*Date: 2012 06 15*
*File: T1-CR-2010-001150*

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**- and -**

**CAMERON UNKA**

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**RULING ON *VOIR DIRE***
**of the**
**HONOURABLE JUDGE CHRISTINE GAGNON**

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| Heard at: | Yellowknife, Northwest Territories<br>July 14, 2011<br>January 27, 2012<br>May 17, 2012 |
| Date of Decision: | June 15, 2012 |
| Counsel for the Crown: | Duane Praught |
| Counsel for the Accused: | Shannon Prithipaul |

[s.7, 8, 9, 10(b) of the *Canadian Charter of Rights and Freedoms*]

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"*In determining the boundaries of police powers, caution is required to ensure the proper balance between preventing excessive intrusions on an individual's liberty and privacy, and enabling the police to do what is reasonably necessary to perform their duties in protecting the public*."[1]

## INTRODUCTION

[1] Cameron Unka is a 26 year-old aboriginal man facing a number of charges contrary to sections 253(1)(a), 249.1(1)(a), 259(4) and 335(1) of the *Criminal Code*. At the time of the alleged incidents, he was 24.

[2] Prior to the start of the trial, counsel for the Defense filed a Notice of Charter Argument, followed by a Revised Notice of Charter Argument which was filed prior to the date set for the trial to continue. The Revised Notice alleges violations to sections 7,8, 9, and 10(b) of the *Canadian Charter of Rights and Freedoms* and the Accused is seeking a remedy pursuant to sections 24(1) and/or 24(2) of the *Charter*. As the Crown seeks to tender a statement that the accused gave to a person in authority, the Crown also intends to show that this statement was voluntary under the common law.

[3] The evidence has been heard in the context of a voir-dire and the Crown called as witnesses five police officers involved in some aspect of the investigation.

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[1] R. v. Clayton, [2007] S.C.J. 32

[4] At issue in this ruling are allegations that Mr. Unka's right protected under section 8 of the *Canadian Charter of Rights and Freedoms* was violated through a warrantless search of his room and the seizure of three shirts and a hat and he seeks a remedy for this breach.

[5] The Defense also alleges that pictures of his legs, arms and face were obtained unlawfully since he was not offered a second opportunity to seek legal advice prior to the pictures being taken; as a result of this violation of section 10(b) of the *Charter*, he asks that they be excluded from the evidence.

[6] The Defense further alleges that Mr. Unka's right to counsel was violated as part of a policy of the RCMP not to allow a detained person to call directly for a lawyer, and further, that his right to counsel was violated during the interview conducted by Cst. Watson. He is therefore asking that the warned statement be excluded from the evidence.

[7] Finally, the Defense alleges a violation of section 9 of the *Charter* on the basis that his arrest was unlawful as the police lacked reasonable and probable grounds to believe that he had committed an indictable offence, and that the resulting detention for more than 18 hours was unlawful and arbitrary.

[8] A first ruling was delivered orally on May 17, 2012, with respect to allegations of breach of sections 8 and 10(b) of the *Charter*, as well as with respect to the issue of the voluntariness of the warned statement under the common law rule.

[9] The present written reasons combine the text of that oral ruling and the ruling on section 9 of the *Charter* pursuant to oral arguments presented on May 17, 2012. Counsel have also argued on what the appropriate remedy should be, but have been granted permission to file further written submissions on the issue of the remedy following the filing of the Court's final ruling on sections 7, 8, 9 and 10(b) of the *Canadian Charter of Rights and Freedoms.* The issue of the appropriate remedy will therefore be decided in a ruling to be filed on August 22, 2012.

## CONTEXT PRIOR TO THE ARREST

[10] The events date back to June 25, 2010 and they occurred in or around the City of Yellowknife, in the Northwest Territories. Around 6:00 pm, the Royal

Canadian Mounted Police (RCMP) received a dispatch call regarding a possibly intoxicated driver operating a black Dodge Ram truck on the Ingraham Trail and traveling towards the City. Patrols were conducted for this vehicle, but none of the witnesses who testified during the voir-dire personally observed the vehicle travelling on the road. Information was received from Constable Stewart over the radio as he followed a black Dodge Ram over some distance. Further information communicated by a civilian witness prompted the police to direct their attention to Coronation Drive in the Kam Lake area of Yellowknife.

[11] A vehicle matching the description was located near a building on Coronation Drive, but nobody was observed inside it or in its immediate surroundings. The lead investigator, Constable Dreilich, arrived at the scene and searched the vehicle. She found a passport in the name of Jonathan Clouter inside the vehicle and seized it. A search of the area was inconclusive and the investigation was interrupted.

[12] At about 8:45 pm a dispatch was received regarding a fight in progress at 35 Bourque Drive, involving Jonathan Clouter and Cameron Unka. The complainant was Shawna Unka. Constable Dreilich proceeded towards the address and while en route, heard that two males were in custody. When she arrived at 35 Bourque Drive, she observed that Cameron Unka was sitting in the back of one police car, while another man (later identified as Jonathan Clouter) was being held by two officers.

[13] Constable Dreilich spoke with Jonathan Clouter and told the court of her conversation with him, verbatim. Counsel did not object to this, but it was hearsay, and at times, there was double hearsay as she relayed information that Shawna Unka would have told Mr. Clouter. In the context of a voir-dire focusing on issues such as grounds for arrest, the courts needs to assess what information the police received and whether this information justified their subsequent actions. Therefore, it is necessary to admit evidence that is hearsay for this limited purpose,although this evidence is inadmissible for its truth on the trial proper.

[14] There were three women outside of the house, one of them was identified as Shawna Unka. The other two were Mr. Clouter's mother and girlfriend. Cst. Dreilich did not speak to them. At the time Cst. Dreilich arrived, Ms Unka appeared agitated, and she was yelling things at Jonathan Clouter. Cst.Dreilich said that she spoke to Ms Unka, but only after Cameron Unka had been placed under arrest, "about her information that she had to add", this time without specifying what Ms Unka told her. Constable Skeffington drove away with Cameron Unka, while Jonathan Clouter was being released.

## THE SHIRTS AND CAP AND THE BREACH OF S. 8 OF THE CHARTER

### A) SUMMARY OF THE EVIDENCE

[15] Cst. Dreilich said that she wanted to get Mr. Unka a shirt because he was not wearing one and that she asked Shawna Unka about going into the house for that purpose. Shawna Unka refused, saying that it was not her house. Upon being questioned by Cst. Dreilich, she said it was her mother's, Norinda Unka.

[16] Constable Skeffington said "I recall something about Mr. Unka wanting a shirt and requesting that he get a shirt to go to cells. He did not have a shirt on when he was arrested in the back of my truck."[2]

[17] Cst. Dreilich called Norinda Unka at work and asked permission to enter the house. Ms Unka said that she was coming over and shortly thereafter, she pulled up in a vehicle. Cst. Dreilich asked Norinda Unka about entering her house and explained that "Cam was in custody, he didn't have a shirt, and we would like to go into the house to get the shirt that he had on".[3]

[18] Norinda Unka accepted, after a short hesitation, and they went in. Cst.Dreilich said that Cst. Flatt was accompanying her and that they were led into a bedroom. As an aside, Cst. Flatt was called as a witness but he said that he made no notes about his intervention and that he had no independent recollection of it.

[19] In the bedroom, which was said to be Cameron Unka's, Constable Dreilich observed a white baseball cap and she said that she recalled hearing Cst. Stewart mentioning this on the air while he was pursuing the black pick-up truck.

[20] Constable Dreilich then said that she observed a crumpled shirt on the floor and that she picked it up. She then said that Constable Flatt came towards her holding two other shirts, similar to the one she had seized. She secured those items upon arriving at the RCMP detachment. Constable Dreilich said that:

> "After taking the interviews from Mr. and Mr.Digness I wasn't able to determine that there was any sort of conclusive description of particularly what he had been wearing that

[2] July 14, 2011, p. 22, lines 20-27
[3] July 14, 2011, p. 136, lines 5-6;

> night. So I couldn't say one way or another if those shirts were the ones that he had been wearing or not. (…) So I determined that we didn't need them."[4]

[21] She added that she did not show these items to the witnesses because they were not a match and she returned the shirts to the personal effects of the accused.

## B) ANALYSIS

[22] The accused alleges that the police searched his house and seized three shirts and a cap without a warrant and that this is an unreasonable search, while the Crown says that the accused has not discharged his burden of establishing a reasonable expectation of privacy in his mother's house and that the parent's consent trumps any claim to privacy that a child may have.

[23] The police entered the home on the pretense to get a shirt for the accused, who had been taken into custody wearing only a pair of shorts and footwear. It was not necessary for the police to enter the house. A simple request to the occupants would have sufficed.

[24] The police entered the house because they were hoping to find the shirt that Mr. Unka would have been wearing at the time he allegedly drove the vehicle found on Coronation Drive. This came to light when Cst. Dreilich testified that upon verification none of the shirts corresponded to any description provided by the eye witnesses. Constable Dreilich obtained permission from Norinda Unka to enter the house however, she did not frankly disclose the purpose of her request for entry.

## C) CONCLUSION

[25] I find that that the police did conduct a warrantless search of MsNorindaUnka'shouse, that her consent to the search was obtained through a misrepresentation by the police, and therefore that the search was conducted in a manner that was unreasonable.

[4] July 14, 2011, p. 220, lines 1-10

## THE RIGHT TO COUNSEL UPON ARREST AND BREACH OF S. 10(b)

### A) SUMMARY OF THE EVIDENCE

[26] Constable Dreilich said that she first told Mr. Unka of the reason for his arrest and gave him his right to counsel when he was sitting in the police vehicle with Constable Skeffington. She read from her notebook the following:

> "I am arresting you for flight, dangerous driving, theft and impaired operation of a motor vehicle.
> (…)
> You have the right to retain and instruct counsel in private without delay. You may call any lawyer you want. There's a 24-hour Legal Aid number available. This advice is given without charge and the lawyer can explain the Legal Aid plan to you. If you wish to contact a Legal Aid duty lawyer I can provide you with a telephone number."[5]

[27] She asked Mr. Unka if he understood; he said "yes" and then she asked if he wished to phone a lawyer and he answered "yes". She then read him the police warning. She told Cst. Skeffington to take Mr. Unka to the detachment.

[28] Constable Skeffington said that he sat in the police vehicle with Mr. Unka waiting for back-up and that he made no notes with respect to any conversation with Mr. Unka. He also said that he was not in the police vehicle when Constable Dreilich spoke to Mr. Unka.He left the scene with Mr. Unka and went directly to the detachment.

[29] Cst. Skeffington does not recall any particular conversation with Mr. Unka while underway and he did not make any notes, so he concluded that if they had any conversation, it would have been very general.

[30] Upon arriving at the detachment, Mr. Unka repeated that he wished to speak with a lawyer. Cst.Skeffington said:

> "I then contacted Legal Aid and he was placed in the phone room, and the Legal Aid phone was transferred over at 21:28."

[5] Transcript, July 14, at p. 131-132

[31] He says the conversation ended at 21:32. With respect to this timeline, Exhibit VD 5 is a prisoner log. Mr. Unka was "prisoner 2806". The entries are as follows:

> "2125 Cst.Skeffington + Cst.Dreilichlogded PRIS 2806 to MC4 BIN 6
> PRIS 2806 spoke to layer + cost (sic) Dreilich took pictures of injuries
> PRIS 2806 not happy – yelling + cursing apon (sic) lodging"
>
> "2129 PRIS 2806 on tummy"

[32] Based on this document, I find that Mr. Unka was taken to the telephone room before 21:25 and I find that Cst.Skeffington's testimony is unreliable on that issue.

[33] Constable Skeffington was asked if Mr. Unka requested Legal Aid. He answered:

> "I believe so, yes. It's my general practice that when someone wishes to speak with a lawyer at the detachment I always ask them if there's a certain lawyer they wish to speak with or if they just wish to speak with Legal Aid. If they state a certain lawyer or will want a phone book I will provide them with that number, or with the phone book so they can find the number, otherwise I'll contact Legal Aid.
> -Do your notes indicate whether or not he requested a specific lawyer?
> -My notes do say that he requested to speak with Legal Aid."[6]

[34] Cst. Skeffingtonwas not contradicted on that issue. No evidence was tendered to show any breach of confidentiality during the brief conversation between Mr. Unka and the Legal Aid lawyer.

[35] Constable Skeffington went on to describe that the accused was placed in the phone room, and was shown the telephone. He explained that accused persons may not phone out, that the police make the call to the lawyer and when they have a lawyer on the line, they transfer the communication to the telephone room.

[36] That telephone room does not have a telephone book, neither does it have a list of lawyers, nor is the number for Legal Aid posted. Constable Skeffington explained:

> "The Legal Aid number, we have a number for the police to use. It's not to be given out to the general public, and that's the number that we use when contacting Legal Aid."[7]

[6] July 14, 2011, page 26, lines 8-20
[7] July 14, 2011, p. 27, lines 20-23

[37] Constable Skeffington confirmed that an accused is not able to contact a lawyer on his own.[8]Constable Skeffington was not asked why the policefollows this procedure and what is the rationale behind this. The Crown did not call any evidence on that issue. No questions were asked to Constable Skeffington with respect to the nature of his conversation with counsel prior to transferring the call.

## B) ANALYSIS

[38] The accused takes issue with the fact that the police dialled the telephone number for the duty counsel and then transferred the communication to him in the telephone room. He argues that this unduly limits his right to consult the counsel of his choice in the sense that if he does not have a lawyer in mind, he is not permitted to make any further inquiries or choices on his own behalf.

[39] The Crown says, citing *R. v. Wolbeck*, that "there is no Charter prohibition on the police assisting an accused in contacting counsel, only a prohibition on the police interfering with the right to counsel."[9]

[40] The police has the duty not only to inform an accused of his right to retain and instruct counsel, but also to implement this right by giving the accused a reasonable opportunity to do so and to refrain from questioning him until he has done so.

[41] The Crown also relies on *R. v. Carter*[10] in which a judge of this court said, in relation to the same situation:

> "This differs from the situations in Rath and McLinden, where a call to a legal aid lawyer meant choosing someone on the list of legal aid lawyers who had indicated that he or she was willing to take section 10 b) calls. Once Mr. Carter made the choice to phone Legal Aid, no further choice had to be made. That Cst. Hicks dialed the Legal Aid telephone number or that the accused dialed the Legal Aid telephone number, in my view, makes no difference with respect to the implementation of his right to counsel."

## C) CONCLUSION

[42] I agree with this view. I also find as a question of fact that the accused did tell Constable Skeffington that he wished to speak to a Legal Aid lawyer. Consequently, I find that the action of the police did not breach section 10(b) of the *Charter* with respect to providing access to a lawyer to Mr. Unka.

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[8] Ibidem, p. 48, lines 6-8
[9] 2010 A.J. No 508
[10] 2012 NWTJ No 19

## THE PICTURES AND THE BREACH OF S. 10(b) OF THE CHARTER

### A) SUMMARY OF THE EVIDENCE

[43] After Mr. Unka left the telephone room, Constable Skeffington asked him about the scratches on his legs. He says that Mr. Unka "stated that they were from a week or a week and a half prior to that".He added that in his opinion "they appeared to be fresher and newer than that"[11] and that he did not believe him. He placed Mr. Unka in cells.

[44] Constable Dreilich testified that Cst.Skeffington mentioned to her that she might want to get a camera to take pictures of Mr. Unka's legs. I note that Constable Skeffington did not mention this in his testimony.She said: "I went to the cell area, and I advised Mr. Unka that I was going to take some photographs of the scratches on his legs. He was having a conversation with Constable Skeffington about the scratches."[12]

[45] She added:

> "At that point he said something about them being old or from something else. It didn't matter, I just had him remain sitting where he was for now, and I took photographs of scratches on both of his legs, on the side of his calves, on both legs. I went from one side to the other, took a few photos, three or four perhaps of his legs."[13]

[46] She then told him to stand up and to hold his hands up in front of him and she took pictures of his hands and then took a picture of him, "the entire front standing there as well."[14]Those pictures were tendered as Exhibit VD 1.

[47] Mr. Unka did not ask the peace officers to take these pictures. Constable Dreilich did not ask Mr. Unka for his permission before she took these pictures, nor did she obtain a warrant to authorize her to take these pictures. According to the comments noted on the prisoner log, Mr. Unka was yelling and cursing when he was lodged back in cells after this procedure.[15]

[48] Constable Dreilich explained why she wanted to take pictures of the scratches:

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[11] Transcript of July 14, 2011, at p. 28
[12]Ibidem, p. 142, lines 5-12
[13] July 14, 2011, p. 142, lines 13-19
[14]Ibidem, p. 143, lines 4-5
[15] Exhibit VD 5, page 1, at 21:25

> "I wanted to take photographs of the scratches because they appeared very fresh. They were very red and you could see sort of even some trickles of blood on some of it. Because at this point our investigation had involved or we believed that the person, Mr. Unka, when he left the vehicle there, he got out of it and he ran off into the bush, and that he had ran through the bushes to get around across to where he could get up to where Kam Lake Road was and cross over to go to his residence on Bourque Drive. So that's why we had the Police Dog Service come and do that search through that area. We believed that he had been out in that bush, and scratches like that would be consistent with somebody having walked through brush and branches and that sort of thing."[16]

[49] Constable Dreilich took the picture of Mr. Unka's face "just to match the same type of photographs in (their) prisoner booking system".[17]Exhibit VD-5 shows that she took a picture of Mr. Unka's face at 22:12, which is a separate procedure from the pictures of the injuries, which were taken at 21:25.

Constable Dreilich said that she consulted her supervisor about conducting a photo lineup.[18] I infer from Exhibit VD-5 that the consultation with her supervisor occurred between 21:25 and 22:12. She did not tell Mr. Unka that she would take a photograph of his face for the purpose of using it for a photo lineup.

## B) ANALYSIS

[50] The accused says that the police were not authorized by law to take pictures of his legs, arms and face. He says that he was not given an opportunity to contact a lawyer prior to the police proceeding to take pictures of him, and that this prevented him to make an informed decision about agreeing or not to this. The Defense argued that a picture of the accused's face was used for a photo line-up and that this line-up was flawed because many of the individuals who were included in this line-up did not at all resemble the accused. Counsel added an argument about the police not having reasonable and probable grounds for arrest, but did not quite link this argument with the allegation of a breach of section 10(b) of the *Charter*. I will consider this argument in the context of the analysis under section 9.

[51] The Crown responded that taking photographs of an individual following his lawful arrest does not constitute a search. The Crown says that Mr. Unka was lawfully arrested and that there was no breach of section 8 of the *Charter*.

### (a) The photographs of the injuries

[52] There is a line of decisions from British Columbia and Ontario taking the position that photographic evidence is admissible provided that it is established

[16] Idem, lines 25-27 and p. 144, lines 1-14
[17] Ibid, at p. 146
[18] Ibid, at p. 145

that the facts depicted in them are accurate and fair.[19] With respect to the use of photographs, the reasoning is that they cannot be characterized as *emanating* from the accused.[20]

> "they can be used to refresh a witness's memory or as past recollection recorded provided that the requirements of that type of evidence is proven – namely, that the record was made and verified at the time that the witness's memory was fresh."[21]

(b) The photograph of Mr. Unka's face

[53] In my oral reasons, I addressed the impact of the police taking a picture of Mr. Unka's face in the context of Mr. Unka's warned statement. It should also be addressed in the context of the present argument.

[54] The picture of Mr. Unka's face is a distinct issue from that of the pictures of the injuries because the police did not need this photograph to refresh their memory.

[55] Counsel for the defense properly identified that the police have a right to take pictures of an accused's face and to fingerprint him as part of the right to collect data in compliance with the *Identification of Criminals Act.* This step is usually taken when a person is formally charged with an indictable offence rather than at the investigation stage.

[56] In *R. v. Sinclair*, the Supreme Court of Canada analyzed the issue of the right to counsel in the context of a warned statement. They said that there is no constitutional right to have a counsel present, and that generally, a detainee is afforded a single consultation. However, they add that the authorities "also recognize that in some circumstances, a further opportunity to consult a lawyer may be constitutionally required. These circumstances, (…) generally involve a material change in the detainee's situation after the initial consultation."[22]

[57] A material change includes a change in jeopardy or new procedures involving the Detainee, such as non-routine procedures which would not fall under the expectations of the initial consultation. Non-routine procedures have included the participation to a line-up, a reconstruction video, a polygraph test. [23]

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[19] R. v. Giang, 1994 BCJ no 3154
[20] R. v. Dilling, 1991 BCJ no 4110 at par. 46, and 1993 BCJ No 865 (BCCA) appeal dismissed; R. v. Giang, supra, at paragraph 50
[21] R. v. Giang, supra at par. 55
[22] Supra, at par. 43
[23] R. v. Sinclair, supra, at par. 50-51

[58] With respect to the picture of Mr. Unka's face to match the same type of photographs in the police prisoner booking system, and subsequent use in a photo line up, I find that this was a non-routine procedure and that it could not possibly have been covered during the initial conversation with an on-call legal aid lawyer.

## C) CONCLUSION

(a) The photographs of the injuries

[59] With respect to the fact that the accused was not afforded the opportunity to speak to counsel about the intention of the police to photograph his injuries, I find that the police did not need his consent to take pictures of his injuries, thus the lack of opportunity to consult a lawyer about this procedure was not material.

[60] I find that the pictures of the accused's injuries did not constitute a new development requiring that he receive further legal advice and I conclude that there was no breach of section 10(b) of the *Charter.*

[61] I do not consider that the act of taking pictures of the accused's injuries was a seizure and I conclude that section 8 of the *Charter* was not breached.

(b) The photograph of Mr. Unka's face

[62] The accused should have been made aware that the police intended to use the picture of his face for a photo line-up. This is the kind of non-routine procedure that triggered an obligation on the part of the police to give him a further opportunity to consult a lawyer in order to decide whether to consent or not to having a picture of his face taken.

[63] Conversely, the police had to refrain from taking his picture until he had had that consultation.

[64] I find that the picture of Mr. Unka's face was taken in breach of section 10(b) of the *Charter*. As a result, I also find that this was an unreasonable seizure and that it breaches section 8 of the *Charter*.

[65] The issue of the admissibility of all the photographs may be further analyzed in the context of an argument based on section 9 of the *Charter*.

## THE VIDEO-RECORDED STATEMENT AND THE BREACH OF S. 10(b)

### A) SUMMARY OF THE EVIDENCE

[66] Constable Watson interviewed Mr. Unka at 14:45 on June 26, 2010. He was tasked by Cpl Pokiak to conduct an interview at about 7:00 am that morning, at the beginning of his shift. Cpl Pokiak had also instructed him to release Mr. Unka on a promise to appear.[24]

[67] Prior to this interview, Constable Dreilich had arranged for the initial complainants, Mr. & Mrs Digness, to come to the RCMP detachment to do a photo-line-up identification. Based on her testimony and the time at which the photopacks were sealed, this would have been between 22:12 on June 25th and 00:12 on June 26th, 2010.

[68] Constable Duval was tasked with this operation and Constable Dreilich monitored it. Constable Dreilich said that Constable Duval told her that Mrs Digness identified Mr. Unka, but that he had this discussion with her after Mrs Digness had completed the procedure and that the information being that Mr. Unka was identified came from Constable Dreilich.

[69] In her cross-examination, Constable Dreilich acknowledged that not only had Mr. Digness not identified Mr. Unka, he had said "it's not him" when he was shown his picture[25]. The photopacks were tendered as exhibits VD-2 and VD-3.

[70] Constable Dreilich briefed Constable Watson on the photo identification when she got off her shift; Cst. Watson used what information he had garnered through the investigation as it was unfolding, mainly second-hand and unverified information. He said that whatever he put to Mr. Unka during this interview, he believed to be true and he denied that he deliberately lied to him.

[71] The salient points of the interview are:

> **P.3, line 35-37**: **"ok, um. Basically from I'll be honest with you, ok, I'm not going to trick you or hide anything from you. Um, basically you were you're (sic) friend came in, said you took his black truck."** (*Cst. Watson did not know if anybody had provided a statement, other than the fact that the Dignesses had come to the detachment for a photopack identification and he acknowledged that he did not take statements from*

[24] January 27, p. 53, lines 25-27
[25] July 14,2011, p. 208 at lines 15-25

*anybody*[26]*; he also said he did not know where he got that from*[27] *and he admitted that he never spoke to Jonathan Clouter*[28]*).*

**P.16, lines 27-32: "I'll tell you how I know you were the only one driving that truck ok, because we got a bunch of phone calls about that truck because it was being driven erratically by you and every single person describes only person in that truck, one driver. The RCMP officer that was in the unmarked police vehicle saw one driver, ok, so you have an RCMP officer saying there's only one driver in the truck, and you have multiple witnesses calling in saying there is one driver in the truck."** (*Cst. Watson acknowledged that he did not personally talk to any caller*[29] *and that any information he used was based on the updates he heard on the air coming from dispatch. He said he did not personally review any of these calls.*[30]*)*

**P. 17, lines 1, 4-6: "…you have to stop denying this you've already been caught. (…) the two people that called about you driving the truck, they've already picked you out of a photo line-up. They know it was you. They picked you out and said this is the guy driving the truck."** *(at the time, Constable Dreilich had not provided specific information to him and had not disclosed that only one had identified the accused*[31]*).*

**P. 17, lines 10-12: "The RCMP officer who tried to stop you said there was only one person driving the truck, he described the person that fits your description."** *(Cst. Watson admitted that he only recalls Cst. Stewart describing the vehicle and saying that there was one person in it.*[32]*)*

[72] Constable Watson testified that it is not his practice to lie to a person from whom he is attempting to obtain a statement; he acknowledged that he may suggest or allude to something that is not true, but he denied that he would make up evidence.[33]

[73] With respect to the right to counsel, Constable Watson and Mr. Unka had the following exchange during the video-recorded interview:

"CW: ok. Um, officer wrote you spoke to a lawyer already.
CU: no, like I just briefly
CW: but you did speak to a lawyer
CU: yeah last night when I came in
CW: last night you spoke to a lawyer ok. And, you've spoken to a lawyer, you've had access to counsel.
CU: (sigh) yeah
CW: ok

[26] January 27, 2012, p. 139, line 25
[27] Ibid, p. 151, line 20
[28] Ibid, p. 164, lines 18-27
[29] Ibid, pl. 139, line 25
[30] Ibid, p. 140, line 10
[31] Ibid, pl 114
[32] Ibid, p. 110, lines 24-27
[33] Ibid, p. 113

CU: I wasn't given ah given my rights when I was arrested, I was pulled out of my house."[34]

[74] Then at p. 18, Mr. Unka started answering Cst. Watson by asking questions: "When is my court date; what's happening to me, am I getting released; so what am I getting charged with again…" and then at line 33, he says:

"CU: I need to speak to a lawyer.
CW: you've already spoken to a lawyer
CU: well
CW: you've already spoken to a lawyer, we're past that. K, we're having a conversation now.

[75] At page 19:

CU: Nope. I'm not admitting to anything.
CW: k, Cameron you were the guy driving the truck ok.
CU: Fuck I am not.
CW: you were.
CU: like what's the difference I'm still getting charged for it.
CW: you were the guy driving the truck is what I am saying.
CU: But just take it to court.
CW: k, you're not listening to me.
CU: cause I want a lawyer
CW: you've already spoken to a lawyer.
CU: well I already spoken to a lawyer but I want to get a legal lawyer
CW: what do you mean a legal lawyer
CU: (cough) well one that I can actually sit down and talk with.
CW: Ok, well there's not … there's not going to be a lawyer coming here right now."

[76] At page 22:

"CU: 'm not saying any more
CW: It happens man. You got scared, and you took off.
CU: Am I allowed to leave
CW: no you can't you've been arrested
CU: yeah I know
CW: ok, you remember we just discussed that and you had that explained to you last night
CU: yep, whatever
CW: well can I have my charges, do my fingerprints, whatever
CW: k, this is your time, I'm giving you this opportunity to tell me what happened man so you can set the record straight once and for all about what happened. This is it, this is your opportunity.

[34] VD 7, page 2, lines 6-21

CU: yeah, I got scared
CW: You got scared.
CU: yeah of course, I ran.
CW: k. so you were driving.
CU: yes I was."

[77] Constable Watson admitted that he denied Mr. Unka the ability to leave, but he also acknowledged that from the moment Mr. Unka agreed that he was driving, he released him within a few minutes[35] on a promise to appear given to a peace officer in charge.

## B) ANALYSIS

[78] Mr. Unka alleges through his counsel that his right to remain silent and his right to counsel were breached during the investigation.

[79] The Defense first argued that given that the warned statement was obtained some 17 hours after Mr. Unka had his 4-minute long conversation with a Legal-Aid lawyer, this consultation would "have done Mr. Unka little good seventeen hours later." The Defense further argued that even if the court were to find that there was no violation of section 10(b), "that fact did not mean that the interrogation did not run afoul of the confession rule or voluntariness"

[80] The Crown says that the statement is voluntary under the common law rule , since no threats or promises were made to Mr. Unka by Cst. Watson or by any officer he came in contact with while he was detained.

[81] The Crown further says that Mr. Unka was not denied food, clothing, water or sleep, medical attention or access to counsel. The Crown argues that in the context of the interrogation, the false or exaggerated information used by Constable Watson did not create a climate of oppression, nor did it amount to trickery, adding that the interrogation was not unduly long and that Mr. Unka had an operating mind throughout.

[82] I find that the police did not make promises, threats or inducements to the accused. At the beginning, the statement was voluntary. However, I find that Constable Watson exaggerated certain facts and overemphasized the quality of the information known to them as a means to confront Mr. Unka. This started after

[35] January 27, 2012, p. 163

Constable Watson left the interview room for a few minutes. Upon his return, his tone was more assertive and his questions became affirmations. When he addressed the accused again, he remained standing for a while, then he sat down.

[83] The accused's body language for the remaining portion of the interview (from 20:50 to 32:02) was closed: he had his arms crossed against his chest and his head was down. At times he pushed his chair away from the table where he and the police officer were sitting.

[84] This is part of what is recognized by the Supreme Court of Canada in *R. v. Singh*[36] as being "police persuasion".

[85] That also marks the point where Mr. Unka began to show signs of discomfort. From page 18 of the transcript until the end of the interview, Mr. Unka said twice that he wanted to speak with a lawyer, he said seven times that he was either denying the allegations or not admitting anything, and he asked seven times in different ways to stop the interview all the while Constable Watson kept confronting him with their theory of the case.

[86] Finally Constable Watson said: "so you were driving", which was more a statement than a question, to which Mr. Unka said "yes, I was". Constable Watson then stopped his interrogation.

[87] I find that the exchange leading to this "yes" shows that the accused was increasingly uncomfortable with the affirmations of the police and that the accused asserted his intention to remain silent and to terminate this interview. I agree with the following comments by Justice Fish in *R. v. Singh* although they were part of his minority dissent:

> "The question (on this appeal) is whether "no" means "yes" where a police interrogator refuses to take "no" for an answer from a detainee under his total control."[37]

[88] In this same case, the majority of the Supreme Court stated that:

> "it must again be emphasized that such situations are highly fact-specific and trial judges must take into account all the relevant factors in determining whether or not the Crown has established that the accused's confession is voluntary. In some circumstances, the evidence will support a finding that continued questioning by the police in the face of the accused's repeated assertions of the right to silence denied the accused a meaningful choice whether to speak or to remain silent: see *Otis*. The number of times the accused asserts his or her right to silence is part of the assessment of all of the circumstances, but

[36] 2007 SCC 48
[37] Idem, at par.55

> is not in itself determinative. The ultimate question is whether the accused exercised free will by choosing to make a statement: *R. c. Otis*, at paras. 50-54."

[89] Counsel for the accused argued in her written submissions that

> "it became obvious that he would need to confess before he would be released and he did so. (…) Questions inevitably arise upon viewing the videotape and reviewing the transcript as to whether or not Mr. Unka simply indicated he was the driver so that he could be released. This was not a situation in which the accused wished to "unburden himself". Somewhat tellingly, when the officer asks him whether or not he feels better after the confession, Mr. Unka indicates he does not."[38]

[90] I agree with this characterization of the evidence. This evidence raises the question whether Mr. Unka's final answer is a true admission or if it was simply said out of exasperation and a desire to be released. This must also be assessed in the context that Mr. Unkahad now been detained for more than 18 hours.

[91] The Supreme Court of Canada in *Singh* said:

> "Under both common law and Charter rules, police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities."[39]

[92] And further:

> "…the law recognizes an accused's free will and the ability of an accused to change his or her mind about whether or not to speak to the police. This change of mind can occur either as a result of personal reasons, or police persuasion that does not violate principles of fundamental justice or deprive the accused of choice."[40]

[93] And at paragraph 39:

> "if the circumstances are such that an accused is able to show on a balance of probabilities a breach of his or her right to silence, the Crown will not be in a position to meet the voluntariness test."

[94] In *R. v. Sinclair*, the Supreme Court of Canada analyzed the issue of the right to counsel in the context of a warned statement. They said that there is no constitutional right to have a counsel present, and that generally, a detainee is afforded a single consultation. However, they add that the authorities "also recognize that in some circumstances, a further opportunity to consult a lawyer

[38] Written submissions of the Defense, at par. 101 and 103
[39] Supra at par. 47
[40] Ibidem at par. 43

may be constitutionally required. These circumstances, (…) generally involve a material change in the detainee's situation after the initial consultation."[41]

[95] A material change includes a change in jeopardy or new procedures involving the Detainee, such as non-routine procedures which would not fall under the expectations of the initial consultation. A change of jeopardy generally refers to situations where the investigation takes a new and more serious turn as events unfold. As a result, the initial advice received may no longer be adequate to the actual situation.

[96] It is important to note that Mr. Unka began to say that he wanted to speak to counsel when the police started to tell him that he had been identified after a photo line-up. The Supreme Court says in *Sinclair* that

> "the change of circumstances must be objectively observable in order to trigger additional implemental duties for the police. (…) the failure to provide an additional opportunity to consult counsel will constitute a breach of s. 10(b) only when it becomes clear, as a result of changed circumstances or new developments, that the initial advice, viewed contextually, is no longer sufficient or correct. This is consistent with the purpose of s. 10(b) to ensure that the detainee's decision to cooperate with the police or not is informed as well as free."[42]

[97] This context includes the fact that the initial advice was received the evening before when Mr. Unka was just arrested and while he was not aware of what element of evidence the police had. At the beginning of the interview, 17 hours later, the police confirms that Mr. Unka spoke to a lawyer, but as Mr. Unka says that he only spoke briefly, thus starting to express that he was not satisfied that he was fully instructed, the police cuts him off and asserts that he has had his opportunity to speak to a lawyer.

[98] Further, contrary to cases such as *Oickle*[43], the police made it clear to the accused that he was not free to leave and that he was under arrest, although he knew that his instructions were to release Mr. Unka on a promise to appear.

[99] Finally, the police told Mr. Unka that he was positively identified by many sources while this was not true.

[100] The allegation of positive identification is a new development in this investigation. Mr. Unka did not possess this information when he initially spoke to a Legal-Aid counsel. Mr. Unka's request to speak to counsel during the interview was legitimate. I find that the police's deliberate refusal to let the accused interrupt

[41] Supra, at par. 43
[42] Supra, at par. 55 and 57
[43] [2000] 2 S.C.R. 3

the interview and speak with counsel undermined his right to make a meaningful and informed choice, in this case whether to continue to speak to the police.

### C) CONCLUSION

[101] I find on a balance of probabilities that Mr. Unka's right to counsel guaranteed by section 10(b) of the *Charter* was breached and that his right to remain silent guaranteed by section 7 of the *Charter* was also breached.

[102] I also find that the portion of the warned statement beginning at 20:50 of the video-taped recording and ending at 32:02, and the corresponding part of the transcript beginning at page 16, line 20 until the end of page 23, to be involuntary under the common law rule.

[103] I find the remaining portion of the statement to be voluntary and admissible, under the common law, unless there are further reasons to question its admissibility as a result of a violation of section 9 of the *Charter*.

## THE REASONABLE GROUNDS FOR ARREST AND SECTION 9 OF THE CHARTER

[104] Mr. Unka was placed under arrest twice on June 25, 2010:first by Constable Flatt and then by Constable Dreilich.

## THE ARREST BY CST. FLATT

### A) SUMMARY OF THE EVIDENCE

1. Evidence of Constable Dalyn Flatt

Constable Flatt's testimony was very short. He said that he had no memory of this arrest and that he made no notes of it. All he recalls is that he attended at 35 Bourque Drive and placed Mr. Unka under arrest for disturbing the peace on June 25, 2010. He did not provide information as to the circumstances or reasons of the arrest. I find that Constable Flatt's lack of memory is somewhat surprising.

## 2. Evidence of Constable Adam Long

[105] Constable Long had finished his shift when a call came from dispatch for a fight in progress at 35 Bourque Drive. He was a passenger in Constable Flatt's marked police vehicle and Constable Flatt was driving Constable Long to his residence. They changed their destination and attended 35 Bourque Drive.

[106] Upon arriving at that address, Constable Long said he observed only one male at the front of the house. Somebody had mentioned that "he" had run down one of the streets that was in front of the house. Cst. Long ran down the street to see if he could find Mr. Unka. As he ran and did not find him, he heard on his radio that Mr. Unka was "back at the house".

[107] When Cst. Long came back to the house, Mr. Unka was already in a police vehicle.

## 3. Evidence of Constable Philip Skeffington

[108] Constable Skeffington said that he received a dispatch at 20:45 for 35 Bourque Drive. He arrived at 35 Bourque Drive and observed Cst. Flatt standing on the steps with Mr. Unka. He recalls Cst. Flatt attempting to place Mr. Unka in handcuffs. Mr. Unka was wearing shorts but he was not wearing a shirt.

[109] He said that Mr. Unka was uncooperative as Cst. Flatt was trying to place him into handcuffs. He noted that they were speaking, but does not recall the conversation. He added:

> "We placed him in the back of the vehicle, at which time Cst.Flatt advised me that he had placed Mr. Unka under arrest for I believe it was disturbing the peace."

[110] Constable Skeffington also said that Constable Flatt had told him that Mr. Unka was likely the suspect with respect to the earlier call for a possibly impaired driver of a black pick-up truck. Constable Flatt having said he had no recollection of the events, there is no information with respect to how he would have known this.

[111] Constable Skeffington said that he did not make any notes with respect to this and he acknowledged that he may not have known the reason for arrest. He did not say why Mr. Unka was detained until Constable Dreilich arrived.

4. Other witnesses heard on the voir-dire

[112] Constable Dreilich arrived after Constable Skeffington and Mr. Unka was already in police custody. Constable Watson did not attend at 35 Bourque Drive.

## B) ANALYSIS

[113] There is no direct or admissible evidence on this voir-dire with respect to the circumstances of the arrest by Constable Flatt. The Crown Prosecutor says that he does not have to prove that the arrest was lawful.

[114] Counsel for the Defense alleges that the arrest was unlawful and that a negative inference should be drawn from the absence of evidence with respect of the circumstances surrounding this arrest.

[115] The police have a right to arrest a person without a warrant for an offence punishable upon summary conviction, but only if they ***find*** the person committing the offence.[44]

[116] Constable Flatt and Constable Long arrived together at 35 Bourque Drive and saw only one male. No fight was ongoing at that time. Neither of them found anyone committing an offence.

## C) CONCLUSION

[117] Constable Flatt had heard that there was a fight in progress at 35 Bourque Drive. I infer from this that he acted on "reasonable grounds to believe" that Mr. Unka had disturbed the peace according to s. 495 (1)(a) of the *Criminal Code*.

[118] This is however the criterion to perform an arrest without a warrant for an indictable offence, not a criminal offence, which includes the offence punishable upon summary conviction, pursuant to s. 495(1)(b) of the ***Criminal Code*.**

[119] He did not ***find*** Mr. Unka committing the offence of disturbing the peace, which is punishable upon summary conviction, therefore he had no right to arrest him pursuant to section 495 of the *Criminal Code*.

[44] S. 495(1)(b) Criminal Code; R. v. Dobrotic [1997] Carswell N.B. 522 at para. 9

[120] I find that the arrest of Cameron Unka by Constable Flatt was unlawful. I also find that the subsequent detention of Mr. Unka until the arrival of Constable Dreilich was unlawful and arbitrary and that it breached Mr. Unka's right protected under section 9 of the *Canadian Charter of Rights and Freedoms*.

## THE ARREST BY CST. DREILICH

## A) SUMMARY OF THE EVIDENCE

[121] Constable Roxanne Dreilich said she received a report that a black Dodge Ram left the side of the Yellowknife River at a high rate of speed. Over the next twenty to thirty minutes, she received regular dispatches from witnesses about the vehicle, although she made no observation herself.

[122] There would then have been a clear dispatch with respect to the vehicle having been left on a property on Coronation Drive. When the vehicle was located, she attended the scene and cursorily searched the vehicle.

[123] She found a passport in the name of Jonathan Clouter inside it. She had also learnt that the vehicle was registered to this same person. There were bottles of alcohol in the back of the truck, some empty, some not.

[124] She heard the dispatch with respect to a fight between Mr. Clouter and Mr. Unka and attended 35 Bourque Drive. The caller was Shawna Unka and she would have said they were fighting about the vehicle and that "Jocko" would have been driving.

[125] Cst. Dreilich met with Mr. Clouter and he said to her that Mr. Unka had taken his vehicle. Constable Dreilich said that Mr. Clouter repeated many times that "Cam" stole his truck. Through the narrative, Cst.Dreilich learned that Mr. Clouter had gone to the Yellowknife River with Mr. Unka. He had left on a boat, while Mr. Unka had stayed ashore. Upon his return, the truck was gone. He went to Cam's house looking for the truck and met with Shawna Unka.

[126] Constable Dreilich did not speak with Shawna Unka after speaking with Mr. Clouter. She was aware that the initial dispatch reported that an intoxicated male got into a vehicle and drove erratically as he left the Yellowknife River, although no physical description had been provided of this man.

[127] She says that based on this information, she had reasonable grounds to believe that Mr. Unka did drive Mr. Clouter's black Dodge Ram while intoxicated, that he evaded the police and that he took this vehicle without the owner's permission.

[128] Mr. Unka appeared angry, flushed; his eyes were a bit red and she could smell alcohol.

[129] She placed him under arrest for "flight, dangerous driving, theft and impaired operation of a motor vehicle."[45]

## B) ANALYSIS

[130] Counsel for the Defense argues that Constable Dreilich had no reasonable grounds to believe that Mr. Unka had committed an indictable offence because there was no reliable or credible evidence to support a belief that Mr. Unka was driving the black Dodge Ram, nor that his ability to operate a motor vehicle was impaired by alcohol. She says that although police may rely on hearsay evidence to form their grounds to arrest, she adds that they should assess the reliability of this information.

[131] Crown counsel says that the accused must prove that the arrest was unlawful and he argues that the arrest was based on reasonable grounds.

[132] The *Criminal Code* provides at section 495 that a peace officer may arrest a person without the prior necessity of obtaining a warrant when certain conditions are met, which include arresting a person whom they find committing a criminal offence and arresting a person where there are reasonable grounds to believe that this person has committed an indictable offence. For the purpose of section 495(1)(a), an indictable offence includes hybrid offences, which are deemed to be indictable until the Crown has entered its election.[46]

[133] The grounds for an arrest without a warrant must be both subjectively and objectively reasonable. Objectively reasonable means that a reasonable person, placed in the position of the peace officer, must be able to conclude that there were indeed reasonable grounds for the arrest.

[45] Transcript of July 14, 2011, p. 133
[46] S. 34, *Interpretation Act*, R.S.C. 1985, ch. I-21

[134] On the other hand, the police need not demonstrate anything more than reasonable grounds and specifically are not required to establish a prima facie case for conviction before making the arrest[47].

[135] As the Supreme Court of Canada further stated in *R. v. Storrey*:

> "In order to safeguard the liberty of citizens, the Criminal Code requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest."[48]

[136] I am satisfied that Cst. Dreilich subjectively concluded that Cameron Unka could have been the driver of the black Dodge Ram, based on her professional experience and on the information gathered.

[137] The issue is whether this subjective belief is justifiable from an objective point of view, when no description was given of the driver of this vehicle by any of the persons calling in to report about it.

[138] Mr. Clouter is said to have told Cst. Dreilich that "Cam stole his truck" but he *assumed* that Mr. Unka did this.

[139] The only element that connects Mr. Unka to the vehicle is this unverified (at that stage of the investigation) assertion by Jonathan Clouter that he had left the bank of the Yellowknife River while Mr. Unka was near his vehicle with his keys and that when he returned, both the truck and Mr. Unka were gone.

[140] The vehicle was found unoccupied at a location not related to Mr. Unka; Mr. Unka was not seen at that location; no car keys were found in Mr. Unka's possession. No fingerprints were obtained from the black Dodge Ram. The police at that point of their investigation had no evidence that materially placed Mr. Unka in possession of that vehicle.

[141] I note that the first call with respect to a possibly impaired driver came in at about 18:25. The call for a disturbance at 35 Bourque Drive was dispatched at about 20:35. Constable Dreilich placed Mr. Unka under arrest at 20:53.

[142] There were many breaks in the timeline and in the chain of observations of the vehicle so that other facts could have occurred or intervened between the last

[47] R. v. Storrey, [1990] 1 S.C.R. 241
[48] Idem, Carswell version, at paragraph 14

sighting of the vehicle on the road, its location at Coronation Drive, and the report of a fight in progress at 35 Bourque Drive.

## C) CONCLUSION

[143] I find that the circumstances surrounding the operation of the black truck would make Mr. Unka a person of interest to the police, and that these circumstances justify an investigation. However, the evidence obtained by the police up to that point was too tenuous to justify objectively that they arrest Mr. Unka without a warrant.

[144] I find that Constable Dreilich lacked reasonable grounds to arrest Mr. Unka without a warrant at that time. I find that the warrantless arrest did not comply with the requirement of section 495 of the *Criminal Code* and that it was unlawful.

## THE DETENTION OF CAMERON UNKA

## A) SUMMARY OF THE EVIDENCE

[145] Constable Dreilich explained her decision to detain Mr. Unka as follows:

> "He was intoxicated at that point, we believed that, in order for us to ensure that we were able to speak with him, obtain a statement from him in a sober state, and process him on those release documents, that he would fully understand it, and he was held until he was determined to be sober."[49]

[146] With respect to Mr. Unka's intoxication, Cst.Skeffington observed upon arrest that Mr. Unka had glossy eyes, slurred speech, and smelled of alcohol. He did not make any observations with respect to his balance. He also admitted that he did not write this in his notebook.[50]

[147] Constable Dreilich testified that Mr. Unka was "still very agitated, he was just yelling and cursing at me."[51] She placed him under arrest and read him his rights and police warning from a card. She was satisfied that he understood this.[52]

[148] She decided not to require that he provide a sample of his breath because too much time had elapsed since the initial complaint.[53]

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[49] Transcript of July 14, 2011, page 169
[50] Idem, at p. 34
[51] Idem, at p. 130
[52] Idem, at p. 133
[53] Idem, at p. 135

[149] Constable Dreilich testified that she made some observations of Mr. Unka at the detachment, post arrest: "his speech was slurred. His face was still somewhat flushed, quite red. He was still a bit sweaty. His eyes were red and kind of droopy, like sleepy looking; (…) and I could smell, he had the smell of alcohol as well…"[54]

[150] Constable Watson explained some of the codes used on VD-5 and that MC means "male cell" as opposed to the "drunk tank"[55]. He confirmed that Mr. Unka was not placed in the drunk tank, but in a regular cell.

[151] Constable Watson said that when he took the statement from Mr. Unka, he looked hung over, but not intoxicated.

[152] Exhibit VD-5 shows that Corporal Williams checked on prisoners at 00:50 and 4:04 on June 26th. Then Corporal Pokiak took over and checked on prisoners at 7:25 and 12:10.

[153] They did not have any particular interaction with Mr. Unka.[56]

[154] Mr. Unka was detained from 20:45 on June 25, 2010, which is the time of his arrest by Constable Flatt, until 15:25 on June 26, 2010 when he was released by Watson. He spent a total of 18 hours and 40 minutes in police custody.

[155] During that time, a number of events occurred, including:

> 20:45 - arrest by Constable Flatt and detention
>
> 20:53 - arrest by Constable Dreilich and transport to RCMP detachment
>
> "21:25 -C. Unka telephone conversation with legal aid counsel conversation ended; Cst.Dreilich takes pictures of injuries; C. Unka lodged in cell MC4; Mr. Unka "not happy – yelling +cursing upon lodging
>
> 22:12 - Cst.Dreilich takes photo of Mr. Unka; he stated "just give me my papers +let me go"[57]
>
> 00:15 - photo lineup identification completed[58]; Form C-13 completed; Promise to appear completed
>
> 07:00 - Cst.Dreilich off shift; Cpl Violet Pokiak tasks Cst. Christopher Watson to obtain a statement from Mr. Unka. CplPokiak released 17 prisoners between 7:00 and 8:07

[54] Idem, at p. 144
[55] Transcript of January 27, p. 80
[56] Idem, at p. 202, lines 12-25
[57] Exhibit VD-5 p.1
[58] Exhibit VD-2

"10:15 - Cst. Watson lodged a prisoner in the drunk tank

10:52 - Cst. Watson took out a prisoner to speak to his wife

11:33 - C. Unka wanted to know when the officer would come back;

14:20 - Cst. Watson brings a prisoner to meet with lawyer

14:45 - Cst. Watson takes Mr. Unka out for interview

15:25 - Cameron Unka released on a promise to appear"[59]

[156] Constable Watson explained that he only proceeded to take a statement from Mr. Unka at 14:45 because he was busy all day. On cross-examination, it was established that he arrested someone with a warrant at 8:55 on June 2010, and that he arrested another person at 14:09. He took this prisoner to meet his lawyer at 14:20 and lodged him back in cells at 14:27. He did not recall any specifics about this day and he could not say what he did on June 26 other than by referring to those annotations.

## B) ANALYSIS

[157] The Crown approached this issue from the perspective that they felt the arrest was lawful and referred to *R. v. Storrey*, which stands for the principle that there is nothing wrong in detaining a person pursuant to a lawful arrest, even for 18 hours, to enable the police to continue their investigation.

[158] The Crown adds that Mr. Unka's detention was necessary in the public interest, because of the need for the police to identify him and the need to secure evidence; and Crown interprets the criterion of public interest found at section 497 as a stand-alone justification for arrest, further adding that Mr. Unka's intoxication justified his detention.

[159] The Crown said that there is no basis to conclude that the police had any oblique motive for this lengthy detention and that Constable Watson was simply too busy to conduct the interrogation earlier.

[160] Counsel for the Defense says that the detention is unlawful and arbitrary because it follows an unlawful arrest. She adds that the length of the detention is abusive because the police had no real reason to detain Mr. Unka except to gain a strategic advantage for the purpose of securing a confession.

[59] Exhibit VD-5

[161] She says that the signs of intoxication described by the police are doubtful and that the fact that the accused would have been angry at the time of arrest is equally consistent with the fact that the arrest was unlawful as with a state of intoxication, thus saying that this criterion is unreliable.

[162] She says that if intoxication was the true and only reason for the prolonged detention, the police should have been assessing Mr. Unka on a regular basis to determine if he had sobered up.

[163] The Defense argues that being "busy" is an unconvincing argument to justify why the police took the statement only at 14:45 on June 26, since when Constable Watson was pressed on the issue, he could only show that he had performed one arrest around 9:00 and another one at about 14:00, thus urging the Court to conclude that Mr. Unka was arbitrarily detained.

[164] In *R. v. Duguay, Murphy and Sevigny*[60], the Ontario Court of Appeal stated that not every unlawful arrest results in an arbitrary detention:

> "It cannot be that every unlawful arrest necessarily falls within the words "arbitrarily detained". The grounds upon which an arrest was made may fall "just short" of constituting reasonable and probable cause. The person making the arrest may honestly, though mistakenly, believe that reasonable and probable grounds for the arrest exist and there may be some basis for that belief. In those circumstances the arrest, though subsequently found to be unlawful, could not be said to be capricious or arbitrary. On the other hand, the entire absence of reasonable and probable grounds for the arrest could support an inference that no reasonable person could have genuinely believed that such grounds existed. In such cases, the conclusion would be that the person arrested was arbitrarily detained. Between these two ends of the spectrum, shading from white to grey to black, the issue of whether an accused was arbitrarily detained will depend, basically, on two considerations: first, the particular facts of the case, and secondly, the view taken by the court with respect to the extent of the departure from the standard of reasonable and probable grounds and the honesty of the belief and basis for the belief in the existence of reasonable and probable grounds on the part of the person making the arrest."

[165] In *R. v. Storrey*, the Supreme Court of Canada said that:

> "The statement goes no further than confirming that an otherwise unlawful arrest cannot be justified on the grounds that it was necessary in order to further the investigation of the crime. It should not be taken as establishing a principle that whenever a lawful arrest is made, in circumstances where the police intend to do further investigation, that the arrest should then be considered to have been made for an improper purpose."[61]

[60] [1985] O.J. No. 2492, Affirmed,[1989] 1 S.C.R. 93
[61] [1990] 1 S.C.R. 241 at par. 24

[166] Conversely, I take this reasoning to mean that an unlawful arrest may not always result in an arbitrary detention, provided that the police are able to justify that detaining the accused for a period of time beyond the arrest was reasonably necessary, considering the totality of the circumstances. In *R. v. Dedman*, the Supreme Court of Canada said that:

> "The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference"[62].

[167] Section 497 of the *Criminal Code*, creates the obligation for a peace officer who arrests a person without a warrant for an offence listed under section 496(1)(a), (b) or (c), to release this individual as soon as practicable, unless he believes on reasonable grounds that

> "(1.1) (a) it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to
>
> (i) Establish the identity of the person;
> (ii) Secure or preserve evidence of or relating to the offence;
> (iii) Prevent the continuation or repetition of the offence or the commission of another offence, or
> (iv) Ensure the safety and security of any victim of or witness to the offence; or
>
> (b) that if the person is released from custody, the person will fail to attend court in order to be dealt with according to law."

Establish the identity of the person

[168] Constable Flatt, who first arrested Mr. Unka, testified that he knew him.[63] When Constable Flatt turned Mr. Unka over to Constable Skeffington, he confirmed his identity to him.[64] Therefore, detention was not necessary for the purpose of establishing the identity of the accused.

Secure or preserve evidence of or relating to the offence

[169] Mr. Unka was arrested at his home, which the police searched shortly after he was taken over to the detachment. Any evidence they were looking for was found and seized by the time Constable Dreilich returned to the detachment, around 21:20. The police had apparently investigated the vehicle found at Coronation Drive and were satisfied of their findings. Detention was not required beyond 21:20 with respect to securing or preserving evidence.

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[62] [1985] 2 S.C.R. 2 at p. 35
[63] Transcript of July 14, 2011, at p. 79
[64] Idem at pages 20-21

Prevent the continuation or repetition of the offence or the commission of another offence

[170] When Mr. Unka was arrested, he was at his home. He was not driving a motor vehicle and there is no evidence that he was in possession of car keys. Although the police were dispatched for a fight in progress at 35 Bourque Drive, when constable Dreilich arrived, Mr. Unka was already detained.

[171] There were no reasonable grounds to believe that he would continue or repeat any of the offence previously alleged. Constable Dreilich did not say that her purpose for detaining Mr. Unka further was to prevent the commission of another offence.

[172] I find that there were no reasonable grounds to believe that detention was necessary to prevent the continuation or repetition of the offence or the commission of another offence.

Ensure the safety and security of any victim of or witness to the offence

[173] No evidence was tendered with that respect. Mr. Clouter was apparently the one who attacked Mr. Unka at 35 Bourque Drive. The police were prepared to release Mr. Unka on an undertaking with a promise to appear. This undertaking did not prohibit Mr. Unka from having contact with anybody.

[174] Had they been concerned for the safety and security of any victim of or witness to the offence, they may have sought to show cause before a justice of the peace or included a prohibition of contact. In view of the fact that neither were sought, I find that Mr. Unka's detention was not necessary for this purpose.

That if the person is released from custody, the person will fail to attend court in order to be dealt with according to law

[175] No evidence was heard with respect to this concern and I conclude that this was not a live issue.

The necessity to keep Mr. Unka in custody because he was intoxicated

[176] Constable Dreilich said she felt that it was necessary to keep Mr. Unka in custody so that he would be sober when they attempt to obtain a statement from

him and then she said it was also important that he be able to understand his conditions of release.

[177] I find that this argument is not credible. The evidence shows that over the course of her shift, she did not re-assess the level of intoxication of Mr. Unka, nor did she ask anyone to follow-up after she was off shift.

[178] Exhibit VD-5 reveals that only standard observations were made by the guards ("all prisoners are OK") or by the supervisors, Corporal Williams and Corporal Pokiak and that no one specifically attempted to determine Mr. Unka's state of sobriety in order to proceed to obtain a statement.

[179] Constable Dreilich was satisfied that Mr. Unka understood his right to counsel when she read him this right upon arrest at 20:53, notwithstanding that she observed that he displayed signs of intoxication.

[180] Understanding the right to counsel requires that a person have an operating mind. I conclude that if he had an operating mind at 20:53 on June 25, there is no reason why he would not have had an operating mind later.

[181] With respect to understanding the conditions of release, I note that there are not many conditions on the undertaking of June 26, 2010 and that they are not particularly complicated or onerous.

[182] As an aside, this document was not tendered as evidence on the voir-dire, but it is part of the court record and I find that it contains information that is useful in assessing the credibility of Constable Dreilich's testimony. This document was referred to by Constable Dreilich and by Constable Watson. I also find that I can take judicial notice of the information contained in the court's record.[65]

[183] The conditions on this undertaking are to report between 9 am-5 pm every Monday commencing June 28, 2010, to the Yellowknife RCMP Detachment; to notify the Yellowknife RCMP Detachment of any change in address, employment or occupation and to abstain from the consumption of alcohol or other intoxicating substances or the consumption of drugs except in accordance with a medical prescription. I find that understanding these conditions of release did not require that Mr. Unka remain in police custody for more than 18 hours.

[184] Finally, Mr. Unka was lodged in a regular cell, not in the cell referred to as the "drunk tank". I take it that this is a further reflection of the fact that Mr. Unka, although visibly under the influence of alcohol, was not intoxicated by alcohol.

[65] R. v. Evaglok, 2010 NWTSC 35

[185] There are many reported precedents standing for the proposition that it may be necessary in the public interest to detain a person who is intoxicated, because this intoxication may result in this person committing further offences if released[66].

[186] Often this includes the fact that the person was arrested while driving a motor vehicle in a highly intoxicated state and the fact that there was no sober person able to come to the detachment to drive the accused home. At other times, it includes the fact that the highly intoxicated person under arrest was at risk of harming himself or others if released.

[187] This was clearly not the concern of the authorities with respect to Mr. Unka and I find that it was not necessary to detain Mr. Unka for that purpose.

[188] Constable Dreilich said that they wanted to obtain a statement from Mr. Unka, however she did not say when that decision was made. I infer that it would have become a necessity for them to obtain a statement from Mr. Unka when the Dignesses did not positively identify Mr. Unka as the person who would have driven away from the Yellowknife River in the black pick-up truck.

[189] It is clear that the only reason why Mr. Unka was still detained after the police searched his home, took a picture of his injuries, then a picture of his face, and proceeded to do a photo line-up identification with Mr. and Mrs Digness, was to take a statement from him, because unless he confessed to the offences, they had no evidence to tie him to the evidence they had obtained up to that point.

[190] I find that the reason advanced by Constable Watson that he was too busy from 7:00 to 14:45 to conduct the interview sounds shallow when matched with the notes he took of his actions on June 26, 2010 and the notes found on Exhibit VD-5 pertaining to his actions.

[191] Although it is a stretch to conclude that the police deliberately waited until 14:45 before attempting to obtain a statement from Mr. Unka, they were certainly not rushing into that procedure. It is also clear that they were determined to obtain this confession, judging by the tone adopted by Constable Watson 20 minutes into the interview, and by the fact that he made it clear to Mr. Unka that he was detained and not free to leave the detachment. It is thus not a coincidence that as soon as Mr. Unka said yes to the affirmation "so you were driving", he was released on a promise to appear.

[66] R. v. Weik [2012] M.J. 181; R. v. Scott [2010] S.J. No 375

## C) CONCLUSION

[192] The arrests of Cameron Unka by Constables Flatt and Dreilich were unlawful because they did not comply with the requirements of s. 495 of the *Criminal Code*. His following detention was unlawful, as it did not comply with the requirements of section 497 of the *Criminal Code*.

[193] The police may have felt there were some investigative imperatives to keep Mr. Unka detained until about midnight on June 26, 2010. But from the moment that the photopacks were sealed, the investigation was concluded. The only reason for the continued detention of Mr. Unka was the need for the police to obtain a confession. He was detained for that purpose for more than 15 hours.

[194] The only purpose for detaining Mr. Unka was to complete the police investigation. There was no objective reason for the prolonged detention other than to obtain a confession. The police did not articulate any reason for the duration of the detention other than the fact that they thought Mr.Unka was too intoxicated and that they were too busy over the course of their shift, which I found not to be credible.

[195] I find that the reasons offered by the police for the prolonged detention of Mr. Unka were unreasonable.

[196] I find that the arrests and subsequent detention were investigatory tools. In the light of how the events unfolded on June 25 and 26, I conclude that the first arrest was performed on a pretext for the purpose of ensuring that Mr. Unka would not leave his home until Cst. Dreilich arrived.

[197] I find that Mr. Unka was detained until the police had obtained evidence that was necessary to connect him to the black pick-up truck.

[198] I conclude that the detention of Mr. Unka for 18 hours and forty minutes was arbitrary, infringing on his right to be protected from arbitrary detention pursuant to section 9 of the *Canadian Charter of Rights and Freedoms.*

Dated in Yellowknife, this 15th day of June, 2012

Christine Gagnon
J.T.C.

*Date: 2012 06 15*
*File: T1-CR-2010-001150*

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**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

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**BETWEEN:**

**HER MAJESTY THE QUEEN**

**- and -**

**CAMERON UNKA**

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**RULING ON *VOIR DIRE***
**of the**
**HONOURABLE JUDGE CHRISTINE GAGNON**

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