldn't be taking the rough road." In response, the accused remarked (referring to the "several roads you can take" mentioned by Sgt. McMartin) that he thought "... all of them are going to be pretty rough, if a guy is going to admit to this."

43

Clearly, the inducement did not have the desired effect. But Sgt. McMartin did not let up, saying among other things: "Well, okay, just a moment though. Yeah, I am not going to sit here and try to profess to you for a moment here that maybe there aren't going to be a few bumps along the way. But I'll tell you, you take the right road, Roger, and it is going to smooth out, it will, Yeah, it might be a little bumpy along the way, but God, you know that." There was more, stressing the need for compassion for the families of the deceased and the need of those concerned to know the truth, if only to help the healing process for them; and, towards the end, the exhortation reached a peak when Sgt. McMartin reminded the accused of a mine accident which he had witnessed some years before, saying "I know that you have seen it before and you have been there and it bothered you. You have seen things where you couldn't even touch the

person and it is not a pretty sight ... You couldn't take it with one person. I sit back and look at that and say, he didn't intend with those 9 miners. I can't believe that, I can't believe it for a moment that he intended that. Am I wrong? Can you be a man yourself, Roger, can you at least even admit to yourself? Am I wrong? Hey? Can you not be a man yourself and say God damn it, I am sorry, and you can't say those words because you don't care? Is that what it is? Am I wrong about that with the miners, you could not, you could not live with yourself, knowing that it was going to happen, could you? Eh?" To all of which the accused merely replied: "No, I wouldn't be able to".

44

Once again, the inducements at least implicit in Sgt. McMartin's remarks were without their intended effect. Neither the accusations made point blank to the accused before he left the interview room and the Task Force offices at 3.45 p.m. nor the subsequent imputations and inducements after he returned of his own free will at 5.30 p.m. had in fact caused him to make any verbal admission, though it is apparent that his responses were no longer as openly confrontational as when he in effect challenged Sgt. McMartin to arrest and charge him if that officer believed there was sufficient evidence against him.

45

This apparent softening on the accused's part was evidently perceived by Sgt. McMartin, who in turn took up where the accused had left off, saying "No, I know you wouldn't be able to ... so it was done as an accident, it was done, but it wasn't for the people there. Now I'll tell you what, I'm glad you told me that because I could not believe that for a moment with yourself, I couldn't. It wasn't intended for the guys, it was only intended for the mine. To make a point, to prove something to them, to show

something to them. Eh? Eh? That's a hell of a thing to have to live with though, I feel sorry for you to, I mean there is nothing can be done or said to alleviate it from you, about what happened ...". In response to Sgt. McMartin's following question "Was it done up the way that they said it was? Eh?", the accused entered into an exchange with Sgt. McMartin in which that officer urged the accused to "Be a man, Roger, take the big step ... cut the bullshit, so that we can say there wasn't a game" (as between the accused and the police) and that "it wasn't done against the miners, so that I know it wasn't done, set that way, exactly how they're saying" (i.e. as to how the explosion was set to be triggered off).

46 Did these inducements cause the accused to confess? Not at all. The accused responded, with a colourful embellishment of expletives, by denying that the boots the police had seized from him could have been down underground at Giant Mine on the night in question. Accused of lying, he answered back "You guys are lying to me." Clearly, he had not been overly impressed by the photographs in the staging area and by Sgt. McMartin's statement that the police had proof positive that those were the boots worn by the person who set the explosion.

47 Sgt. McMartin then gave expression to a show of sympathy for the accused as a person who had suffered and was still suffering as a result of the deaths of the nine miners, which showed the accused's concern and care, and that those deaths had not been intended. This led to a response by the accused, as follows:

> A. Well, it is not just Roger Warren, a guy, or anybody whoever is faced with this kind of stuff has got to think of

> a lot of things, even hypothetically.
>
> Q. Okay.
>
> A. Well, you can say, that I should have thought of that before, big deal.
>
> Q. No, no, no ...
>
> A. You have got to think of your wife, you got to think of your children.
>
> Q. Yes, yes, okay, and I agree.
>
> A. Look, even if I was hypothetically going to make a decision about something like this, like you are talking about, without getting advice from lawyers and all kinds of bullshit, which I had never done, I have never ...

48 Immediately prior to Sgt. McMartin's show of sympathy, the record shows a very brief but unintelligible response by the accused to what Sgt. McMartin had said before that. There is nothing in the accused's testimony, or that of Sgt. McMartin, which allows me to conclude what that response in fact was. Counsel for the accused has suggested that the response was to the effect that the accused had nothing more to say. If that was indeed so, it is plainly inconsistent for him to have then given the further responses last quoted above. I conclude that the accused did not give expression to any refusal to speak further with Sgt. McMartin. On the contrary, I find that their conversation continued without any such indication from the accused.

49 The accused a short time later began to talk of penalties, doing so of his own volition, and saying "Even if you could prove ... it was accidental, it's still an act of terrorism using explosives, I'm sure you are going to get the mandatory 10-14 years for

that." It was at this point that Sgt. McMartin began to discuss the differences between murder and manslaughter even though both offences "carry life" (a penalty of life imprisonment), that penalty being a maximum in a case of manslaughter, with a 10-year sentence requiring only about 3 years to be served and so forth. Once again, this was a perfectly obvious inducement to confess. But, as before, the accused resisted it. Instead, he said: "I've gotta talk to my wife before I have anything else to say if you don't mind if I'm not under arrest or whatever".

50 Sgt. McMartin agreed to this, saying "Roger if you want to, if you want to talk to your wife, fine. Do you want to bring your wife in?" The accused merely said "Pardon" in response to this, leading Sgt. McMartin to continue in much the same vein as before. Once more, no admission resulted. Sgt. McMartin broached the subject of trip wires. The accused merely replied "Never deal with stuff like that". This, in turn, prompted further remarks from Sgt. McMartin, leading back again to how the explosion was set, and the question whether it was set "the way that they're saying that it was set." Sgt. McMartin observed, at this point, "I think they're probably wrong", to which the accused responded "Well, I think they're probably wrong too".

51 Continuing this line of conversation, Sgt. McMartin remarked that "... if it wasn't done the way that they are saying it, that yeah could change the whole picture. How are they wrong, how, how was it set? Hey, deal with it, Roger, get it out. I'll tell you something else if you want to show a little emotion don't be afraid. Get rid of it." To this the accused replied: "The only thing I'm afraid of is I don't want somebody tricking me into an admission of something and then I find out after I didn't have to admit

that". More followed much along the same line, from which it is apparent that the accused was weighing the pros and cons of confessing or continuing to avoid doing so. He was clearly aware that once that step was taken there would be no going back, with serious consequences for both him and his family if he confessed when he need not have done so. And yet, if the police were in a position to prove him to have been responsible, there was clearly enough still an opportunity to show them that the miners' deaths were unintended.

52 This emerged in the course of the discussion when the accused said "How am I ever gonna prove that or how, I can't understand how, I could ever prove that it wasn't deliberate." And, a short time later, "But the bottom line is one wrong word and it's don't pass. Go straight to fucken jail." A few further words were then exchanged, which reflected the accused's sense of being in a dilemma, whereupon he said after a pause: "I've been doing some heavy thinking about this kind of stuff. Well, if I'm not under arrest, I'm gonna leave."

53 At this point, Sgt. McMartin asked the accused to wait there just for a moment, to which the accused agreed, and Sgt. McMartin then left the interview room saying that he would "Be back in a sec, Roger". He came back with a woman officer about four minutes later and then, with the accused's agreement, arranged that she should give his wife a ride home. Following this, the accused asked Sgt. McMartin: "So I guess you answered my question, you're arresting me?" To which that officer replied, "No you're not under arrest right now, I've told you that in the beginning too. I'm also I'm not, I'm not the investigator of this file ...". He then returned to the themes he had

spoken of before.

54 The accused then advanced the following: "You got to put yourself in my place too you know like ah no matter how bad a guy is or what anybody thinks of me it could be the total asshole, but know something untoward were to happen 'en you've got involved in something whereby, just say hypothetically, now would you sit here talking to me if you were in my place talking to you without legal representation would you?" Put forward in this way it was not, as counsel for the accused seemed to suggest, either a clear refusal to say more or an indication that the accused wished to contact a lawyer. Sgt. McMartin continued on, without protest by the accused, once again going over much of the same ground as before. After some time, he helped the accused to dispose of his well-chewed gum in the garbage can, standing up to do so, and then he asked the accused to again tell him "the story ... of what happened", suggesting aspects which the accused could cover and adding: "You are sorry for what happened aren't you, hey?"

55 This elicited the following response from the accused: "Well, I'm not refusing to comment any more unless I'm arrested and even if I'm arrested I'm not commenting without a lawyer". This was, as counsel for the accused urged in argument, a garbled but nevertheless clear enough indication that he did not want to say more without contacting a lawyer. And when Sgt. McMartin then said: "Okay, so you want to play the game then?", the accused replied "It's not a game, a guy's got to protect himself partner, holy fuck." (thus reinforcing his decision with some emphasis). And yet, the accused continued talking. Asked by Sgt. McMartin if it was easier for him to talk about it with a lawyer present, the accused shifted his ground, remarking: "I'm just

saying, ah". The conversation continued, at which point the accused began to give vent to anger about the employment of replacement workers during the strike, saying "I'd put a little guilt on the people that caused that too". Once again, the heightened emotion at this point was expressed by a liberal sprinkling of expletives, in which Sgt. McMartin also indulged in a show of fellow-feeling. And so the conversation continued without the slightest further show of reluctance or hesitation on the part of the accused.

56 That the accused was far from easily manipulable or suggestible is evident from the repeated refusals by him to respond positively to inducements offered to him to confess, during the interview with Sgt. McMartin. Having talked quite freely with Sgt. McMartin about replacement workers and related matters, leading up to the latter remarking that a lot of strikers must have admired him for what he did, the accused's response was that, on the contrary: "I don't think anybody admires that." And when Sgt. McMartin attempted to pursue the point, the accused laughed, commenting: "That's just semantics". The accused's marked trait of independent-mindedness shows through clearly in these and numerous earlier exchanges during the interview.

57 This aspect of the accused's character was detected also by Allan W. Hayduk, Ph.D., a Chartered Psychologist employed by the Edmonton City Police, who interviewed the accused in that city on February 17th 1993. Dr. Hayduk was to have used hypnosis to assist the accused in recalling events from his memory in connection with what the accused had told police he had seen on the early morning of September 18th 1992. But the accused scored "zero" on each of two very simple tests of compliance with Dr. Hayduk's instructions. Dr. Hayduk concluded from this result that

the accused was not a suitable subject for hypnosis, being very obviously resistant to the entirely natural (and neutral) procedures outlined by Dr. Hayduk. In a word, the accused demonstrated on that occasion that he possessed the capacity to resist suggestions made to him even where compliance with them might have helped him to recall things from memory which could ostensibly have been of assistance to him personally and to the police in relation to their investigation.

58 Pursuing the mention of semantics, Sgt. McMartin elicited some strongly worded remarks from the accused leading up to his saying "Look to me this is like fucking being drilled in an inquisition." And, a moment later, in response to a further short question: "I'm not under arrest but I can't go". This led to Sgt. McMartin asking him if he wanted to go, which produced the response: "I don't wanta fucking answer something." Asked again if he wanted to go, the accused replied "Right at this particular moment anyways". But this qualified reply was not either a clear "yes" or a clear "no". The accused seemed at this point to be resisting any and every suggestion or question put to him, but still did not attempt to leave and did not cease taking part.

59 Sgt. McMartin sought an explanation for the accused's responses at this point, reiterating that while the police knew what "happened in the end" (to the deceased miners), they still did not know "why?" (the motive for the explosion, and the related intent of the person or persons responsible). To this the accused replied:

> A. What do you mean like what it is I'm talking about is uh a guy can set something up underground whereby an ore car hypothetically an ore car going by could get smashed against the wall an ore car got steel that

> fucking thick, there's not going to be much happening with a fucking ore car, you can set something like up so an ore car eh cause an ore car has got something on it no other fucking car has. A fifth fucking wheel eh.
>
> Q. Okay ...
>
> A. But ...
>
> Q. Maybe someone might get hurt, but they're not going to be getting killed.
>
> A. There wouldn't be too much chance of it if that happened because the fucking motor is back fifty, sixty feet where the guys are, you know what I mean?

60 That these statements were made freely and voluntarily is shown by the accused then asking "There's nowhere in here you can smoke, eh?" Sgt. McMartin fetched a container for use as an ashtray, whereupon the accused lit up a cigarette and smoked. He then proceeded to explain how an explosion could be set to damage an ore car without risk to miners in a man car, drawing a diagram of the fifth wheel on an ore car and how it could have triggered a tripwire device to detonate the explosives. And he explained how the device could have been actuated accidently by a man car only if there had been something projecting from it which would not ordinarily have been there.

61 Following this quite lengthy and detailed "hypothetical" explanation, Sgt. McMartin asked the accused: "Why didn't you come out and tell us this before?" He repeated the question, the accused having responded only with an"Eh", and then came the accused's answer: "Fear". This led to the accused saying that he felt horrible about the deceased miners then and still did, so that he could barely sleep at times. And then,

leaving the hypotheticals aside, he came right out and added:

> A. I wasn't gonna even do that. I was gonna go out to the fucking shaft and fucken really fuck that shaft up with nobody in it of course but how you gonna do this shit by yourself. Who wants to involve somebody.
>
> Q. Which side of the track ...
>
> A. I ruined my whole life. I ruined a hundred and twenty or forty guys that are left. They're fucked. What else can you do fuck.

62 From this point on, the questions and answers flowed in straightforward fashion as the accused gave details of his confession to setting the explosion, without any assistance from anyone else, on the night in question. Using a diagram illustrating a story on the explosion in the Edmonton Journal issue of September 18th 1992 (headed "the MURDERER") which showed the various shafts and levels of the mine in relation to the explosion, the accused traced the route which he had taken. And he provided an outline of what he had done, what he had used to do it with, and what he had intended to accomplish.

63 Sgt. McMartin then left the room and brought back Cpl. McGowan with him. At that point, the record shows (M referring to Cpl. McGowan):

> Q. Okay Roger, I just mention here to Dale so he can appreciate this, that this whole thing is being cleared up. We got this out. What we're looking at Dale ...
>
> A. Couldn't tell any more fucken lies. Simple description.
>
> M. I'll tell you right off the bat before we get going away, I didn't think you were the kind of guy that would ah

intentionally do something like that but ah.

A. No.

64 All three initially took part in the discussion which followed, but for the most part the questioning was now left to Cpl. McGowan. From this, and from what had passed between the accused and Sgt. McMartin before Cpl. McGowan joined them, it emerged that the accused had worn boots similar in type to but a size smaller than those seized by the police and that he had disposed of those smaller boots out at Cameron Falls. It also emerged that he had used various things such as some fishing line, a home-made hat lamp, batteries and so on, which he had thrown into a pond afterwards. In addition, he described using a mine locomotive to move the explosive material to the site of the blast and told the officers where he had left the locomotive; and he referred to a mark on the wall in the tunnel near the blast which he had used to gauge where the fifth wheel on an ore car would engage the triggering device for the explosion.

(c) After 9.30 p.m.

65 Sgt. McMartin left the interview room, as if absenting himself only for a short time, at about 9.30 p.m. on October 15th 1993. He did not return. From that point on the discussion was confined for some time to Cpl. McGowan and the accused; and in the course of that discussion a great many more details of the accused's actions and intentions in the early morning of September 18th 1993 were mentioned. Eventually, Cpl. McGowan inquired as to whether the accused had spoken with anyone else about these matters. The response was that he had told nobody before this of his involvement, not

even anyone in his family.

66 Cpl. McGowan indicated to the accused that the police intended to follow up on what he had said about the boots by visiting Cameron Falls and by locating where the accused had thrown things into a pond as well as doing "a bit of a walk through ... of just how you got to the site and stuff like that and maybe even head underground", none of which provoked any marked response from the accused. The following exchange then took place:

> M. To say just so um you know the record is clear and all that stuff um there was no uh threats or indications that uh for you to say anything tonight uh, did you feel that you were threatened or had to say anything on a fear of a threat or promise?
>
> A. Not really.
>
> M. Okay what do you mean not really?
>
> A. Not really a threat its just uh guy said you know basically like your fucked anyways so you could probably cause I can still I could've still probably caused a lot of trouble for you guys ...
>
> M. Ya.
>
> A. ... you'd have to go and fuck around and prove this and prove that who knows.
>
> M. I comes into circumstances like you know ...
>
> A. There was quite a few circumstances there if they were any less I probably would have said fuck I'll probably fight this.

37 Not long after that the accused asked for something to eat and then said "Can I just have a coffee". This was attended to by Cpl. McGowan, who left briefly for

that purpose bringing in Sgt. Vernon N. White on his return. Sgt. White was introduced to the accused by Cpl. McGowan, who explained that Sgt. White was the primary investigator in the case. Cpl. McGowan then indicated that the accused would be dealing exclusively with himself and Sgt. White from that point onwards.

68 There followed a formal declaration by Cpl. McGowan informing the accused that he was under arrest for murder and, once again, Cpl. McGowan informed the accused of his rights to counsel under the Charter and cautioned him in the same manner as before, including the additional secondary or "clearance" ("purge") warning, to all of which the accused again replied that he understood. In particular, it is worth noting the following exchange: ("W" refers to Sgt. White):

> M. Okay, so you understand the warnings. You understand that we're ah police officers and that ah police officers and that ah your rights to legal counsel and the ah, the entire ah kinda things that I said about police officers talking to you before about threats or promises or anything like that. I know I haven't or ah ...
>
> A. ... No, no nobody's, nobody's did that.
>
> M. Okay, and ah I've dealt with you probably the most of anybody and I, I haven't threatened or promised you anything ah, the ah. One of the things that we would like to do is because I can't, you're saying that there are certain markings on the wall that are still there ...
>
> A. ... Yaw ...
>
> M. ... and ah the route, ah that you took and things like that. What we'd like to do is ah, we're going to a re-walk that and go, go through that thing again (*there is more, but this will suffice for purposes of quotation*) ...
>
> W. I mean you've told us so we'll give you a chance to show

us, and then we can all understand this, that much better.

M. Do you have any problems with that?

A. No.

69 More conversation took place between the two police officers and the accused, with coffee and food being consumed all round. Sgt. White took the trouble to inquire if the accused had any preferences for who should accompany them underground for the proposed re-enactment exercise. The accused indicated no particular preference and no objections. Asked if he had experienced any difficulty hearing what had been discussed with him that evening, he indicated none. Apart from these things, most of the conversation was in a personal vein and inconsequential. If anything, it reflected a relaxed and congenial atmosphere between the officers and the accused. However, the accused did unburden himself to the officers again about how badly he felt over the miners' deaths and how this had never been intended by him. And he provided further details on the explosives he had used.

70 Asked if he would be "okay ... to make the walk tonight?" the accused answered "Oh yaw", by which it appears that he saw no reason to object and felt fully capable of accomplishing it. Among other things, the officers inquired about the accused's medication and arranged to have it sent for. And they arranged for suitable clothing to be on hand for the accused to wear underground, in addition to their own. Finally, they obtained a newspaper for the accused to read while they went about making other arrangements prior to going out to the mine. The accused completed the crossword during this waiting period.

4. The Underground Re-enactment

On Saturday October 16th 1993 at approximately 1.30 a.m. the accused, together with Sgt. White and Cpl. McGowan, went to Giant Mine so that he could show them where he went and what he did there on September 18th 1992. They were accompanied by other officers with audio/video and still camera equipment and a member of the mine staff. Over the course of the following four and a half hours they went down into the mine, following the route described by the accused and pausing from time to time to allow him to describe the places he had visited back then and what he had done there. The only departure from the route taken by the accused on September 18th 1992 was on the return of the party to the surface, which was accomplished by ascending by one of the shafts in an elevator since the accused was quite tired by that time.

72 During the re-enactment shown on the video-tape there is not the slightest hint that the accused was ever acting or speaking other than freely and voluntarily, though Sgt. White and Cpl. McGowan kept quite close to him at all times. Given the circumstances, including the fact that the accused was under arrest by then, it is not in any way inconsistent with this assessment to note that he was evidently in a somewhat resigned mental state. There is no indication whatsoever that he may have been actually inventing details of the tale which had already unfolded in his interviews with Sgt. McMartin and the other officers on the previous day. On the contrary, the accused's tone and demeanour, as shown and heard on the video-tape, is very convincing as to the truthful intent of his statements and as to his utter sincerity during the entire re-enactment.

73 The accused was once again informed of his rights to counsel and given the usual police caution, including the secondary "clearing" (or "purge") warning, at the commencement of the re-enactment. This can be seen on the video-tape. It is evident that the accused did not express any wish to exercise those rights at that time and that he fully understood and accepted the conditions of the police caution.

74 On completion of the underground re-enactment the accused, accompanied by Sgt. White and Cpl. McGowan, returned to the Yellowknife detachment building of the Royal Canadian Mounted Police, where the accused was lodged in cells in the usual way at about 7.30 a.m. on October 16th 1993. However, the police had taken the precaution of prohibiting anyone from communicating with the accused (other than Sgt. White, Cpl. McGowan and Cpl. N.G. Defer) both during the re-enactment and while the accused was in his cell. He himself had not attempted to communicate directly with anyone (except, on one occasion during the re-enactment, when he addressed a couple of questions about a certain vehicle to the mine staff member accompanying the party, to which no response had been given). As agreed with the accused before the re-enactment, Cpl. Defer, a female police officer, was to inform his wife of his arrest in the meantime.

75 Notwithstanding the intervention of several hours between the accused's arrest and the re-enactment exercise, including a lengthy period when he was alone in the interview room with the newspaper, there is nothing in the evidence of the re-enactment to indicate in any way that the accused was at any time attempting to recall what he had told the investigating officers in his earlier confession or that there was the slightest hesitation or doubt on his part in his again recollecting details of his actions on September

18th 1992 which details he had mentioned already in that confession. There is not the slightest inconsistency between the confession and the re-enactment.

On the way back to the R.C.M.P. Yellowknife detachment building from Giant Mine on the morning of October 16th 1993, the police took a detour and located a pond in which the accused indicated to them that he had thrown a satchel containing various items he had used underground on September 18th 1992.

5. The Cameron Falls Demonstration

Shortly before 3.00 p.m. on October 16th 1993 the accused was removed from his cell and placed in a vehicle along with Sgt. White and Cpl. McGowan. In response to a direct question about that, he told the officers that he had only slept 3 or 4 hours since being booked into his cell earlier that day. Cpl. McGowan then once again cautioned the accused and informed him of his rights to counsel, to which he responded that he understood. Asked if he then wished to contact a lawyer, he replied: "I wish to contact one, one of these times, I gotta soon get one you know." And on being asked by Cpl. McGowan if he wanted to contact one at that point, he replied: "I was thinking maybe before we went out there, I should maybe get a, give Austin a call or somebody there".

78 From the accused's following remarks it appears that the accused wanted really to communicate with his wife at that point. At all events, the officers brought the accused back into the building so that he could telephone a lawyer. He was escorted to

an office with a telephone and directory; and steps were taken as well to ensure that he could make his telephone call in privacy. However, the accused was unable to reach the party he was calling. Sgt. White endeavoured to assist him but also without success. Upon then being asked if there was another lawyer whom he wished to contact, the accused replied: "Not right at this time. Maybe if somebody could communicate with my wife she could get a hold of him" (referring to Mr. Austin Marshall, a lawyer in private practice at Yellowknife). The accused added that he wanted to talk to Mr. Marshall.

79 To avoid any possible doubts, I shall quote the exchange between the accused and the police officers which followed in that connection:

Q. Okay, what we'll, I can do is I can contact our, see if Nancy or one of the other guys is, wants to contact your wife and give her those instructions.

A. Yeah.

W. Are you uh ...

A. And she can pick up the stuff too.

W. Your vehicle, okay.

A. And take that car and ...

Q. He's talking about the keys to his vehicle, he wants the keys to his vehicle.

W. Okay, no problem, also okay, we can, we can do that. Last night you told us about an item that you burned. We're wondering if you're willing to take us to that area.

A. Oh yeah, oh there's no problem. That has nothing to do with it.

W. That has nothing to do with your lawyer?

A. No shit, no.

W. Oh, so you're willing to take us there and speak to a lawyer later?

A. Yeah.

M. Is that okay?

A. Yeah.

M. You're absolutely sure?

A. Positive, it had nothing to do with that. I just wanted to make, get somebody in place so I could make contact with my wife once and a while.

M. Oh okay.

W: If you want, well the logistics of that I can, I'll make a phone call here right now.

M. I mean, if you want us to stop now we'll stop.

A. No, it's okay. We can go.

M. Okay?

A. Yeah sure.

80 Cpl. McGowan then arranged for a message to be passed to the accused's wife to contact Mr. Marshall so that he might be available to the accused on his return from Cameron Falls, where the police were heading with the accused to follow up on his statement that he had there disposed of the boots worn by him underground on September 18th 1992. Sgt. White reiterated to the accused, before leaving for Cameron Falls, that he was free to cease his co-operation at any time he saw fit, as the following excerpt from the record shows:

W. Just so we understand Roger, and you understand that you're under no obligation to talk to us. Do you understand that?

A. Oh yes.

W. And you understand you do have the right to contact a lawyer?

A. Yeah.

W. And if you'd like to stop this until we get a lawyer, just tell me.

A. No its okay, we'll go and do it.

W. You're absolutely sure?

A. Positive.

W. Okay, good enough. Do you have any questions Roger at all?

A. No, no that's okay.

81 Sgt. White then reminded the accused of his right to silence, saying: "If you want to stop at any time, you have any problems let us know." To which the accused replied, "Okay". He likewise acknowledged that anything he showed the police as well as anything he might do or say could be used in evidence.

82 As to his motivation for co-operating with the police, he remarked: "And then yesterday when I was having a coffee with my wife, she didn't know nothing about it but I decided fuck I'm sick of it". This, of course, was in reference to a time between his having been accused by Sgt. McMartin of being the person responsible for the explosion during the interview on October 15th 1993, just prior to his leaving at 3.45

p.m. to take his daughter to the hospital, and his returning to the interview at 5.30 p.m. Asked by Cpl. McGowan: "... sick of what?" the accused replied: "Sick of this lying and bullshit ...". Sgt. White responded "You just felt it was time to get it out in the open?" And Cpl. McGowan added "Take the weight off your shoulders anyways". They then noticed that the accused was sobbing, in the midst of which he managed to say: "I just never did that before in my life, lying like that, I hate lying ... Did it for a year now." And again, "It's almost as bad as, doing that, killing those guys".

83 Referring to his interview with Sgt. McMartin, the accused a few moments later responded to some words from Sgt. White, saying:

A. Yeah the guy knew it, the other fellow there. Like it wasn't just 'cause he come out and said, "well I think you're lying about everything".

W. Yeah.

A. I was just about ready to tell him yeah that was all a lie.

W. Yeah.

A. Because I didn't even really try to make a very convincing rundown.

W. Yeah.

A. Piss on it, I'm sick of doing it. Most of the stuff I told you was true but it didn't happen at that time.

W. Yeah. Okay.

A. It was various little things.

84 None of these remarks were elicited by any suggestive questions or

inducements on the part of the officers. Instead, they occurred spontaneously, perhaps in response to the fair and considerate treatment clearly shown to the accused by the officers. And indeed those remarks go a long way to show that what the accused had said the day before, in his confession to Sgt. McMartin, and had then elaborated on with Cpl. McGowan and Sgt. White, had been said entirely of his own free choice and will and not because of any inducement which may have been made to him by any of them.

85 On their way to Cameron Falls the party visited the MacDonald's drive-through outlet for some coffee, continuing on down the highway in the company of other police vehicles and arriving at a parking lot in the vicinity of the Falls. From that point on the accused was filmed on video-tape describing what he had done with his boots the year previous, also in or about October, and where he had gone on that occasion. He informed the officers, besides, that he had bought the boots a few days before the explosion on September 18th 1992.

86 At the conclusion of the accused's demonstration and interview at Cameron Falls the party returned to Yellowknife again by road, arriving at the R.C.M.P. detachment building there at about 6.30 p.m. Sgt. White and Cpl. McGowan interviewed the accused as he sat in the rear of the police vehicle on the journey back to Yellowknife, after again cautioning him, reminding him of his rights and obtaining his agreement to answering further questions about his actions underground on September 18th 1992. During this interview the accused described various aspects of his activities at that time and his appreciation then of their possible consequences. As before the officers asked the accused if he had been coerced (he said "no"), how he felt physically (he said "not too

bad") and mentally (he said "deeply depressed" but "fairly alert"), whether they had made any threats or offers of favour (he said "no"), and whether he had been aware of his rights to counsel (he said "Yes, I'm well advised of that").

6. The post-blast expert interview

87 On arrival at the R.C.M.P. detachment building at Yellowknife, Sgt. White and Cpl. McGowan turned the accused over to two other investigators, namely Corporal Dean Ravelli and Corporal Michael Brandford. Before doing so, Corporal McGowan informed the accused that it was for him to decide if he wished to speak first to those investigators or to a lawyer. The accused indicated that he would speak first to the investigators and that he would then speak to Mr. Marshall "to see if he would take it or not" (referring to his retainer, presumably).

88 The accused was introduced by Sgt. White to Cpls. Ravelli and Brandford in an interview in the detachment building. Cpl. Ravelli was aware that two lawyers, namely Mr. Marshall and Mr. Alex. Pringle of Edmonton, were endeavouring to contact the accused. However, the accused was in no hurry to talk to either of them. The interview room was rigged with a video camera in a corner of the ceiling; but this was visible to the accused and did not appear to disturb him. In addition, but unknown to the accused, Cpl. Ravelli was carrying an audio-recorder in a slim briefcase which was left on the table between the accused and the two officers. To the extent that the equipment permitted, everything said and done during the following interview was recorded. The interview began at about 6.40 p.m.

89 At about 7.25 p.m. the two officers were joined by Special Constable Jean Y. Vermette, a post-blast expert and explosives technician with the R.C.M.P. Cst. Vermette joined in the interview, whereupon the accused described to him how he had set the explosive charges and detonating device underground at Giant Mine in the early morning hours of September 18th 1992. It was Cst. Vermette's evidence that the accused showed no unwillingness or reluctance to speak about these matters during the interview.

90 Between 7.39 p.m. and 7.56 p.m. the officers vacated the interview room to allow the accused to call Mr. Marshall using the telephone there. During that time the video camera was switched off, the tape-recorder in the brief case was removed and all monitoring of the accused ceased, except that his knock on the door was heard when he was through, as arranged, to allow the officers to re-enter.

91 At 8.17 p.m. Mr. Pringle called and his call was transferred to the interview room, where it was answered initially by Cpl. Ravelli. Once again, the officers left, the video camera was switched off and all monitoring of the accused ceased until he again knocked on the door to signal that he had completed the call. This occurred at 8.26 p.m. During the brief conversation between Mr. Pringle and Cpl. Ravelli before the officers turned the telephone over to the accused and left him alone to speak in private, Mr. Pringle informed Cpl. Ravelli that he was not taking the accused's case and was therefore not representing him.

7. The Remand in Custody

The accused had been arrested at approximately 10.15 p.m. on Friday October 15th 1993. In accordance with certain legal requirements, the police were obliged to bring him before a justice of the peace no later than twenty-four hours after that, there being several justices of the peace at Yellowknife of whom at least one was generally available for such a purpose. At about 8.40 p.m.on October 16th 1993, His Worship Seamus Henry, a Justice of the Peace in and for the Northwest Territories, arrived at the Yellowknife R.C.M.P. detachment offices and was shown into a room where an information containing nine counts of first degree murder was sworn before him by Cpl. Defer. Mr. Henry was then escorted to the interview room in which the accused and Cpls. Ravelli and Brandford awaited him.

93 For purposes of the proceedings which then followed, the justice of the peace was seated on the other side of the table (in the centre of the room) from the two officers and the accused. The justice of the peace was seated in the chair which had been occupied by the accused during the interview before the justice of the peace entered. The video camera continued running, as did the audio-recorder in Cpl. Ravelli's briefcase. However, presumably to show that the proceedings before the justice of the peace were of a judicial nature, Cpl. Brandford called the Court to order as the proceedings began. These were quite short. After questioning the accused as to whether he first wished to obtain legal advice or representation, to which the accused replied in the negative, Mr. Henry read the contents of the information to the accused and ascertained that it was understood. As requested by Cpl. Brandford, on behalf of the

Crown, Mr. Henry then remanded the accused into the custody of the R.C.M.P. until the following Monday, October 18th 1993, to appear then before the Territorial Court at 4.00 p.m. A warrant in Form 19 under the Criminal Code was thereupon signed by Mr. Henry for that purpose, the accused raising no objection or question. Cpl. Brandford then formally "closed court" and Mr. Henry left.

94 At about 8.40 p.m. another telephone call was transferred to the interview room for the accused. This call was from Glen Orris, Q.C., of Vancouver. Once again, the officers vacated the room, had the video-camera switched off, removed the briefcase containing the audio-recorder, and ensured that the accused was allowed to take the call in complete privacy with nothing being monitored. When this call was completed, the accused gave them the usual signal and they returned.

8. The search at the accused's residence

95 Shortly after 9.00 p.m. the accused accompanied Cpls. Ravelli and Brandford, together with certain other officers, to search the accused's residence pursuant to a search warrant. This was accomplished with the full co-operation of the accused, who produced various items to the officers at their request. The search was video-taped and audio-recorded and began with the now-familiar police caution and reminder of rights to counsel, all of which was acknowledged by the accused.

9. The cell operation

The search ended at about 9.40 p.m. when the accused was returned to the R.C.M.P. detachment building and was lodged there in a cell at about 9.50 p.m. There was at this time another occupant of the cell, which was equipped with an upper and a lower bunk so as to accommodate two prisoners. This other individual was an undercover police officer, namely Corporal Harry Ingraham, playing the role of a defaulting spousal support delinquent who was being held by the R.C.M.P. for return to face court proceedings in Alberta. Cpl. Ingraham had been placed in the cell to enable the accused to talk, if he wished, but without provoking or prompting conversation other than by his presence.

97 Everything said in the cell by the accused and by Cpl. Ingraham was being audio-recorded. The record of their conversation is in evidence on this *voir dire*, complete with background noises.

98 It is the evidence of the accused that he was not deceived by the undercover operator, whom he believed to be a police agent because of the very serious charges which he faced and the noticeable security precautions taken for his personal safety during the expedition to Cameron Falls. The accused knew that the police were aware of his mentally depressed state. He concluded that his cell-mate had been placed there for his protection, both from others and from himself. That this was the accused's perception, and largely an accurate one as it turns out, did not appear to inhibit him in any way in the quite extensive remarks which he saw fit to make in the course of a conversation with the undercover operator over a period of some hours, much of it relating to the explosion on September 18th 1992 and the accused's intentions in

reference to it at that time, although he at no time indicated then that Cpl. Ingraham's "cover was blown".

99 During the period that the accused shared the cell with Cpl. Ingraham, the accused was removed briefly to speak to Cpl. Defer for a few minutes about the keys to the family car and to be informed that the police had a warrant to search it. He was also out of the cell briefly on two occasions to speak privately with a lawyer. Cpl. Ingraham noted no change in the accused's attitude and willingness to talk freely about the events of September 18th 1992 after either of the accused's absences to speak to the lawyer. And the accused was also outside the cell briefly to speak privately on the telephone with his wife.

10. The October 18th 1993 interview

100 The record shows that the accused was in consultation with his counsel at about 10.00 p.m. on Sunday October 17th 1993, when he was removed from the cells for that purpose, returning at about 10.54 p.m. The next morning at 9.50 a.m. he was again removed from the cells to meet briefly with his counsel before going to court at 10.15 a.m. Cpl. Ravelli audio-recorded the proceedings which followed in the Territorial Court, at which time the nine-count information charging the accused with the first degree murder of the nine miners was read to him again.

101 The accused was then remanded in custody to await his preliminary inquiry. No application for his judicial release could be made before the Territorial Court, in view

of the charges being for murder; and no such application has been brought on behalf of the accused, as the *Criminal Code* provides. The accused was taken to holding cells below the court room after the remand and he was there again interviewed by Corporals Revelli and Brandford, who wished to show him some photographs and ask some further questions. Cautioned as before and reminded of his rights to counsel, the accused again freely spoke to the officers without any hesitation or reluctance, answering their questions. Following this he was returned to the cells at the detachment building.

11. The accused's testimony

102 Contrary to the evidence of the accused's confessions on October 15th to 18th 1993, to which reference is made above, the accused testified that he had nothing to do with the blast which killed the nine miners and does not know who is responsible. It is his evidence that he lied to the police when making those confessions. And he offered an explanation for the items thrown into the pond, which were recovered by police divers after he had taken the police to the place in question on the morning of October 16th 1993. As well, he offered a similar explanation for the burned rubber boot fragments recovered by police from Cameron Falls after he had taken the investigators there later that day. Those explanations were to the effect that he had only "planted" those items with a view to persuading the police, if the need arose, that two other striking miners who were rumoured to have caused the explosion were, in fact, not responsible for it.

103 It is not my function, on this *voir dire*, to reach a determination as to the

truthfulness or otherwise of the confessions in question, or any of them. My task, instead, is to determine if the evidence tendered by the Crown, as to any or all of the statements allegedly made by the accused to the police, is admissible in law for purposes of the scheduled trial in this case. And, in this portion of my reasons for ruling on that question, I shall confine myself solely to what I understand to be required under the common law in that connection. Nothing that I say here is to be understood as expressing any final conclusion as to the truthfulness or otherwise of any of the statements so far mentioned, that being a question for others if the evidence of those statements is ruled admissible for purposes of the trial.

104 Immediately following the explosion, as might have been expected, a shock of horror reverberated not only throughout Yellowknife and the mining community beyond but across Canada in its entirety. And, as the accused testified, the deaths of the nine miners caused a lot of problems for the whole community at Yellowknife. It is only fair to say that this resulted in a more than usually onerous investigative burden upon the Royal Canadian Mounted Police.

105 The testimony of the accused is that he concluded that he was a suspect in the police investigations from the time that he was cautioned and informed of his rights to counsel by Cpl. Defer when she obtained a written statement from him, denying all involvement in the explosion, on October 16th 1992. Subsequent interviews with Cpl. McGowan and two police polygraph operators only confirmed the accused in that view. And, as he mentioned then (and subsequently, if in slightly different terms to Sgt. McMartin) it was as if he was thereby required to clear himself of suspicion, if he was not

to remain a suspect for an indeterminate period.

106 It is the accused's evidence that this was what led him to co-operate so fully with the police, to the point that he invariably answered their requests of him respecting interviews, photographs, clothing, sketches, polygraph tests and the rest, even though he had been advised against undergoing a polygraph test; and, indeed, his wife was adamantly opposed to his doing so. Furthermore, with the labour dispute seeming never likely to be resolved, and the cloud which metaphorically hung over the union and its members as a result of the explosion, it is the accused's testimony that he considered it important to assist the police to solve the crime or he might never be able to obtain work as a miner anywhere again.

107 The general atmosphere of gloom in the community had spread to the strikers, many of whom had left town while others were becoming psychologically depressed, drinking on the picket-line and so forth. There seemed to be no end to the situation in sight. And the atmosphere was exacerbated by newspaper headlines and articles to the effect that the labour dispute could not be resolved until charges were laid against the person or persons responsible for the explosion.

108 When Sgt. McMartin told the accused that he had been lying all along to the police, the accused did not show any reaction. That is the evidence of Sgt. McMartin. It is the accused's evidence that he tried not to show any reaction; he was determined not to react. And this continued when Sgt. McMartin told the accused that he was the person responsible for setting the explosives on September 18th 1992. The accused's

testimony on this point, to the effect that he tried not to react, is confirmed by that of Sgt. McMartin; and, likewise, the accused's testimony confirms the evidence of Sgt. McMartin on this point. It is the accused's testimony that he was being browbeaten by Sgt. McMartin both before and after he returned to the interview at 5.30 p.m. And his evidence is that he felt that he was unable to leave the interview from about 6.00 p.m. on. He says in his testimony that he was 90% sure then that he was already under arrest, that Sgt. McMartin was overwhelming him and that this was made more intimidating by Sgt. McMartin's ostensible close association with the office of the Attorney General himself.

109 Nevertheless, it is also the accused's testimony, under cross-examination, that he had already come to the realization in August 1993 that he would be better off simply to exercise his rights by refusing to co-operate further with the police. The accused acknowledged under cross-examination that he fully understood his rights in that respect and, furthermore, that he could have gone at any time to Mr. Marshall for legal advice in relation to the police investigation as it was affecting him, had he wished to do so; but that he did not.

110 In particular, the accused acknowledged in the course of his cross-examination that he had fully understood his rights on October 15th when he was interviewed at the R.C.M.P. Homicide Task Force office by Sgt. McMartin. The accused was aware then, more particularly, that he did not have to meet with or talk to the police if he felt that he did not wish to do so. Likewise, he was aware of his rights to counsel at that time; and he knew then that Mr. Marshall had been retained by C.A.S.A.W. to

provide legal advice and representation to him and any other member of the union requiring it in relation to anything of a criminal nature arising in relation to the labour dispute.

111 Challenged by Crown counsel to admit in cross-examination that he knew on October 15th 1993 and all along that he did not have to say anything whatsoever to the police, the accused testified that he knew his rights perfectly well but that he also knew that he had to help the police and work with them, or otherwise he would be charged with first degree murder. To quote from his evidence, he said "They are going to charge me anyways, but they might reduce it if I help them co-operate. It is easy to say you understand something. Yes I understood it. You would have to be a dunce not to. But the thing was, what is the difference. I mean who cares. I still had -- as far as I was concerned, I was compelled to help them, or to work with them, to co-operate and not to resist in any way."

112 Asked if: "... for that reason you decided to talk to them because you saw this as a puzzle, and you wanted to accept the challenge and talk to them?" the accused replied: "I don't know if I saw it as a puzzle. I saw it as a problem to be solved." This, and the other evidence given along the same lines by the accused, invites me somehow to believe that he told the police an enormous and extremely complex concatenation of lies, lies which made him plainly appear to be solely responsible for a most horrible crime, whether labelled murder or merely manslaughter, only because he wanted above all to work with the police, "to co-operate with them and not resist in any way". Given the mature age and life experience of the accused, his demonstrated ability to resist police

exhortations and questioning, not to mention his failure of Dr. Hayduk's simple tests for mere compliance, I find myself unable to accept this portion of the accused's testimony or the other portions of it in which he said that he felt that he was being compelled to confess in order to escape being charged with first degree murder.

113 The evidence is that he made not the slightest protest when Cpl. McGowan told him, at about 10.15 p.m. on October 15th 1993, that he was under arrest for first degree murder. And he evidently continued to actively co-operate with the police, without any hint of disappointment or reluctance, from that point onwards, long after Sgt. McMartin had disappeared from the scene.

114 I do not accept the testimony of the accused to the effect that he felt that he was being detained or that he was under arrest from about 6.00 p.m. onwards on October 15th 1993 (Sgt. McMartin having already accused him before he left, without any hindrance, at 3.45 p.m.) or that he confessed only because he felt that he had to do so in order to escape first degree murder charges. On the contrary, the evidence shows that he was enormously self-confident and self-controlled, stonewalling each and every of the many exhortations, inducements and questions directed at him by Sgt. McMartin as well as by the several other officers who had spoken to him prior to October 15th 1993.

115 Furthermore, the evidence shows that the accused was for some time carefully weighing the pros and cons of making his confession well before he in fact finally made it. He may indeed have been tired of lying, when he finally decided to

confess; but I am satisfied that this alone was not the true reason for his decision to do so. His conscience was clearly troubling him deeply. The relief which he admittedly experienced following his confession is altogether inconsistent, it seems to me, with the emotional stress which he would instead have felt if he had only then begun to embark on a complex series of deliberate and detailed falsehoods designed to masquerade as the truth. His confession was instead the result of a carefully considered personal decision dictated by his stubborn will and not by any promise, threat or similar inducement which had been held out to him by the police.

12. The common law rule

116 The common law on the reception of hearsay in evidence has been evolving over the years. In the past decade it may even be said to have undergone somewhat of a revolution: *Khan v. R.*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, 41 O.A.C. 353, 13 N.R. 53; *R. v. Smith*, [1992] 2 S.C.R. 915, 75 C.C.C. (3d) 257, 15 C.R. (4th) 133, 94 D.L.R. (4th) 590, 550 A.C. 321, 139 N.R. 323; *R. v. B. (K.G.)*, [1993] 2 S.C.R. 740, 79 C.C.C. (3d) 257, 19 C.R. (4th) 1, 61 O.A.C. 1, 148 N.R. 1.

117 The trend towards more judicial readiness in Canada to accept certain hearsay in evidence has as yet only very barely touched the topic of hearsay reception of an accused person's confession or other statement sought to be introduced by the Crown in evidence at the trial of the accused in a criminal case. But the growing reliance of police on newly available electronic technology such as the video and audio-recording of an accused person's statements, as in the present case, is surely not to be either

discouraged or ignored. Reliance on that type of technology was a crucial factor in *R. v. B. (K.G.)*. And see *R. v. L. (D.O.)*, 1993 4 S.C.R. 419, 161 N.R. 1, 88 Man.R. (2d) 241, 85 C.C.C. (3d) 289, 25 C.R. (4th) 285, 18 C.R.R. (2d) 257, [1993] S.C.J. 72. It is clearly a very important factor in the case at bar.

118 Chief Justice Lamer, for the majority in *R. v. B. (K.G.)*, referred to the common law on confessions as follows:

> The classic statement of the first part of the confession rule appears in *Ibrahim v. R.*, (1914) A.C. 599 (P.C.) at p.609:
>
> > It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.
>
> *Ibrahim* was first adopted by this court in *Prosko v. R.* (1922), 63 S.C.R. 226 and was extended to decisions such as *Horvath v. R.*, [1979] 2 S.C.R. 376 in which Beetz J. wrote (at pp. 424-25):
>
> > Furthermore, the principle which inspires the rule remains a positive one, it is the principle of voluntariness. The principle always governs and may justify an extension of the rule to situations where involuntariness has been caused otherwise than by promises, threats, hope or fear, if it is felt that other causes are as coercive as promises or threats, hope or fear and serious enough to bring the principle into play.

119 The Chief Justice went on to add, as I have already mentioned above in reference to the accused's testimony in this *voir dire*, that:

> It must be stressed that the trial judge is not making a determination on the voir dire as to the ultimate reliability and credibility of the statement. As I have indicated, that is a matter for the trier of fact. The trial judge need not be satisfied that the prior statement was true and should be believed in preference to the witness' current testimony. This distinction is also derived from the law relating to confessions. In *R. v. Piche*, [1971] S.C.R. 23, at pp. 25-26, Cartwright C.J.C. noted that:
>
> > The main reason assigned for the rule that an involuntary confession is to be excluded is the danger that it may be untrue but, as has been recently reasserted by this Court in *DeClercq v. The Queen* (1968) S.C.R. 902, the answer to the question whether such a confession should be admitted depends on whether or not it was voluntary not on whether or not it was true.
>
> Similarly, in *Rothman*, I wrote, at p.691, that:
>
> > ... a statement before being left to the trier of fact for consideration of its probative value should be the object of a *voir dire* in order to determine, not whether or not the statement is reliable, but whether the authorities have done or said anything that could have induced the accused to make a statement which was or might be untrue. It is of the utmost importance to keep in mind that the inquiry is not concerned with reliability but with the authorities' conduct as regards reliability.

120 Although Lamer J. (as he then was) spoke only for himself in rendering his reasons for concurring in the decision of the court in *R. v. Rothman*, [1981] 1 S.C.R. 640, 59 C.C.C. (2d) 30, 20 C.R. (3d) 97, 121 D.L.R. (3d) 578, 35 N.R. 485, I must assume that the above quoted excerpt from his reasons in that case has now been endorsed by the majority in *R. v. B. (K.G.)*, even if it was not subscribed to by the earlier majority in *R. v. Rothman* itself.

121 As already mentioned, counsel for the accused has invited me to declare that

the evidence on this *voir dire* with respect to all statements made by the accused before October 15th 1993 meets the requirements of the common law rule on confessions so as to be admissible in evidence on behalf of the Crown at trial. Having now heard and examined all the evidence, including that of statements made on and after October 15th 1993, I accept that invitation and so declare.

122 No such invitation or concession has been made on behalf of the accused with respect to the evidence of any statement made on or after October 15th 1993. That being so, I shall now consider the motion made by Crown counsel that all the evidence of statements in that category be likewise ruled admissible on behalf of the Crown at trial.

13. The statements on October 15th 1993

123 These statements are described above in outline only, but nevertheless with details of the interviews in which they were made between 2.00 p.m. and as late as nearly midnight on Friday, October 15th 1993. I have focussed on three periods of time in making that descriptive outline, that is to say: (a) from 2.00 p.m. to 3.45 p.m.; (b) from 5.30 p.m. to 9.30 p.m.; and (c) after 9.30 p.m. And I have provided a chronology of the events leading up to those statements, in the course of the police investigation, which provide the wider context within which the statements were made.

124 Crown counsel relies upon *D.P.P. v. Ping Lin*, 62 Cr. App. R.14, [1975] 3 All E.R. 175 (H.L.) for the proposition that the Court must scrutinise the evidence now before it to determine whether any inducement made by the police to the accused did,

in fact, cause him to make the statement or statements now subject to question. If the Court has only a reasonable doubt on that score, then the statement or statements must be ruled inadmissible. On the other hand, if there is not at least a reasonable doubt as to that, the ruling will go the other way.

125 In *D.P.P. v. Ping Lin*, Lord Morris gave expression to this view, in discussing the common law confession rule enunciated in *Ibrahim v. R.*, at p.178 (All E.R.):

> Stated otherwise, was it as a result of something said or done by a person in authority that an accused was caused or led to make a statement? Did he make it because he was caused to fear that he would be prejudiced if he did not or because he was caused to hope that he would have advantage if he did? The prosecution must show that the statement did not owe its origin to such a cause.

126 Lord Hailsham, while by no means uncritical of the rule, had this to say at p.184 (All E.R.):

> The question to be answered in every case is whether the prosecution has proved the statement in question to be voluntary in the sense of not being obtained as a matter of fact by fear of prejudice or hope of advantage excited or held out by a person in authority. It is the chain of causation which has to be excluded by the prosecution and not the hypostatisation of any part of it.

127 Earlier in the same paragraph of his speech, Lord Hailsham had remarked:

> Thirdly, an immense amount of argument was directed both here and below to what is or can be considered an 'inducement'. But the word 'inducement' forms no part of the rule as formulated by Lord Sumner, and although it is sanctioned in a judgment of Cave J. in *R. v. Thompson*, I doubt

> whether in all cases this particular hypostatisation is particularly helpful.

(By way of footnote, "hypostatisation" is defined by the Oxford English Dictionary as a derivative of "hypostasize" meaning "to make into or treat as a substance", which suggests an element of artificiality or even artifice.)

128 Although not referred to in *R. v. Green* (1987), 36 C.C.C. (3d) 137 (Alta. C.A.), the above quoted passages from *D.P.P. v. Ping Lin* are entirely consistent with the decision in that Alberta appellate case, as expressed at p.139:

> The learned judge's ruling, after review of substantially the same submissions put to us, was that the confession was not the product of improper threats or inducements or an inoperative mind. The judge found that the confession came forth by the fact of the accused's arrest, his detention and his own contemplation of what his future held. The finding was that the confession was spawned "... by his own sense of remorse". That finding is supportable by review of the evidence and we will not upset it.

129 In *R. v. Reyat* (1993), 80 C.C.C. (3d) 210, 20 C.R. (4th) 149, 24 B.C.A.C. 161, 40 W.A.C. 161, 14 C.R.R. (2d) 282, leave to appeal to S.C.C. refused September 16th 1993, the British Columbia Court of Appeal upheld a manslaughter conviction, in respect of a bomb explosion on an aircraft overseas on a flight from Vancouver, where the accused made self-incriminating statements in the course of a lengthy interview by the police in circumstances not without parallels in the present case. In its reasons for judgment, the court in that case adopted the above quoted passages from *D.P.P. v. Ping Lin* and referred to the judgments in *R. v. Hatton* (1978), 39 C.C.C. (2d) 281 (Ont. C.A.) and *R. v. Puffer, McFall and Kizyma*, [1976] 6 W.W.R. 239, 31 C.C.C. (2d) 81 (Man. C.A.), where certain police inducements were held not to have resulted in any

involuntariness on the part of the accused when he later made self-incriminating statements to them. In *R. v. Reyat*, McEachern, C.J.B.C. said, for the court: "I conclude that he said what he wanted to say, and did not say what he did not want to say".

130 The fact that the police have given expression to strong exhortations to the accused to tell them the truth, based upon moral or other considerations, has been held not in itself to be a basis for ruling inadmissible a subsequent self-incriminating statement: *R. v. Hayes* (1982), 65 C.C.C. (2d) 294 (Alta. C.A.). And in *R. v. Rennie*, [1982] 1 W.L.R. 64, [1982] 1 All E.R. 385 (C.A.) a trial judge's finding of voluntariness respecting statements of an accused which were motivated by his belief in the strength of the case against him was upheld, Lord Lane, C.J. saying:

> Very few confessions are inspired solely by remorse. Often the motives of an accused person are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. That is not the law.

131 Nor is the considerable length of the interviews held by police with an accused person who eventually confesses necessarily a barrier to the admission of that confession in evidence. Like the other considerations already mentioned, this is a factor to be weighed in the balance when adjudicating the issue of voluntariness in relation to the confession: *R. v. Reyat (supra)*; *R. v. Swidley*, unreported, May 9th 1979 (Alta. C.A.) per Laycraft J., as he then was.

132 In the case at bar the accused testified in the *voir dire*. This is therefore not a case where one might conclude that the actions and exhortations of the police "could" or "might" have led him to falsely and involuntarily confess to the homicide of the nine miners. The accused's testimony is that this in fact occurred. I find, on the whole of the evidence before the Court on the *voir dire*, and from my assessment of the accused's credibility on that issue during his testimony, that I am unable to accept the accused's version of the facts in that respect to be true. I reject the submissions of counsel for the accused, and the accused's own testimony, to the effect that he would not have made his confession if he had not been persuaded to do so against his will. In my view, the Crown has established on the evidence before me that his confession to Sgt. McMartin, as confirmed to Cpl. McGowan and Sgt. White on October 15th 1993, was made freely and voluntarily in the sense to be understood for purposes of the common law confessions rule as I have discussed it in the light of the applicable authorities.

133 Counsel for the accused has argued for a broadening of the common law basis for exclusion of self-incriminating statements by an accused, relying upon *R. v. Hébert*, [1990] 2 S.C.R. 151, 57 C.C.C. (3d) 1, 77 C.R. (3d) 145, 49 C.R.R. 114, 47 B.C.L.R. (2d) 1, (1990) 5 W.W.R. 1, 110 N.R.1. In particular, he relies upon the following passage at p.39 (C.C.C.):

> The right to choose whether or not to speak to the authorities is defined objectively rather than subjectively. The basic requirement that the suspect possesses an operating mind has a subjective element. But this established, the focus under the Charter shifts to the conduct of the authorities vis-a-vis the suspect. Was the suspect accorded the right to consult counsel? Was there other police conduct which effectively and

> unfairly deprived the suspect of the right to choose whether to speak to the authorities or not?

134 Disregarding the reference in this passage to the impact of the *Canadian Charter of Rights and Freedoms* and the shift of onus, under s.24(2) of the Charter, to the accused, this passage does not, as I see it, expand the scope of the exclusionary basis of the common law rule as discussed in the authorities which I have already mentioned. The same is true of the passage relied upon by counsel of the accused from p.38 (C.C.C.) of the majority reasons for judgment in *R. v. Hébert*:

> If the suspect chooses to make a statement, the suspect may do so. But if the suspect chooses not to, the state is not entitled to use its superior power to override the suspect's will and negate his or her choice.

135 This passage also, in my understanding, does not in any respect modify or enlarge the scope of the common law rule. I am satisfied beyond a reasonable doubt that the accused's will was not overborne, overwhelmed or overridden by the police during or prior to their interviews with him on October 15th 1993.

14. The Voluntariness of the Underground Re-enactment

136 It is not necessary to consider the arguments on either side regarding the possibility of tainting of the underground re-enactment on October 16th 1993 by what preceded it the day before, in view of the conclusions which I have reached as to the completely voluntary nature of the accused's confession then. It may be mentioned, however, that the evidence of the underground re-enactment strongly reinforces my

conclusion as to the voluntariness of the confession; any doubt which might have been cast upon the confession by reason of inability or hesitation on the part of the accused to convincingly perform the re-enactment is removed by the video-recording in evidence.

137 If circumstantial guarantees of the trustworthiness of the confession were required, beyond those considered by the authorities above mentioned, then the video-recording provides such guarantees in my respectful view, and does so in a very convincing way.

138 The location in the pond of items described by the accused and pointed out to the police, on their return with the accused from the underground re-enactment, is a further such guarantee. I reject the accused's testimony as to having sought only to obstruct justice by "planting" these items in the pond in order to help clear C.A.S.A.W. members who might be charged in relation to the events of September 18th 1992. That may have occurred to the accused after he had disposed of the items; but I am unable to accept that it was his motivation for disposing of them.

139 I am fully satisfied, in any event, that the underground re-enactment was itself conducted freely and voluntarily by the accused.

15. The voluntariness of the Cameron Falls re-enactment

140 It is enough to say that I have reached the same conclusions regarding the evidence of the Cameron Falls re-enactment as I have with reference to the underground re-enactment. Here, again, the charred remains of the accused's boots provide

corroborative physical evidence which is not, in my assessment, truthfully explained away by the accused's testimony on the *voir dire*.

16. The voluntariness of the post-blast interview

141 The evidence of the interview with Corporals Ravelli and Brandford, during which they were joined by Cst. Vermette, is likewise untainted and otherwise unobjectionable from the standpoint of the common law confessions rule. In coming to this conclusion, I have carefully considered the close conjunction between the later portions of that interview with the remand proceedings held before the justice of the peace; and I shall discuss the effect of those proceedings separately in what follows.

17. The effect of the remand proceedings

142 It is submitted on behalf of the accused that the remand made by the justice of the peace was not only unlawful, in terms of the *Criminal Code* and the *Canadian Charter of Rights and Freedoms*, but that it contributed to the atmosphere of oppression in which the accused felt constrained to continue his earlier co-operation (or compliance) with the police, all contrary to his will. It is the position of the accused, as I understand the submission, that the holding of the remand proceedings in the same room as the police were using to interrogate the accused, and the apparent control by the police of the judicial proceedings within the police detachment building, all lent colour to the accused's belief at the time that he had no choice but to continue to comply with each and every request of the police, and to continue giving them what they seemed to want

in confirmation of his confession.

143 I shall deal later with the arguments in reference to the *Canadian Charter of Rights and Freedoms*.

144 With reference to the *Criminal Code*, it is true that the proceedings before the justice of the peace appear to have been conducted on the erroneous assumption, on the part of Corporal Brandford and the justice of the peace, that these proceedings were no different in character from the usual remand proceedings held daily in respect of prisoners detained following arrest on a wide variety of charges for offences other than murder, pursuant to the provisions governing detention on arrest under the Code. This is evidenced by the request made by Cpl. Brandford to the justice of the peace to remand the accused in custody until the following Monday for an appearance then in Territorial Court. Such a procedure is authorised, in respect of offences other than murder, under s.516 of the Code. And the justice of the peace then issued, in accordance with that procedure, a warrant in Form 19 of the Code.

145 The correct procedure would of course have been to remand the accused in custody pursuant to s.515(10) of the Code with a warrant issuing in Form 8, not Form 19. Only a superior court judge has jurisdiction to grant a judicial interim release where the accused is detained following arrest on a charge of murder: see s.522 of the Code. There was therefore no need for the remand made by the justice of the peace. But that does not mean that the accused was prejudiced by being confined in the meantime pursuant to the remand, since he would have had to be confined pursuant to s.515(10)

of the Code in any event, pending his appearance and release under s.522. It is noteworthy that he has never applied for such a release.

146 Quite apart from these procedural deficiencies, the accused argues that he was improperly and unduly detained contrary to s.503(1)(a) of the Code, which states:

> 503. (1) A peace officer who arrests a person with or without warrant or to whom a person is delivered under subsection 494(3) shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law, namely,
>
> (a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period.

147 While it is conceded that the accused was brought before the justice of the peace within the 24-hour period mentioned in s.503(1)(a), it is argued that this was not done "without undue delay". The argument is, in effect, that the Code required the police to bring the accused before the justice of the peace "as soon as possible".

148 That requirement is provided for in s.503(1)(b) of the Code. This provision reads:

> (b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible ...

149 Clearly, the "as soon as possible" requirement is expressly and specifically applicable only where the person under detention has not been brought before a justice

of the peace within 24 hours of arrest. That is not this case. And the use of that language in s.503(1)(b), in contrast to the language of s.503(1)(a), makes it abundantly clear that the "as soon as possible" requirement does not apply to cases such as this, where s.503(1)(a) instead must govern.

150 In all the circumstances revealed in the *voir dire* there was, in any event, no unreasonable delay within the meaning of s.503(1)(a) of the Code. Furthermore, I am fully satisfied that, however much it may indeed be desirable for an accused to be brought before a justice of the peace in circumstances completely disassociated from a police establishment or a police investigation (as to which the report of the Royal Commission on the Administration of Justice at Hay River in the Northwest Territories made some highly pertinent recommendations in 1968), there was in this instance neither any prejudice to the accused as a result of the procedures followed nor did the proceedings themselves operate in any way to convey to the accused any form of inducement to provide further statements to the police with respect to the events of September 18th 1992.

151 It is argued, however, that the remand was improperly made into the custody of the R.C.M.P. instead of that of the Warden of the Yellowknife Correctional Centre, an institution administered by and under a Department of the Government of the Northwest Territories completely separate from the R.C.M.P. The argument is that by remanding the accused into police custody the accused was left at the mercy of the investigating officers until he appeared before the Territorial Court two days later pursuant to the remand. That, as I understand the argument, exposed the accused to police influences

of a particularly oppressive nature so as to taint any subsequent statements which he might then make while in that peculiarly vulnerable position.

152 This, if the argument holds water, should have affected the police search of the accused's residence later that evening, when certain items were seized with the accused's co-operation. And presumably it could have affected the accused's state of mind during the cell operation which followed. There is no evidence, either in the video record of the search or the audio-recording of the cell operation to support the argument; and I have not had my attention drawn to any portion of the accused's testimony in this *voir dire* which might give substance to the argument. I therefore reject it.

18. The voluntariness of the search of the residence

153 For the reasons which I outline above, I find that the search was untainted by any involuntariness on the part of the accused, in the sense of the common law confessions rule, in what preceded the search. Nor was the co-operation shown by the accused during the search itself (in any meaningful sense, for present purposes) other than freely and voluntarily given by him.

19. The voluntariness of the cell operation statements

154 It is apparent on the evidence that the accused had not at any time refused to talk to the police, either before or after he had been in contact with any of the several legal counsel with whom he had spoken following his arrest. This alone serves to

distinguish the present case, on its facts, from *R. v. Hebert (supra)*.

155 What is more, it is the accused's testimony, which I am inclined to accept, that he was aware of Cpl. Ingraham's ruse. And yet, he made not the slightest mention of it at the time. He certainly made not the slightest protest or complaint, if he did indeed believe that his cell-mate was an agent of the police. If anything, he says that he believed that the arrangement had been made for his protection. Nor did it inhibit him in any way in expressing himself about the events of September 18th 1992, or as to his intentions at that time, and so forth, all of which is along the lines which he had already given to the police in the various interviews, if only beginning some time after 5.30 p.m. on October 15th 1993.

156 On the assumption that the accused was at least strongly suspicious that Cpl. Ingraham was in fact a police agent, but decided to vent his feelings and thoughts out loud to him nevertheless, as he in effect asks me to believe, it must be obvious that this serves further to distinguish the present case, on its facts, from *R. v. Hebert*.

157 If, indeed, the accused felt oppressed by having been held in close police custody since his arrest and by having been judicially remanded into the custody of the R.C.M.P., in their holding cells at the detachment building instead of in the Yellowknife Correctional Centre, it does not seem to me to be consistent with any such sense of dire oppression for him to have then been so cavalier in the expression of his thoughts and emotions to his cell-mate when he could, instead, have kept his silence since he was tired and on the pretence that he did not in fact know that his cell-mate was an undercover

police operative. The audio-recording of their conversation speaks quite clearly enough on this point.

20. The voluntariness of the vehicle interview after the Cameron Falls re-enactment

158 The audio-recording of this interview, like the others, reveals that the accused spoke freely and voluntarily, with a full appreciation of his rights, during this interview. I find therefore that he did so.

21. The voluntariness of the October 18th 1993 interview

159 As I have already indicated, the accused displayed not the slightest reluctance or hesitation in speaking with Corporals Ravelli and Brandford on this occasion. The evidence persuades me that, once again, he did so freely and voluntarily, and not as a result of any official inducement from anyone in authority over him.

22. Conclusion as to voluntariness

160 To sum up, I find on the evidence that the Crown has established beyond a reasonable doubt that each of the accused's several statements to the police on and after October 15th 1993 was made freely and voluntarily in the sense that is intended by the common law confessions rule. This includes his verbal statements as well as his statements by way of gesture and demonstration in the course of the re-enactments, both underground and at Cameron Falls in addition to the search of his residence, all on

October 16th 1993.

II. Charter Considerations

1. General

161 Subsection 24(2) of the *Canadian Charter of Rights and Freedoms* states:

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

162 In addition, s.7 of the Charter declares:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

163 It is apparent that if there has been an infringement or denial of a right or freedom guaranteed by the Charter, such as those mentioned in s.7, it will still be necessary to consider if any evidence obtained in a manner which resulted in that infringement or denial should be excluded by reason that, in all the circumstances, its admission at trial would bring the administration of justice into disrepute.

164 The accused moves for the exclusion of the evidence of all statements made to the police on or after October 15th 1993 on grounds that they were obtained in violation of s.10(b) of the Charter, in circumstances which would bring the administration

of justice into disrepute if that evidence were to be admitted at trial.

165 In addition, or perhaps in the alternative, the accused moves for the exclusion of the evidence above mentioned on grounds that it was obtained in violation of s.9, and hence s.7, of the Charter, in circumstances which once again require exclusion pursuant to s.24(2) of the Charter.

2. Rights to counsel: s.10(b)

166 Paragraph 10(b) of the Charter reads as follows:

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

167 The focus of the accused's motion is upon the period leading up to his arrest at about 10.15 p.m. on October 15th 1993, more particularly while he was being interviewed by Sgt. McMartin at the Homicide Task Force offices in Yellowknife that day. Nonetheless, he also relies upon the evidence of previous contacts between the accused and the police beginning with the "warned" statement in writing which the police obtained from him on October 16th 1992. The thesis which is propounded on behalf of the accused is that the police, by their words and actions, effectively convinced him that he had no right to silence, no right to refuse to co-operate with them and no right to the presumption of innocence. As a result, it is argued, the accused complied with all their requests, talked to them and did all they required to "prove his innocence".

168 Not that the accused is not also relying upon the events at the time of the arrest and thereafter; but, as I understand the argument, it largely stands or falls on the circumstances which preceded that event.

169 The accused relies upon the decision of the Supreme Court of Canada in *R. v. Therens*, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481, 4 C.R. (3d) 97, 18 D.L.R. (4th) 655, (1985) 4 W.W.R. 286, 38 Alta. L.R. (2d) 99, 40 Sask.R. 122, 13 C.R.R. 193, 32 M.V.R. 153, 59 N.R. 122 for the following passage from the reasons of Le Dain J. (in dissent but for all members of the court as to what constitutes "detention" in s.10(b) of the Charter), at page 504 (C.C.C.):

> In addition to the case of deprivation of liberty by physical constraint, there is, in my opinion, a detention within s.10 of the Charter when a police officer or other agent of the State assumes control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes counsel.

170 The difficulty which I find with the accused's reliance upon this passage is that, in *R. v. Therens*, the accused had not been informed by the police of his rights to counsel under s.10(b) of the Charter, when the police made a demand upon him to accompany them for a breathalyzer test. In the present case, on the contrary, the police did inform the accused of those rights on each and every occasion when they interviewed him beginning with the interview I have mentioned leading to the "warned" written statement on October 16th 1992. In other words, if there was a detention of the accused on those occasions, and that would include the interview with Sgt. McMartin on October 15th 1993, it was not in breach of s.10(b) of the Charter as occurred in *R. v. Therens*.

171 Counsel for the accused also recites the following passage from the judgment of Le Dain J. in *R. v. Therens*. at page 505 (C.C.C.):

> Although it is not strictly necessary for purposes of this case, I would go further. In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

172 Context for this passage must not however be ignored. As learned counsel for the accused very properly reminded the Court during the *voir dire*, the meaning of words torn from their context may all too easily be distorted and misunderstood. In the context of the facts of *R. v. Therens*, those words make very clear good sense. Applied to the context of the present case, the sense is by no means as clear. In the present instance, on each occasion that the police interviewed the accused, they gave him the standard caution, to the effect that he need not say anything, that he had nothing to hope from any promise and nothing to fear from any threat which may have been held out to

him by anyone in authority, but that anything he did say might be used in evidence. And, on each occasion, the accused acknowledged that he understood the caution. On a number of those occasions he was, in addition, given a secondary "clearing" (or "purge") caution. And, latterly, the police made a practice of asking him if he had, while speaking to them, felt in any way coerced, threatened or under compulsion to do so, to all of which he responded, quite without difficulty, that he had not.

173 The circumstances giving context to the accused's dealings with the police in the present case are clearly distinguishable, in point of fact, from those in *R. v. Therens*.

174 But counsel for the accused does not rest his case there. He relies also upon the minority reasons of Wilson and Sopinka JJ. in *R. v. Hebert*, each separately given. Both judges referred to the right to silence as arising whenever the coercive power of the state is brought to bear in reference to an individual. Again, we must read their reasons in context. *R. v. Hebert* raised an issue of the accused's right to refuse to speak to the police, which he had exercised in the circumstances of that case. As already mentioned, that is not this case.

175 And counsel for the accused relies also on the recent decision of the Supreme Court of Canada in *Kenneth Bartle v. The Queen*, as yet unreported, September 29th 1994 (No. 23623). That was a case where the police were held to have failed fully to comply with their informational duties under s.10(b) of the Charter, in the circumstances of that case. No objection, however, has been taken to the form of words

used by the police in the present case, on any of the many occasions on which they informed the accused of his s.10(b) rights. This case does not fall to be decided, therefore, in accordance with the decision in *Bartle's* case.

176 As for the submission by counsel for the accused that there was a failure by the police to allow the accused to exercise his s.10(b) rights, more particularly during the interview with Sgt. McMartin on October 15th 1994, this seems, with all due deference, to ignore both the accused's response ("No thanks"), at the time, to Corporal McGowan, who informed the accused once again of his s.10(b) rights in the presence of Sgt. McMartin at the outset, and as well the fact that the accused freely left the interview at 3.45 p.m. and was then at liberty to call, or go and consult, or retain counsel if he thought fit to do so, before he went back to continue the interview at 5.30 p.m., even though he had meanwhile contemplated making a telephone call to the Homicide Task Force offices to cancel the rest of the interview. And the submission also ignores the cross-examination testimony of the accused on the *voir dire* to the effect that he in fact knew at the time of the interview on October 15th 1993 that he had the right to retain and instruct counsel without delay and, furthermore, that if he could not afford a lawyer, one would be provided for him "free immediately". Moreover, the accused's evidence is that he had a lawyer at the time, for another matter, namely Mr. Marshall, and that he could have afforded to pay for legal services much as he may have been reluctant to do so.

177 The evidence shows, for that matter, that the accused did not wish to consult a lawyer or even contact one until about 3.00 p.m. on October 16th 1993. And

then it was a case of his really wishing to get in touch, through the lawyer, with his wife. In the conversation he had with his cell-mate later that day, the accused told him that he had never actually wanted a lawyer, as such.

178 My assessment of the evidence taken as a whole is that the accused, as a self-possessed and self-confident individual accustomed to working and thinking independently for himself in surroundings of great potential danger, scorned the idea that he might obtain advice or assistance from a lawyer and only mentioned that he might require legal advice more as a tactic in his verbal fencing with Sgt. McMartin than as a genuine expression of either his need or his wish to consult or be represented by counsel.

179 Assuming, without deciding, that the accused was "detained" between about 5.30 p.m. on October 15th 1993 and his arrest later that evening, I remain unpersuaded, on the evidence and a balance of probabilities, that there was any infringement or denial of his s.10(b) rights during that time. Furthermore, I am not persuaded, again on the same basis, that there was any such infringement or denial at the time of his arrest or thereafter.

180 The motion in reliance upon s.10(b) of the Charter is therefore dismissed.

3. Arbitrary detention: s.7 and s.9

181 Section 9 of the *Canadian Charter of Rights and Freedoms* declares:

> 9. Everyone has the right not to be arbitrarily detained or imprisoned.

182 The crux of this motion is that the accused was unlawfully detained

following his arrest when he was not brought before the justice of the peace "without unreasonable delay" pursuant to s.503(1)(a) of the *Criminal Code*. As I have already concluded, there was no such delay in the factual circumstances of this case. The requirements of s.503(1)(a) were duly complied with.

183 No challenge to the constitutional validity of s.503(1)(a) of the Code is raised in this case. That provision states the law which must govern. As for the technical departures from the requirements of s.515(10) of the Code and Form 8, in the details of the remand, I am unable to accept that these are of any real significance in the circumstances. The remand warrant did not, as in *R. v. Précourt* (1976), 39 C.C.C. (2d) 311 (Ont. C.A.), specify any particular place of confinement. Instead it directed detention in "any common gaol" (my emphasis). The justice of the peace expressly ordered that the accused be kept in the custody of the R.C.M.P., unlike the situation in *R. v. Précourt*. The evidence is that the accused made no objection to this at the time. Furthermore, the evidence reveals that no suitable alternative custodial facility was then available and ready to accept him. The evidence does not reveal any oblique motive on the part of the police in their request for his remand into their continued custody until he could appear before the Territorial Court the following Monday.

184 As mentioned in the course of argument, the term "prison" which appears in s.516 of the Code (and, by implication, is referred to in s.515(10)) is defined by s.2 of the Code to include a "common jail, ... lock up ... or other place in which persons who are charged with or convicted of offences are usually kept in custody". The evidence shows that a remand into the custody of the R.C.M.P. at Yellowknife was usual in

October 1993, where the prisoner had been arrested on the weekend, as was the situation here.

185 The expression "arbitrarily" in s.9 of the Charter was considered authoritatively in *R. v. Hufsky*, [1988] 1 S.C.R. 621, 40 C.C.C. (3d) 398, 63 C.R. (3d) 14, 32 C.R.R. 193, 27 O.A.C. 103, 4 M.V.R. (2d) 170, 84 N.R. 365, in which it was held that a random police spot check of highway traffic constituted an arbitrary detention because selection of any vehicle for checking was in the absolute discretion of the police making the check. It was held that: "A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise". See also *R. v. Pearson*, [1992] 3 S.C.R. 665, 77 C.C.C. (3d) 124, 17 C.R. (4th) 1, 12 C.R.R. (2d) 1, 52 Q.A.C. 1, 144 N.R. 243 and *R. v. Morales*, [1992] 3 S.C.R. 711, 77 C.C.C. (3d) 91, 17 C.R. (4th) 24, 12 C.R.R. (2d) 31, 51 Q.A.C. 161, 144 N.R. 176.

186 Paragraph 503(1)(a) of the *Criminal Code* does, however, provide express criteria for the exercise of police discretion respecting the continued detention of prisoners following their arrest. Those criteria were in fact complied with in this instance, on the evidence before the Court. And there is no suggestion that the accused had been arrested without reasonable cause. Even in the sense that "arbitrarily" means "without reasonable cause" (see *Quinion v. Horne*, [1906] 1 Ch. 596 at pp. 603-4), there is no basis for the claim that the accused in this case was arbitrarily detained following his arrest. See also *Levitz v. Ryan* (1972), 9 C.C.C. (2d) 182, 29 D.L.R. (3d) 519, [1972] 3 O.R. 783 (C.A.) where reference is made to *Isbrandtson Co., Inc. v. United States*, 96 F.Supp. 883 (1951) at page 889, where it was held that:

> ... arbitrary conduct means unreasoned or unreasonable conduct, i.e. without reference to an adequate determining principle or standard.

187 It may be added that practices in relation to the custody of prisoners on remand may well differ in Ontario or Quebec from those in other parts of Canada, more particularly the Northwest Territories. The practice evidently followed at Yellowknife in October 1993 did not vary, so far as I am aware, from that followed elsewhere in the Northwest Territories at that time. The absence of facilities other than police holding cells in most communities in the Northwest Territories would make it impracticable, and indeed unreasonable, to here require that remand prisoners be detained elsewhere.

188 There is simply no evidence before me to the effect that the accused's "security of the person" was in any way infringed or denied by his detention on remand in the police holding cells at Yellowknife. Clearly, the police had taken precautions for his personal security, so much so that the accused has testified that he believed Cpl. Ingraham was a police officer or agent who had been specially detailed to maintain a close watch over him, so as to provide him with constant protection even from himself. There was no breach of the s.7 Charter rights of the accused during either the remand proceedings before the justice of the peace or during the accused's detention in police custody pursuant to the remand.

189 In conclusion, this motion must also be dismissed since I remain unpersuaded, on the evidence before me and a balance of probabilities that there was any infringement or denial of the accused's rights and freedoms as declared in either s.7 or

s.9 of the Charter so as to require consideration of s.24(2). Even if, perchance, such a violation were to be thought to have occurred (bearing in mind what was said in 1968 in the Royal Commission report mentioned earlier), I am completely satisfied that if the administration of justice were to be brought into disrepute it would only be as a result of the exclusion, and not the admission, of the impugned evidence at trial.

III. Conclusion

190 I rule that the evidence tendered on behalf of the Crown is admissible in evidence at the trial subject only to such editing as may be required to exclude any mention of the accused's previous criminal record or any other item which would be subject to exclusion for reasons other than discussed in the course of this *voir dire*. This ruling does not apply in respect of the search warrant or the boots seized by police on June 18th 1993.

191 Counsel on both sides have greatly assisted the Court in presenting their submissions, and in the reception by the Court of the evidence, in this very lengthy, complex and no doubt important matter. I express my warm appreciation to each of them for this.

M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
October 21st 1994

Counsel for the Crown: Peter W.L. Martin, Q.C.
David W. Guenter

Counsel for the Accused: Glen Orris, Q.C.
Gillian Boothroyd

CR 02518

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROGER WALLACE WARREN

VOIR DIRE RULINGS