

1 IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

2  
3 IN THE MATTER:

4  
5 HER MAJESTY THE QUEEN

6 VS

7  
8 ROGER WILLIAM NEEDLAY

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13 Transcript of Proceedings of an Oral Judgment  
14 delivered by His Honour Deputy Judge G. PRICE,  
15 sitting at Fort Liard in the Northwest Territories  
16 on Wednesday, June 24, A.D. 1987.

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21 APPEARANCES:

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23 MR. R. PEACH Counsel for the Crown

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25 MR. C. REHN Counsel for the Defence

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1 THE COURT: I first should say that I wish I had more  
2 time to consider the issue; but appreciating that the  
3 Accused is entitled to a speedy decision and, secondly,  
4 that it is inconvenient for me to return to Calgary and  
5 then come back again to deliver Judgment, I choose to give  
6 Judgment at this point.

7 I am also handicapped not having any Court  
8 of Appeal or Territorial decisions to consult nor, indeed,  
9 any full decisions to consult, relying merely on Snow's  
10 Criminal Code and Martin's Criminal Code and an extract  
11 from Defence Counsel coming from the Lawyers Weekly.

12 Mr. Needlay stands charged on the 16th of  
13 May, 1987, at the Hamlet of Fort Liard in the Northwest  
14 Territories that he, having consumed alcohol in such a  
15 quantity that the concentration thereof in his blood  
16 exceeded 80 milligrams of alcohol in 100 millilitres of  
17 blood, did operate a motor vehicle contrary to Section  
18 237(b) of the Criminal Code. I should note, looking at the  
19 Information, that "motor vehicle" is described as "mogor  
20 vehicle;" and I assume that Defence has no problem with  
21 correcting that if, indeed, a formal amendment is thought  
22 to be necessary.

23 MR. PEACH: I would ask to amend simply so that the  
24 record is clear, Your Honour.

25 MR. REHN: No difficulty with that.

26 THE COURT: That amendment will then go.

27 The evidence to a point is straight-

1 forward. On the 16th of May, acting on information  
2 received, the investigating Corporal observed a Cougar  
3 motor vehicle in Fort Liard. He apprehended Mr. Needlay,  
4 apprehended him in the sense that he approached him and  
5 asked him a series of questions. He asked him his name  
6 and got a response that he could not understand. He asked  
7 him for his licence, and that was produced. Apparently, he  
8 did not ask him for his car registration. He made certain  
9 observations of Mr. Needlay. Those were that he did not  
10 seem to walk normally. It appeared that one leg dragged.  
11 He observed or smelled a strong odour of alcohol. He  
12 observed that Mr. Needlay appeared a bit confused. Acting  
13 on those observations and his information received, he  
14 formed the opinion that Mr. Needlay was impaired, or  
15 rather, his ability to drive was impaired by alcohol. He  
16 therefore gave him the Breathalyzer Demand in standard form  
17 at 5:28 in the afternoon. This was then followed by the  
18 recitation of his Charter Right: his right to retain and  
19 instruct Counsel without delay. In response to that  
20 Charter advice, if that is the right terminology to use, he  
21 got no reply when he specifically asked Mr. Needlay if he  
22 understood. In cross-examination, he amplified on that  
23 indicating that he explained that "Counsel" meant "lawyer;"  
24 and he got no response to that. He then had a discussion  
25 with Mr. Needlay concerning the car, and I observe that the Officer  
26 received a response to the effect that he could leave the  
27 car where it was; but the investigating Corporal indicated

1 that the car had to be moved. By 5:30, the investigating  
2 Officers--there were two of them--and Mr. Needlay were at  
3 the Detachment office. The Breathalyzer was being set up;  
4 but then, other events intervened. The test was not  
5 administered forthwith. However, there is no issue taken  
6 as to the 25- to 30-minute delay; and I observe under the  
7 Code that the test is to be within a two-hour time period;  
8 and no issue being made of this, I do not comment further.

9 In any event, Mr. Needlay was arrested,  
10 accompanied the Officers handcuffed in the Police vehicle  
11 on the separate complaint, and then returned at 6:00 p.m.  
12 back to the Detachment. Exhibit T-1 in evidence indicates  
13 that at 6:20 the first test was taken. A Breathalyzer  
14 reading of 220 milligrams of alcohol in 100 millilitres of  
15 blood was obtained; and the second test 20 minutes later at  
16 6:40 was administered resulting in a reading of, again,  
17 220 milligrams in 100 millilitres of blood. These two  
18 results are clearly above the legal limit of .08 or 80  
19 milligrams of alcohol in 100 millilitres of blood. The  
20 readings are relatively high.

21 At one point, while Mr. Needlay was at the  
22 Police Detachment, he made the comment that he did not  
23 drink and drive and that he had some admiration for the  
24 Royal Canadian Mounted Police but not for the Edmonton City  
25 Police. He was lodged in cells over night. In the morning  
26 at 1011, he was given a copy of the Certificate of  
27 Analyses, Exhibit T-1, along with the accompanying Notice

1 guile and no attempt to shade the evidence. I find  
2 he had a memory gap. But I am not sure that that really  
3 helps him because I am persuaded by the Crown that  
4 there is a difference between a lack of understanding and a  
5 lack of memory. Clearly, Mr. Needlay had a lack of memory;  
6 but the issue here is a lack of understanding which puts the  
7 issue before the Court nicely into focus; and that really is  
8 the Charter Right, Section 10(b): "Everyone has the right  
9 upon arrest or detention to retain and instruct Counsel  
10 without delay and to be informed of that right." How can  
11 you be informed, to ask the rhetorical question, unless you  
12 understand what the Officer is advising you of?

13 The Crown invites me to rely on the Saskatch-  
14 ewan decision--the name escapes me, but it appears to be a  
15 decision of Mr. Justice Noble of the Court of Queen's Bench,  
16 basically, to the effect that the recitation of the Right  
17 is sufficient unless there are exceptional circumstances to  
18 alert the Officer that more is required. On that basis,  
19 the Crown's position is that, despite the fact that there  
20 was no response to the advice that Mr. Needlay had the right  
21 to retain and instruct Counsel without delay, there were no  
22 exceptional circumstances that required the Police to go  
23 any further. There was nothing, in other words, to put them  
24 on the alert that more was required.

25 The Defence's position is that there was an  
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1 issue as to lack of understanding and that if the Crown  
2 does not prove beyond a reasonable doubt that the Accused,  
3 Mr. Needlay, understood that he had the right to retain and  
4 instruct Counsel without delay there, then, has been an  
5 infringement of Section 10(b) of the Charter; and then, the  
6 operation of Section 24(2) of the Charter comes into  
7 effect; and basically, on the basis of the Therens decision of the  
8 Supreme Court of Canada, the evidence must be, once the  
9 Charter Right is infringed, excluded. If I am to follow the  
10 Defence's submission, then, I must ignore Exhibit T-1 since  
11 that comes after the infringement. (if I find there has been  
12 an infringement) and the case falls for lack of evidence on  
13 a material aspect of the charge.

14 I have found three cases that are of some  
15 assistance. I firstly make reference to the Clarkson  
16 decision, which is the decision recently from the Supreme  
17 Court of Canada that deals with the young woman from the  
18 Maritimes--perhaps middle-aged woman from the  
19 Maritimes--who was charged with murder. The issue there  
20 was basically waiver of her Charter Right, but I take  
21 the Supreme Court--without having the decision in front of  
22 me to refer to--to mean that you can not have waiver unless  
23 you understand that you are giving something up. So,  
24 really, the issue there was this woman was so drunk that  
25 she did not understand; and therefore, she could not waive  
26 her right to a lawyer. Because her statement followed from  
27 that, the statement was excluded.

1                   The Baig case found at 1985, 46 Criminal  
2                   Reports, Third Series, 222, a Court of Appeal decision--  
3                   unfortunately, from what province is not clear--indicates  
4                   that in the ordinary case, after a Section 10(b) Charter  
5                   Right has been read, an accused will acknowledge that he  
6                   understands his Right. In other words, in the ordinary  
7                   course, the response that the R.C.M.P. Officer should have  
8                   obtained from the Section 10(b) advice was "Yes" in response  
9                   to the question: "Do you understand you have the right to  
10                  retain and instruct Counsel without delay?" If, coming back  
11                  to the Baig case, the accused does not acknowledge that he  
12                  understands his Right, there is no duty on the Prosecution  
13                  to adduce evidence of the suspect's degree of understanding  
14                  or to adduce further evidence in the absence of such special  
15                  circumstances as drinking or obvious language difficulty or  
16                  the absence of words or conduct from which it can be reason-  
17                  ably inferred that the accused did not understand his Right.  
18                  Now, to me, that suggests two things: One, drinking is a  
19                  special circumstance and, two, are there words or is there  
20                  conduct of Mr. Needlay to indicate to the Officer that  
21                  Mr. Needlay did understand what was going on. Well, clearly,  
22                  we have in the uncontroverted evidence of Mr. Needlay the  
23                  fact that he had been drinking. In fact, the Officer smelled  
24                  a strong odour of alcohol and observed Mr. Needlay appeared  
25                  a bit confused. Is this a special circumstance, then, that  
26                  would require that the Officer go further? I think it is.

27                   I also refer to the Mole decision that

1 Mr. Rehn referred to. The five tests set out in that Court  
2 of Appeal decision--again, unfortunately, we only have the  
3 extract from the Lawyers Weekly--indicates that the advice  
4 must be given at a time when the suspect is capable of  
5 understanding and appreciating the right to Counsel without  
6 delay. In that particular case, the Mole case, Mr. Mole was  
7 very drunk, very intoxicated. He was advised of his Right.  
8 He complied with the Demand. He provided Breathalyzer  
9 samples, and tests were administered. He was acquitted at  
10 trial because the Judge ruled that he had been so drunk that  
11 he could not understand what the Police had told him. I  
12 observe that the evidence showed that the Police knew  
13 Mr. Mole could not comprehend what they had told him.

14 So the issue here becomes did the Police know  
15 that Mr. Needlay did not understand. I would answer that in  
16 the negative. Yet, they had reason to suspect that he did  
17 not understand. It would be different had the discussions  
18 as to the vehicle being left, the comment that Mr. Needlay  
19 did not drink and drive, the comments about the R.C.M.P. and  
20 the Edmonton City Police, the specific answers on the check-  
21 list--had all those things come before the Charter advice  
22 was given. But they did not. The advice as to his right to  
23 retain and instruct Counsel without delay came first, and  
24 these other discussions came later. What the Court must  
25 look at is Mr. Needlay's comprehension and understanding at  
26 the time that the Charter Right was administered.

27 Returning to the Mole decision, then, I am of



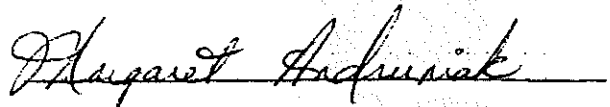
1 the view that the Police Officer should have gone further  
2 when he did not receive any kind of a response to the ques-  
3 tion, did he understand. He should have probed. That might  
4 have elicited some sort of comment or course of conduct that  
5 he could observe that would indicate that Mr. Needlay under-  
6 stood what he had been advised. In the absence of that and,  
7 clearly, because he had been drinking and appeared a bit  
8 confused, I am of the view that Mr. Needlay did not fully  
9 appreciate and fully understand the Charter Right that he  
10 was being given.

11 It therefore follows that I find that he was  
12 not capable of understanding that Right, and his Charter  
13 Right was infringed. I apply Section 24(2) of the Charter.  
14 I exclude the Breathalyzer evidence.

15 Would you stand, please.

16 You are acquitted of the charge.

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20 Certified a Correct Transcript:

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23 Margaret Andruniak  
24 Court Reporter  
25  
26  
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