

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

- and -

LAWRENCE LLOYD BLACKDUCK

RULING ON VOIR DIRE

A) INTRODUCTION

[1] Lawrence Lloyd Blackduck faces charges of aggravated assault, assault with a weapon, and uttering a death threat. His jury trial on these charges is scheduled to commence November 24, 2014.

[2] During the course of the investigation into this matter, Mr. Blackduck was interviewed by Sgt. Jeremie Landry (he had the rank of Corporal at the time, but I have used his current rank throughout this Ruling). The Crown wishes to use this statement at Mr. Blackduck's trial. Mr. Blackduck's position is that the statement is not admissible.

[3] A *voir dire* was scheduled to determine the admissibility of the statement from the point of view of its voluntariness. No application was filed alleging breaches of Mr. Blackduck's rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*). The *voir dire* evidence was called on May 22 and 23. Counsel made their submissions on July 24, 2014.

[4] Mr. Blackduck's first language is Tlicho (which was also referred to as "Dogrib" during the evidence at the *voir dire*). His position that the statement should not be admitted is largely based on the fact that when it was taken, Mr. Blackduck did not have the assistance of an interpreter. He argues that his limited comprehension of the English language and his limited ability to express himself in that language makes the statement inadmissible.

[5] The Crown called Sgt. Landry and Cst. Shawn DeGrandpre, the two police officers who dealt with Mr. Blackduck on the day of his arrest. The Crown also called Roger Charlo, who was called in to work as a guard after Mr. Blackduck was taken into custody. Mr. Blackduck testified on the *voir dire* as well. He did so with the assistance of an interpreter.

#### B) OVERVIEW OF EVENTS FROM MR. BLACKDUCK'S ARREST TO THE START OF THE INTERVIEW

[6] The investigation into this matter began shortly before 9:00AM on March 28, 2014. The Royal Canadian Mounted Police (R.C.M.P.) in Behchoko received calls requesting police assistance and reporting that two men had been injured. In response to this, Sgt. Landry and Cst. DeGrandpre attended the social services office in Behchoko.

[7] Mr. Blackduck was in the sitting area outside the social services office. He appeared calm but had blood on his clothes. Cst. DeGrandpre stayed near him while Sgt. Landry went inside the social services office and obtained information from witnesses who were there. Based on that information, Sgt. Landry advised Cst. DeGrandpre that Mr. Blackduck should be placed under arrest.

[8] Cst. DeGrandpre advised Mr. Blackduck that he was under arrest for assault causing bodily harm. He escorted Mr. Blackduck to the police vehicle. Once Mr. Blackduck was seated in the back of the vehicle, Cst. DeGrandpre advised him again of the reason for his arrest, advised him of his right to counsel, and told him that he did not need to say anything but that anything he did say could be used as evidence.

[9] Cst. DeGrandpre did not make any note of what Mr. Blackduck's response was to being told about the reason for his arrest, but he testified that he believed that Mr. Blackduck understood. Mr. Blackduck's response to being advised of his rights to counsel was "he stole my money". His response, when asked if he understood the police caution, was "yeah".

[10] According to Cst. DeGrandpre, Mr. Blackduck was intoxicated. While he was initially calm, he became slightly belligerent when he was told he was under arrest. After he was advised of his rights he continued to be belligerent, swearing and yelling. Cst. DeGrandpre could not understand what Mr. Blackduck was saying but he said he was swearing in English, saying things associated with Afghanistan and Germany.

[11] The officers drove Mr. Blackduck to the R.C.M.P. detachment and lodged him in a cell. Cst. DeGrandpre left the detachment to respond to another call. The threat that forms the subject-matter of the uttering threats charge is alleged to have been made to Sgt. Landry while he was completing the booking procedure with respect to Mr. Blackduck, and while the two of them were alone at the detachment. Mr. Blackduck is alleged to have said "I'm going to kill you guys".

[12] Cst. DeGrandpre returned to the detachment at 11:00. Sgt. Landry passed on additional information to him. Cst. DeGrandpre went to see Mr. Blackduck at the cell. He advised him of the charges he would be facing, because they were different from the ones he had been told about at the time of his arrest. Cst. DeGrandpre repeated the rights and warnings he had given to Mr. Blackduck in the police vehicle a few hours earlier.

[13] Cst. DeGrandpre was unable to say if Mr. Blackduck gave any response when he was advised of what he would be charged with, because he did not have a note of it. He testified that when he asked Mr. Blackduck if he wanted to contact a lawyer, Mr. Blackduck answered "not right away". When he asked Mr. Blackduck if he understood the police warning, Mr. Blackduck replied "yes".

[14] Cst. DeGrandpre advised Mr. Blackduck that he would be remanded in custody pending a show cause hearing to determine whether he would be released or not. Cst. DeGrandpre suggested to Mr. Blackduck that he may wish to call a lawyer but Mr. Blackduck declined to do so.

[15] Cst. DeGrandpre testified that Mr. Blackduck became agitated again during this interaction, and made various utterances, calling him the "white devil", and making disparaging remarks about the court system and the "bitch judge".

[16] Cst. DeGrandpre had no further involvement with Mr. Blackduck that day. He testified that he did not have the impression that Mr. Blackduck had any difficulty

understanding him. Mr. Blackduck did not at any time request the assistance of an interpreter.

[17] James Charlo was called in to work as a guard after Mr. Blackduck was lodged in cells. He did not have any contact with Mr. Blackduck while he was guarding him. Guards are asked to record observations they make about prisoners in the guards' logbook. Mr. Charlo's notes indicate that during the time he was guarding him, Mr. Blackduck was at times standing in his cell, at other times lying down on a mattress in the cell. Mr. Charlo made notes that Mr. Blackduck was swearing at one point. He testified that Mr. Blackduck was swearing mostly in English. Mr. Charlo also made notes that Mr. Blackduck at another point was singing. In his testimony Mr. Charlo said he remembers the song being a tea dance, and that Mr. Blackduck was singing it in Tlichó.

[18] In his *voir dire* testimony, Mr. Blackduck said he does not understand the English language very well, that there are words he does not understand, others that he mixes up with other words. He said that it is very difficult for him to understand, or express himself, when a conversation takes place in English and he does not have an interpreter.

[19] Mr. Blackduck testified that he remembers very little of what took place between the time of his arrest and the time of the interview. He remembers sitting on a sofa outside the social services office. He said he was really drunk at the time and recalls only being walked to the police truck. He recalls the police officer speaking to him, but said did not fully understand what he was saying to him.

[20] Mr. Blackduck recalls being put in a cell but said he had very limited recollection of things he was told at that point. He has no recollection of saying anything to Mr. Charlo. He has no recollection of swearing or singing. But he testified that he specifically recalls the officer escorting him to the cell saying to him "you like to hit old men, don't you?" He said that comment really bothered him.

### C) THE INTERVIEW

[21] Shortly before 8:00PM the same day Sgt. Landry brought Mr. Blackduck from his cell to an interview room in the detachment. The interaction between Sgt. Landry and Mr. Blackduck in that room was video-recorded, so there is no issue about what took place between them at that point. The recording was filed as an exhibit on the *voir dire*.

A transcript of the recording was filed as well, to be used as an aid only. The evidence, and what I have relied on for the purposes of this Ruling, is the recording itself.

[22] At the start of the interview, Sgt. Landry told Mr. Blackduck what charges he was facing. He told him he had the right to retain and instruct counsel in private, and advised him of the availability of free legal advice through the legal aid plan. Sgt. Landry also gave Mr. Blackduck the standard police cautions.

[23] Mr. Blackduck indicated he wanted to speak to counsel, specifically, Jay Bran. Sgt. Landry testified that he took Mr. Blackduck to his office to try to contact Mr. Bran. Sgt. Landry said he phoned Mr. Bran's office and there was no answer. Sgt. Landry then called Mr. Bran's home number and got no answer there either. Sgt. Landry said he left a message for Mr. Bran at his home number.

[24] Sgt. Landry and Mr. Blackduck returned to the interview room. Sgt. Landry spoke about the efforts to reach Mr. Bran and about having asked Mr. Blackduck if he wanted Sgt. Landry to call another lawyer for him. Mr. Blackduck said he was willing to give a statement without speaking to anyone beforehand, and that he might talk to Mr. Bran later. Sgt. Landry told Mr. Blackduck that if at any point during the interview he decided he did want to speak to a lawyer, he should say so and Sgt. Landry would get him in touch with one.

[25] During the course of the interview Mr. Blackduck admitted that he stabbed two individuals. He said that he did so in self defence, after he had himself been threatened, assaulted for no reason, and injured. As for the alleged threat against the police officers, Mr. Blackduck initially denied making it. Later he suggested the officer misunderstood his words, and that he was just singing a song.

[26] Sgt. Landry testified that Mr. Blackduck did not request the assistance of an interpreter at any point that day. Sgt. Landry was familiar with Mr. Blackduck from past dealings with him in Yellowknife as well as in Behchoko. He had seen Mr. Blackduck being dealt with in Court without an interpreter being used. His

overall impression during his interactions with Mr. Blackduck that day was that Mr. Blackduck understood everything he was being told.

[27] Mr. Blackduck testified that there were many things during the interview with Sgt. Landry that he did not understand. Counsel repeated the words of the police caution in

English and asked Mr. Blackduck if he understood what those words meant. Mr. Blackduck said that he did not. He was asked if he knows what D.N.A. is. He said he does not, and that when the officer was talking to him about D.N.A. and swabs of blood being taken, he thought the police officer was talking about someone "swallowing blood". Mr. Blackduck said that he did not understand what the words "are you waiving your right?" meant either.

[28] Mr. Blackduck said on a number of occasions that he thought the other people involved in the incident would be the ones to get charged, not him. He said that he believed that was the reason Sgt. Landry was speaking with him. He said he believed he had been picked up and lodged in cells that morning because he was drunk.

[29] Mr. Blackduck testified that when people speak to him in English and he does not understand, or he does not know how to answer a question, he tends to answer "yes". I understood him to say that although he said "yes" many times during the interview, he did not always understand what he was saying "yes" to.

[30] Mr. Blackduck also said, in response to a question from his counsel, that he did not understand why he was in court on the day of the *voir dire* because it had not been explained fully to him.

[31] Mr. Blackduck's criminal record was put to him on cross-examination and was marked as an exhibit. It is a lengthy record, and Mr. Blackduck acknowledged that it was his. He acknowledged that he has been arrested and charged numerous times in the past. Crown suggested to him that given the number of times he has been before the courts, he is very familiar with how the criminal justice process operates. Mr. Blackduck responded that there have been times in the past where he had interpreters assisting him in court, but also times where he did not fully understand what was going on but pleaded guilty anyway. He also said there were several times when he was put in jail when he did not understand why.

[32] Mr. Blackduck acknowledged that he never asked for an interpreter during the interview or at any point that day. He said he did not know that he could ask for one.

#### D) ANALYSIS

##### 1. Preliminary remarks

[33] As I noted at the outset, Mr. Blackduck has not filed an application seeking the exclusion of the statement on the basis of infringements of any of his *Charter* protected rights. In particular, he has not filed an application alleging any breach of his right to

counsel. Yet, some of the evidence and submissions presented at the *voir dire* were related to that issue. Before I deal with the issue of voluntariness, I want to address those aspects of the evidence and of the submissions.

[34] As already noted, the recording shows that at the start of the interview, Sgt. Landry advised Mr. Blackduck of what he was charged with, of his rights to counsel, and gave him the standard police cautions. Sgt. Landry then asked Mr. Blackduck if he wanted to speak to a lawyer and Mr. Blackduck said he wanted to speak with Jay Bran. Mr. Bran is a lawyer who practices in the Northwest Territories, and is the counsel who is representing Mr. Blackduck in this trial.

[35] Sgt. Landry was cross-examined in a lot of detail about the steps he took to put Mr. Blackduck in touch with counsel. One of the topics raised was how Sgt. Landry came to have access to Mr. Bran's home number. Another was why he chose to leave a message at that number but not at Mr. Bran's office; Sgt. Landry was also asked to confirm that he never gave Mr. Blackduck the phone, or a phone book, and that he never placed a call for Mr. Blackduck to the 24-hour duty legal aid counsel.

[36] In addition, in cross-examining Cst. DeGrandpre, counsel elicited evidence from him about the usual procedures for getting individuals in touch with counsel at the Behchoko R.C.M.P. detachment, more specifically, that using an office inside the detachment itself would be highly unusual. That issue was not put to Sgt. Landry, however.

[37] Had there been a *Charter* application alleging a breach of Mr. Blackduck's right to retain and instruct counsel, this evidence might have been significant. For example, Mr. Blackduck's decision to continue with the interview even though he had not been able to reach counsel would have come under scrutiny. When a detainee expresses the wish to speak to counsel, but subsequently waives that right, the standard to constitute effective waiver is high, and special obligations are

triggered for the police:

(...) once a detainee asserts his or her right to counsel and is duly diligent in exercising it, thereby triggering the obligation on the police to hold off, the standard required to constitute effective waiver of this right will be high. Upon the detainee doing something which suggests he or she has changed his or her mind and no longer wishes to speak to a lawyer, police will be required to advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their obligation during this time not to elicit incriminating evidence from the detainee.

*R. v. Prosper* [1994] 3 S.C.R. 236, para. 50

[38] In that context, Mr. Blackduck's language skills would have been relevant not just from the point of view of voluntariness, but also from the point of view of his understanding of his right to counsel. In circumstances where a person's ability to understand English is limited, the police may be required to take extra steps to ensure that person understands his or her rights and has a meaningful opportunity to exercise them. *R. v. Arjun*, 2013 BCSC 2076, para. 90.

[39] But in the absence of an application to exclude evidence based on a breach of the rights protected by paragraph 10(b) of the *Charter*, these issues are simply not before the Court on this *voir dire*.

[40] Defence relied on *R. v. Harrer* [1995] 3 S.C.R. 562, in support for the proposition that the statement could be excluded on the basis of the *Charter*, even in the absence of a formal *Charter* application being made.

[41] In *Harrer*, the issue was the admissibility, in a prosecution taking place in Canada, of a statement taken from the accused in the United States by U.S. officials. The procedure followed complied with the law applicable in that country. The accused had been arrested and advised of her rights on the basis of her being unlawfully in the United States. As her interrogation progressed, she became a suspect in having assisted her boyfriend to escape lawful custody, and was asked questions on that topic. She was not advised of this broadening of the scope of the investigation, nor of the change in her jeopardy. Under American law, she did not have to be. But by *Charter* standards, police would have been required to advise her of the change in her jeopardy.



[42] The main issue in *Harrer* was whether there had been a *Charter* breach, which in turn depended on whether the *Charter* applied to the American authorities in those circumstances. The Supreme Court of Canada concluded that it did not. The Court went on to say that under certain circumstances, a *Charter* remedy could nonetheless be available in this type of situation, on the basis of the right to a fair trial protected by paragraph 11(d) of the *Charter*, or on the basis of the rules of fundamental justice enshrined in section 7. Ultimately, the Supreme Court decided that there was no need to resort to those areas of relief, and that it was proper for the statement to be admitted. Given this, the comments about the availability of the relief are *obiter*.

[43] In this case, I do not think exclusion of evidence on that basis of section 7 or paragraph 11(d) of the *Charter* should be entertained. In my view there are both procedural and substantive impediments to doing so.

[44] An application to exclude evidence that is based on the *Charter*, no matter on what specific section of the *Charter* it is based, is a very specific type of application. It will inevitably engage principles and considerations that go beyond the general common law rules of evidence. It is open to an accused to make such an application, but it triggers notice requirements.

[45] Part 13 of the *Criminal Procedure Rules of the Supreme Court of the Northwest Territories* sets out the requirements that must be complied for applications seeking exclusion of evidence. Rule 72 makes specific reference to applications to exclude evidence based on Paragraph 24(2) of the *Charter*. I find that by analogy, similar requirements must apply to an application to exclude evidence even if it based on other provisions of the *Charter*. A *voir dire* into the admissibility of evidence based on the general rules of evidence cannot be turned into a *Charter* application without notice. The basis for seeking exclusion of evidence may have an impact on the type of evidence that the parties decide to call on the *voir dire*. If the fundamental scope of a *voir dire* is permitted to change part-way into the hearing, there is a great risk of proceedings being derailed and delayed.

[46] There are also substantive concerns about entertaining the Defence's position in this case. The comments in *Harrer*, even if they are *obiter*, carry great weight, given that they come from the Supreme Court of Canada. But they must be placed in context. The situation that arose in *Harrer* was very unique. At issue was the potential availability of *Charter* relief to preserve trial fairness when an

accused could not say that the evidence was obtained through a breach of the *Charter*.

[47] I would be very reluctant to adopt the same approach in situations such as the one in this case, where it was open to Mr. Blackduck to seek *Charter* relief he in the ordinary course, by filing a *Charter* application alleging a breach of his right to counsel, or a breach of trial fairness, or a breach of the rules of fundamental justice, if that is what he wished to do.

[48] In any event, as far as fair trial rights, quite apart from any relief that might be available under the *Charter*, trial judges have, in Canadian law, the discretion to exclude evidence where its prejudicial effect would outweigh its probative value. This residual discretion applies to the admission of statements made by accused persons just as it does to any other type of evidence the prosecution may want to use. The basis for that discretion is rooted in the importance of preserving trial fairness.

[49] Here, the main area of contention, as far as admissibility is concerned, has to do with Mr. Blackduck's language skills. If that issue gives rise to concerns about trial fairness that are not already captured by the general principles that govern the admissibility of confessions, those concerns can be addressed through the exercise of the Court's residual discretion to exclude evidence.

## 2. Voluntariness - General Principles

[50] The rule that governs the admissibility of statements made to persons in authority has been recast in *R. v. Oickle*, (2000) 2 S.C.R. 3, and was further clarified in *R. v. Singh*, (2007) 3 S.C.R. 405 and *R. v. Spencer*, (2007) 1 S.C.R. 151.

[51] One of the concerns that underlie the confessions rule is the importance of ensuring that unreliable confessions not be admitted in evidence. The assessment of voluntariness requires a contextual analysis and is very fact-specific. Courts are required to consider a number of factors, including whether the statement is the result of threats or inducements made by persons in authority; whether the person who made the statement had an operating mind at the relevant time; whether the statement is the result of oppressive circumstances; and whether police used, in obtaining the statement, tricks that would shock the community.

[52] Here, there is no evidence of any threats or inducements. Mr. Blackduck was sober at the time of the interview and there is nothing to suggest he did not have an operating mind when the statement was taken. There is no evidence of oppression. And

there is no suggestion that Sgt. Landry resorted to any inappropriate trickery to persuade Mr. Blackduck to talk to him.

[53] But voluntariness encompasses broader considerations. The confessions rule serves to protect a detainee's exercise of free will in choosing whether to remain silent, and includes safeguards to ensure that the admission of the statement will not result in an unfair trial. *R. v. Singh, supra*, para. 34.

[54] Under the current state of the law, the voluntariness analysis necessarily includes consideration of whether the police respected the suspect's right to remain silent. Where, as here, the issue is the admissibility of the statement made to police officers by a person who was in their custody, the question of whether the detainee's *Charter* protected right to silence was breached overlaps completely with the analysis of voluntariness at common law. The two legal tests are functionally equivalent. *R. v. Singh, supra*, para. 8.

### 3. Application to the circumstances of this case

[55] In the specific circumstances of this case, as I already mentioned, the evidence does not give rise to any concerns about the statement having been the result of threats, inducements, oppression, or inappropriate trickery. There is also no issue about Mr. Blackduck having had an operating mind during the interview.

[56] The Crown argues that the language issue is a factor that should not go to the issue of admissibility of the statement, but rather, goes to the weight that can be attached to it, and should be left to the jury to assess.

[57] There is support in the case law for the proposition that where language comprehension is an issue, it only renders a statement involuntary and inadmissible if the accused's comprehension of the language used during the statement was so deficient that it made it impossible for the accused to understand what the person taking the statement was saying, or made it impossible for that accused to make a statement. *R. v. Arjun, supra*, paras 58-59. *R. v. Alayadi* 2010 ABPC 79, para. 35.

[58] This makes sense: unless a person has a basic understanding of the language in which the interview takes place, nothing said in that interview can reasonably be attributed to that person.

[59] Mr. Blackduck claimed, in his testimony at the *voir dire*, that he understood very little of what took place in his interview with Sgt. Landry. In my view, the level of

comprehension he described in his evidence falls short of what would be required for the statement to be considered to actually be his. For that reason, if his evidence in this regard is accepted or leaves me with a reasonable doubt, it is dispositive of the issue on this *voir dire*. Given this, before examining other aspects of the case, I must first assess Mr. Blackduck's evidence.

[60] I have great difficulty accepting Mr. Blackduck's evidence as a reliable account of his level of understanding of his interaction with Sgt. Landry. I accept, and it is apparent from the recording of the interview, that Mr. Blackduck's understanding of the English language has considerable limits. I do not, however, accept that his understanding is as perfunctory as he claimed in his testimony. In my view, that evidence is contradicted by the manner in which Mr. Blackduck responded to Sgt. Landry during the interview. If he understood as little as he claims, he would not have been able to provide some of the answers he did, many of which were contextually appropriate.

[61] There are other reasons why I do not find Mr. Blackduck's testimony entirely credible.

[62] Mr. Blackduck testified at the *voir dire* with the assistance of an interpreter. Because of some of Mr. Blackduck's comments about his difficulties understanding his interactions with the police officers when he was charged on this occasion, his difficulties in understanding past court proceedings and his confusion about the purpose of this *voir dire*, I made a point of asking him, at the conclusion of his testimony, whether he had had any difficulty understanding the interpreter, or understanding any of the questions put to him. Mr. Blackduck answered that he understood everything in the proceedings very well and had no difficulty communicating with the interpreter. Indeed, during the hearing he never expressed any difficulty or problem understanding the questions as translated. In light of those answers, for the purpose of assessing his evidence, I have to assume he understood the questions that were put to him.

[63] Yet, there were several times during the *voir dire* where Mr. Blackduck's answers were not responsive at all to the questions put to him. In particular, during cross-examination, Mr. Blackduck seemed intent, rather than answering the questions, on reiterating over and over again his difficulties with English and that he should have had an interpreter during the interview with Sgt. Landry. Some

questions, despite having been repeated and put to him several times by Crown counsel, were never actually answered.

[64] Another factor that has a bearing on my assessment of Mr. Blackduck's evidence is that his memory of the events that followed his arrest appears to be quite selective and somewhat self-serving. He acknowledged that he was very drunk when he was arrested by police. He said he had very limited recollection of his dealings with the police officers at that point. He was unequivocal about his lack of memory about things that might put him in a negative light. For example, he said he did not remember swearing at the officers or swearing when he was in cells. By contrast, when he was asked about his memory of things that might reflect badly on the police officers, he was more nuanced. For example when it was suggested to him he was never threatened by police his answer was that he "was not certain of that".

[65] Mr. Blackduck also claimed to have a clear memory of one officer telling him "you like to hit old men, don't you" as he was being escorted to cells. Neither officer referred to saying anything of the sort to Mr. Blackduck in their testimony. The alleged comment was not put to either of them in cross-examination so they did not have an opportunity to respond to that allegation. This affects the weight to be attached to that aspect of Mr. Blackduck's evidence. But even apart from that, it strikes me as somewhat self-serving and dubious that Mr. Blackduck would remember that one interaction so clearly while remembering so little else about the time between his arrest and the interview.

[66] Mr. Blackduck claimed to not even understand why he was in Court when this *voir dire* proceeded. I find this difficult to accept. Mr. Blackduck was arrested, charged, and kept in custody on these charges. He had a show cause hearing and a preliminary hearing. He chose to be tried by a jury. He is represented by very diligent counsel. I find it difficult to believe that when he was testifying in Court on the *voir dire*, he did not understand why he was there.

[67] I also found that Mr. Blackduck was quite evasive in some of his answers. For example, during the interview, Sgt. Landry asked Mr. Blackduck why he threatened the officers the morning of his arrest. At first Mr. Blackduck denied having done so. Then he said he was singing a song. Sgt. Landry asked "so, 'I'm going to kill you guys' is a song?" In response Mr. Blackduck laughed. When he was cross-examined about this during the *voir dire*, Mr. Blackduck said a number of things. At first, he did not really answer the question, and instead again raised the issue of his difficulty with the English language. Crown counsel pressed him on the point. Mr. Blackduck eventually said that he was not feeling well the day of these events, that he wanted to throw up. He added that if he laughed, it was probably because he was "thinking of some very funny thoughts".

[68] With all due respect for Mr. Blackduck, I find that his explanation for laughing at that particular point of the interview makes no sense. It seems to me to have been a clumsy attempt to evade the question and the topic he was being confronted with.

[69] Those factors undermine Mr. Blackduck's credibility and have an impact on how much weight I am prepared to attach to his testimony. I find that the recording of the interview itself belies Mr. Blackduck's assertions as to his level of understanding of the English language. I do accept that he has some difficulty with English, but I conclude that he exaggerated those difficulties considerably in his testimony.

[70] That said, I do not think that the officers' perceptions of Mr. Blackduck's understanding of what they were telling him should be accepted at face value either. Those perceptions must be approached with caution. They are among the factors to consider, but they are not determinative. It is important to recognize that when it comes to language comprehension, it is quite possible for someone to appear to understand more than they actually do. The officers may have believed Mr. Blackduck understood them well that day, but that does not mean he did.

[71] The clearest and most reliable evidence available to assess Mr. Blackduck's level of comprehension during the interview is the recording itself. That recording provides a clear, objective record of an interaction of almost one hour between Sgt. Landry and Mr. Blackduck, at a time when Mr. Blackduck was sober. It is the best evidence available to me to assess Mr. Blackduck's level of understanding during that interaction. Having reviewed it carefully, I cannot say that Mr. Blackduck's comprehension of English was so deficient that it made impossible for him to understand what Sgt. Landry was saying, or made it impossible for Mr. Blackduck to express himself.

[72] But that does not end matters because in my view, the language issue must be examined from a broader perspective than it was in cases like *Adjun* and *Alayali*, which I referred to previously. The language issue is also relevant in assessing Mr. Blackduck's understanding of his right to remain silent.

[73] In Paragraphs 33 to 49, I explained why issues related to Mr. Blackduck's right to counsel should not be considered on this *voir dire*, in the absence of a *Charter* motion. The same is not true for his right to silence, because the concept of voluntariness, as it is defined in the existing jurisprudence, includes a consideration of whether the accused's right to silence was respected.

[74] In cases where the accused has not spoken to counsel before giving a statement, the police caution plays a crucial role in making the detainee aware of his or her right to silence. For that right to have any meaning, the detainee has to be able to fully understand what the caution means.

[75] This Court has recently addressed the importance of the police caution in assessing the voluntariness of a statement:

The purpose of the caution is to make the person cautioned aware of the full implications of speaking to the police, which is an element of trial fairness. Without that awareness, whether it comes from the police or from counsel, any statement obtained may be found not to have been truly voluntary. The presence of the caution is a factor in determining the voluntariness of a statement made by a person under arrest or detention and has been for over half a century: *R. v. Singh*, also referring to *Boudreau v. The King*, [1949] S.C.R. 262. In many cases it is an important factor.

As Watt J. (as he then was) put it in *R. v. Worrall*, [2002] O.J. No. 2711 (Ont. D.C. Jus.) at paragraph 106, “Voluntariness implies an awareness about what is at stake in speaking to persons in authority, or declining to assist them.”

*R. v. St. Germaine*, [2014] NWTSC 52, paras 17-18. (Currently unreported, as it is subject to a publication ban pursuant to section 648 of the *Criminal Code*).

[76] In that case, the issue was not the suspect’s language capabilities. Rather, the problem arose from what the Court found was confusing language used by the officer who gave him the caution. The Court concluded that this confusing language, in conjunction with other things that were said during the interview, may have resulted in the suspect not being aware of what was at stake in the interview.

[77] The circumstances in that case were completely different from what they are here. The suspect was not detained, had not been charged, and had attended the police station voluntarily at the request of the investigating officer. By contrast, here, the interview occurred in a context where Mr. Blackduck had been arrested, taken in custody, and lodged in cells. There was nothing ambiguous, in English, in the words used by Sgt. Landry when he gave him the police caution. On its face, this would leave little room for confusion on Mr. Blackduck’s part about what was at stake. But that, of course, assumes Mr. Blackduck’s understanding of English was sufficient to grasp the full meaning of the things that he was told.

[78] Mr. Blackduck’s responses when Sgt. Landry gave him the police caution, taken at face value, would suggest that he understood, because he responded with words like “yes”, “yeah”, or “ok”. But upon closer examination, I find that there are some

indications that Mr. Blackduck may not have actually fully understood what Sgt. Landry was telling him. The exchange that took place at the time Sgt. Landry gave Mr. Blackduck the cautions illustrates this:

LANDRY: Ok, now Lawrence

BLACKDUCK: Yes.

LANDRY: Ah, couple more things I have to read to you here.

BLACKDUCK: Ya.

LANDRY: You have been arrested with respect to the offences of Aggravated Assault times 2.

BLACKDUCK: Yes.

LANDRY: Assault with a Weapon times 2, Uttering Threats times 2. You need not say anything, you have nothing to hope for any promise or favor.

BLACKDUCK: Yes.

LANDRY: And nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence. Do you understand that?

BLACKDUCK: Yes.

LANDRY: *Last thing here is, Lawrence, if you have spoken to any other police officer.*

BLACKDUCK: *No.*

LANDRY: *Like the Constable, the other constable that was working today, if you have spoken to any other police officer or any other person in authority.*

BLACKDUCK: *Ok.*

LANDRY: *Including myself with respect to this case here.*

BLACKDUCK: *Ya.*



LANDRY: *Who has offered you any hope of advantage or threatened you in any way to make you speak.*

BLACKDUCK: *Yeah, ok.*

LANDRY: *It is my duty to warn you that no such offer or suggestion or threat.*

BLACKDUCK: *Ok.*

LANDRY: Can be of any effect and must not influence you but anything you do say may be used in evidence. Do you understand that?

BLACKDUCK: Yes I understand ya.

(The emphasis is mine)

*Transcript of Warned Statement, Exhibit "A" lines 58 to 84.*

[79] It is apparent from the italicized portions of this excerpt that at times, Mr. Blackduck answered "yes", "yeah" and "ok" at points where one would not expect him to do so if he actually understood what Sgt. Landry was telling him.

[80] This is consistent with Mr. Blackduck's testimony that when he does not understand what someone is telling him and is not sure what to say, he tends to just say "yes". I have expressed reservations about certain aspects of Mr. Blackduck's testimony, but on this point, I do accept his evidence, as it appears to be confirmed by his manner of responding at times during the interview.

[81] There are other portions of the interview where it appears Mr. Blackduck claimed to understand things when in fact he did not. For example, at one point

during the interview, Sgt. Landry introduced the topic of forensic evidence, referring to the C.S.I. television show and D.N.A.:

LANDRY: Um, ah, you've heard of CSI right?

BLACKDUCK: Yes.

LANDRY: You, have you ever watched it on TV?

BLACKDUCK: What's that?

LANDRY: CSI?

BLACKDUCK: CSI? What's that, like, what kind of movie is that?

LANDRY: Those shows where they come out and they, they look for the finger prints and the blood and on the TV?

BLACKDUCK: Yes I know.

LANDRY: Like, ah, CSI Miami, all those shows.

BLACKDUCK: Yes I know.

LANDRY: Do you know about that?

BLACKDUCK: I know about that ya.

LANDRY: Do you know what DNA is?

BLACKDUCK: Yes I know DNA ya.

LANDRY: What is it?

BLACKDUCK: I know that ya. I know it's DA and then I got it from how many years ago, ya I know that ya.

LANDRY: So you know what DNA is?

BLACKDUCK: Yes I know what DNA is.

*Transcript of Warned Statement, Exhibit "A" lines 354 to 372.*

Based on that exchange, it is far from clear that Mr. Blackduck knows what D.N.A. is, or that he is actually familiar with the C.S.I. television show.

[82] Sgt. Landry testified that he believed that Mr. Blackduck understood what he was being told. He had dealt with him in the past, and had never used an interpreter with him before. No details were adduced about the nature of Sgt. Landry's past dealings with Mr. Blackduck. There is also no evidence about whether he had ever cautioned him about his right to silence before, or about whether to his knowledge, Mr. Blackduck had ever asserted that right.

[83] I accept that Sgt. Landry, for the reasons he explained in his evidence, believed that Mr. Blackduck understood him. But that belief does not establish that in fact, Mr. Blackduck did understand everything he was being told that day, and in particular, that he understood the caution. Having an understanding of language to function in certain types of interactions is not the same thing as understanding rights, legal concepts and the potential ramifications of certain decisions.

[84] Mr. Blackduck has been before the courts numerous times, but that is not determinative either. Sgt. Landry gave general evidence about having seen Mr. Blackduck being dealt with in court without interpreters. That evidence does not establish Mr. Blackduck's level of understanding on those occasions. There is no evidence as to whether counsel who dealt with Mr. Blackduck on those other occasions had assistance from a court worker or community member in their dealings with Mr. Blackduck. And it is also possible, as Mr. Blackduck stated, that there were times where he was dealt with by police or the courts where he did not fully understand what was taking place.

[85] From the start of his dealings with police that day, Mr. Blackduck made utterances suggesting that he saw himself as a victim in this matter, not the person who had done something wrong. One of the utterances he made to Cst. DeGrandpre at the time of his arrest was "he stole my money". During his interaction with Sgt. Landry, Mr. Blackduck described being assaulted and threatened by other individuals, and said that any force he used was in self defence. He also said that he thought he was put in cells that day because he was drunk, not because he was going to be charged with anything.

[86] I am not overlooking the fact that there are other aspects of the evidence that tend to suggest that Mr. Blackduck understood that he was being charged and understood what he was being told. For example, he became belligerent when he was told he was being charged. In addition, he obviously understood his right to retain counsel because he did ask to speak to a specific lawyer.

[87] But on the whole, I find that the evidence about Mr. Blackduck's level of understanding of English is ambiguous. I conclude that Mr. Blackduck understood some things that Sgt. Landry was telling him, but not others.

[88] The assessment of voluntariness is a contextual exercise, and is highly fact-specific. Here, the issue boils down to whether Mr. Blackduck understood his right to remain silent. Bearing in mind that voluntariness implies an awareness of what is at stake, and of the implications of speaking, or not speaking, to the authorities about the alleged events, I am not satisfied that it has been established to the required standard of

proof. I am not satisfied beyond a reasonable doubt that Mr. Blackduck understood his right to remain silent and gave that right up with a full understanding of what was at stake in speaking to Sgt. Landry that day. I am also not satisfied he fully appreciated that what he was telling Sgt. Landry could be used in a prosecution against him.

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[89] I accept that the officers involved in this matter did not believe that there was any issue with Mr. Blackduck's level of understanding of what they were telling him. But when dealing with someone whose first language is not English, it may be prudent for police officers to err on the side of caution and seek the assistance of an interpreter to ensure that detainees have a clear understanding of their rights, before attempting to take a statement from them.

[90] For those reasons, I conclude that Mr. Blackduck's statement is not admissible at his trial.

"L.A. Charbonneau"  
L.A. Charbonneau  
J.S.C.

Dated at Yellowknife, NT, this  
29<sup>th</sup> day of August 2014

Counsel for the Crown: Brad Demone  
Counsel for the Accused: Jay Bran

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**IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES**

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BETWEEN

HER MAJESTY THE QUEEN

- and -

LAWRENCE LLOYD BLACKDUCK

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RULING ON *VOIR DIRE* OF THE  
HONOURABLE JUSTICE L.A CHARBONNEAU

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