IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Daunt,* 2005 YKSC 34

Date: 20050606
Docket No.: S.C. No. 03-01510
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

GEORGE KIERAN DAUNT

Before: Mr. Justice R.S. Veale

Appearances:
David McWhinnie and
Michael Cozens — For the Crown
Richard Fowler and
Elaine Cairns — For the defence

REASONS FOR RULING
(*Voir Dire)*

INTRODUCTION

[1] Kieran Daunt is charged with the second degree murder of Robert Truswell on August 28, 2003, near Dawson City. Defence counsel has applied for a ruling on a *voir dire* that the statements and evidence taken from Kieran Daunt, from the time of his detention on August 28 to his departure from Dawson City on August 30, are inadmissible. The issues generally are whether the Crown has proved voluntariness and whether Kieran Daunt's *Charter* right to counsel and right to silence have been

breached. There are also issues with respect to the delay of the RCMP in taking Kieran Daunt before a Justice of the Peace, the lack of impartiality of the Justice of the Peace who made the remand order and execution of the remand order.

[2] I will deal with each occurrence separately and set out the applicable law. I have ruled that statements made by Kieran Daunt on August 28, 2003, in the police cruiser, at the scene of the shooting and again in the police cruiser at Camelia Sigurdson's residence, are admissible. The statements made by Kieran Daunt in the interrogation on August 29, 2003, in the shower on August 30, 2003, and in the interrogation on August 30, 2003 are inadmissible.

THE FACTS

1. Statements in the police cruiser.

[3] On August 28, 2003, at 4:30 p.m., Kieran Daunt drove into the yard in front of Camelia Sigurdson's residence. Ms. Sigurdson (Cam) lives in Dawson City on the Old Bonanza Creek Road which runs off the Bonanza Creek Road. Bonanza Creek is the location of a number of gold mining claims.

[4] Kieran Daunt and Cam Sigurdson have been "very good friends" since 1979. Cam Sigurdson testified that Kieran Daunt drove into her yard and said that "he thought he had shot Robert Truswell". She described Kieran Daunt as being in a state of shock, traumatized, scared and terrified. She telephoned the police to report the shooting of Robert Truswell and asked for the police and an ambulance to come to her residence.

[5] Before the police arrived, Kieran Daunt phoned his lawyer, Barry Ernewein, who resides in Whitehorse, some 536 kilometres south of Dawson City. Kieran Daunt was apparently advised to say nothing.

[6] Sergeant Ashmore is the RCMP detachment commander in Dawson City. He received a call about the shooting at 4:43 p.m. He called Cam Sigurdson to get more details. She advised that Kieran Daunt had shot Robert Truswell on Gold Hill. Sergeant Ashmore attended at her residence, which he had some difficulty finding, with Constable Groves. Constable Mitchell and later Corporal Gaudet remained on the Bonanza Creek Road. After ascertaining there were no firearms in the residence, Sergeant Ashmore and Constable Groves entered the residence. They saw Kieran Daunt seated at a kitchen table with a beer in front of him.

[7] Sergeant Ashmore advised Kieran Daunt that he was commencing an investigation into a possible homicide and that Kieran Daunt was under investigation for the homicide. There is no doubt that Kieran Daunt was detained at this point. Sergeant Ashmore then read him his *Charter* right to retain and instruct counsel as well as the police warning that Kieran Daunt need not say anything and anything he did say may be used as evidence. Sergeant Ashmore asked him if he understood and Kieran Daunt replied that he did. He asked Kieran Daunt if he wished to contact a lawyer and Kieran Daunt said he had already called a lawyer.

[8] It was not known if Robert Truswell was dead or alive at that time so Sergeant Ashmore requested Kieran Daunt to show him where Robert Truswell was. Kieran Daunt was unwilling to go back to the scene of the shooting because he was concerned that Robert Truswell was still alive and would shoot him. Cam Sigurdson offered to go with the RCMP as she was familiar with the area of the shooting. She wanted to spare Kieran Daunt the trauma. Kieran Daunt reluctantly agreed to go because no one else knew the exact location of the shooting. Cam Sigurdson went along to support Kieran

Daunt. Constable Groves drove the police cruiser, Sergeant Ashmore was in the front passenger seat and Kieran Daunt and Cam Sigurdson were in the back.

[9] Sergeant Ashmore commenced a conversation with Kieran Daunt in the police cruiser asking him where the shooting took place. Kieran Daunt replied that “the confrontation” took place on Gold Hill, approximately 16 kilometres from the Klondyke Highway along the Bonanza Creek Road. Kieran Daunt said there was a shooting that afternoon. He advised Sergeant Ashmore that “Two-by-Four”, (the nickname of Robert Truswell), was shot. When asked if it was possible that Robert Truswell was not hit, Kieran Daunt said “He was hit” and then “I shouldn’t have told you that”. Sergeant Ashmore said “Everything is based on circumstances” and Kieran Daunt replied, “It isn’t good circumstance. Not good circumstance at all”.

[10] When they arrived at Gold Hill, Kieran Daunt did not want to drive up the road on the right or Dawson side of the hill so they took his advice and proceeded up a road on the left side of Gold Hill. The other police officers and the ambulance remained at the bottom of Gold Hill.

2. The Scene of the Shooting.

[11] Sergeant Ashmore stopped the cruiser part way up the left access road to Gold Hill and they walked the remaining 300 metres to the top of Gold Hill.

[12] At the top of the hill, there were tire tracks, a sluice box and a small beat up old trailer and broken glass. Kieran Daunt indicated that this was where the confrontation took place. He said Robert Truswell had driven over the hill and down the other side, the Dawson side of Gold Hill, after the shooting. Sergeant Ashmore directed Constable Groves to walk down in that direction. He also instructed Corporal Gaudet and

Constable Mitchell, on the road below, to come up the same trail that Constable Groves was descending.

[13] Kieran Daunt told Sergeant Ashmore that the incident occurred on the Topaz claim owned by a company called Topaz Resources. Kieran Daunt's father, Ivan Daunt, owned the next claim. Kieran Daunt owned the sluice box and trailer. Kieran Daunt's residence was just over the hill towards his father's place.

[14] Kieran Daunt informed Sergeant Ashmore that he had gone to Gold Hill to put new carpet in his sluice box when Robert Truswell had driven up. Kieran Daunt had walked back towards his vehicle. He said he was scared of Robert Truswell.

[15] At about 6:40 p.m., Sergeant Ashmore learned that Robert Truswell was deceased. He called RCMP headquarters in Whitehorse and asked Sergeant Frank Campbell, the head of the Major Crimes Unit, for assistance.

[16] When they returned to the police cruiser, Corporal Gaudet had driven up. Kieran Daunt was placed in Corporal Gaudet's cruiser and arrested for murder. Sergeant Ashmore read him his *Charter* right to counsel.

[17] At this time, Kieran Daunt said "Yup, yup which I will". Sergeant Ashmore concluded that Kieran Daunt wished to speak to his lawyer.

[18] After the police warning was read, Kieran Daunt said, "From this point on, yup, I've cooperated and I tried to help to a point".

3. Back at the Sigurdson's residence.

[19] Corporal Gaudet drove the police cruiser with Sergeant Ashmore, Kieran Daunt and Cam Sigurdson back to the Sigurdson residence. There were no further statements to Sergeant Ashmore. Sergeant Ashmore stated:

> "No, my intention was not to engage in any kind of conversation with Mr. Daunt related to this incident at the time. I wish - - he had indicated that he would be talking to a lawyer, so I wanted to give him that opportunity".

[20] Kieran Daunt made some conversation with Corporal Gaudet that was not initiated by Corporal Gaudet. One statement was to the effect, "All I know it could have been me, it was that close." Corporal Gaudet did not respond. Kieran Daunt also identified his vehicle at the residence.

4. Statements to Constable Phillips in Daunt's cell.

[21] Kieran Daunt was driven to Dawson City and lodged in a cell at the RCMP detachment. He asked to talk to his lawyer and Corporal Gaudet made the arrangements with Mr. Ernewein. Although Mr. Ernewein requested a single telephone line, it could not be arranged. Kieran Daunt therefore spoke to his lawyer on a multi-line. Kieran Daunt spoke to his lawyer for three minutes and said he was satisfied with the advice from counsel.

[22] That evening, around 10:00 p.m., Corporal Gaudet and Sergeant Ashmore interviewed Kieran Daunt. They obtained swabs from his hands and took a breathalyzer. The hand swabs could not be tested so they are not in issue. The breathalyzer reading of 70 milligrams is not challenged.

[23] At 9:13 a.m. on Friday, August 29, 2003, Constable Tracy Phillips entered Kieran Daunt's cell. She had driven up from Whitehorse with Corporal Brian Edmonds to be part of the investigating team. The balance of the Major Crimes Unit from the Whitehorse detachment arrived on the RCMP plane Friday afternoon under the direction of Sergeant Frank Campbell.

[24] Constable Phillips obtained Kieran Daunt's full name. In response to a question from Constable Phillips, Kieran Daunt said, "I'm not the bad guy".

[25] No secondary police warning was given to Kieran Daunt at this time.

5. Statements made in the August 29, 2003 interrogation by Corporal Gaudet and Constable Phillips.

[26] At 10:50 a.m. on Friday, August 29, 2003, Corporal Gaudet and Constable Phillips began an interrogation that lasted until 2:15 p.m. that afternoon. The interrogation was video and audio taped. The video was played in court with a transcript to assist.

[27] Prior to the interrogation, Kieran Daunt spoke to his lawyer, Mr. Ernewein, for 15 minutes. He spoke to Mr. Ernewein after the interrogation as well.

[28] The interrogation began in a friendly fashion but became increasingly aggressive.

[29] Kieran Daunt indicated he was advised by his lawyer to say nothing and Corporal Gaudet agreed that was okay. Corporal Gaudet read the secondary police warning which advised Kieran Daunt that anything said previously to him by a police officer should not compel or influence him to say anything at this time and that anything he did say may be used as evidence. When asked what the warning meant to him, Kieran Daunt said, "That means shut up". Kieran Daunt also said he hadn't slept at all and felt numb.

[30] When Kieran Daunt referred to the room they were in as the "interrogation room", Corporal Gaudet said "I prefer to call it the room where we talk to people". That theme continued when Constable Phillips asked about his drinking and stated "Don't read into to much of what we ask, we're just, you know, like we're just talking to you".

[31] In the first fifty-six pages of the one hundred forty-three page transcript, Kieran Daunt talks voluntarily about his difficulties with his father, Ivan Daunt. He also discusses his view that Robert Truswell was a bully who had beaten up an old man. He said Robert Truswell was an unsuccessful miner and a bully who should have been put away a long time ago. The latter comment referred to an incident where Robert Truswell attacked a person with a piece of two-by-four lumber.

[32] He called Robert Truswell a paranoid-schizophrenic and indicated that Robert Truswell had made a written complaint about him to the RCMP that summer.

[33] All this information was elicited by the RCMP without difficulty by playing on Kieran Daunt's integrity, Robert Truswell's bad reputation and by minimizing the offence. Kieran Daunt marked a map to show where the disputed claims were located.

[34] At this point (p. 54) in the interrogation, Kieran Daunt began to respond to more detailed questions about the incident with the simple answer "lawyer". Each time Kieran Daunt responded with lawyer, Corporal Gaudet said, "hear me out" and continued the interrogation. At this stage, Kieran Daunt used the word "lawyer" about five times. Kieran Daunt then said "But I don't feel good and I don't want to go any deeper without a lawyer". Constable Phillips left the interview room briefly. Corporal Gaudet continued the interrogation. He began to raise his voice and move his chair and face to within one foot of Kieran Daunt, whose back had been placed against a wall.

[35] There is no dispute that Kieran Daunt used the word "lawyer" in response to questioning about eighty times during the rest of the interrogation. It is agreed that Kieran Daunt made over thirty references to speaking to his lawyer. Constable Phillips

agreed that the reference to the word “lawyer” was an expression of Kieran Daunt's wish to remain silent.

[36] Constable Phillips volunteered that she had personally been in a similar situation to Kieran Daunt and had to shoot a person after a high speed chase. She decided to talk despite her lawyer’s advice not to. Kieran Daunt responded with “I do need a lawyer, we’re in Dawson, we don’t have access to them. I would really like a lawyer here for certain aspects of this conversation and this being one of them”. He followed with a plea, “… please, please bear with me, and (inaudible) my lawyer.” (p. 68) The officers suggested that telling them his side now would be more credible than later. Constable Phillips stated “If you’re traumatized we need to treat you too. …”

[37] The interrogation assumed a somewhat conversational tone until approximately 1:00 p.m., when Kieran Daunt requested a coffee and was provided with one. He said he was not doing okay and he wanted a lawyer present. (p. 83)

[38] He repeated that he wished to have a lawyer present because he couldn’t tell certain things without a lawyer.

[39] The interrogation continued on the subject of the gun. Kieran Daunt immediately said, “lawyer”, “please lawyer”. Corporal Gaudet repeated the “hear me out” line in response. While Corporal Gaudet continued to suggest a child might die or be injured by finding the gun, Kieran Daunt made repeated references to “lawyer” and “At this point, I really need the lawyer”. Corporal Gaudet said, “You’ve talked to your lawyer three times” and continued. Kieran Daunt then resorted to “lawyer, lawyer” on three occasions to which Corporal Gaudet forcefully stated “hear me out, hear me out”. He continued on the theme that the gun issue was a matter of life and death for an innocent

child. Kieran Daunt replied “lawyer”, “it’s my safety blanket”. Corporal Gaudet said, “You know what, it’s a false safety blanket”.

[40] Constable Phillips picked up on the theme by suggesting that a lawyer might give bad legal advice because they don’t know all the facts.

[41] Further on, Constable Phillips suggested that Kieran Daunt “… forget about the legal schmegal bullshit”. (p. 98) Kieran Daunt replied “I can’t forget about the legal stuff because.” Kieran Daunt followed up with five requests for “lawyer” as the questioning continued.

[42] Kieran Daunt then talked about what he was doing that day before the incident but as soon as Corporal Gaudet probed he said “and then now it’s the lawyer again”. (p. 101). A few moments later, Kieran Daunt said, “I have to talk to my lawyer” on two occasions, to which Corporal Gaudet replied, “You’ve talked to your lawyer three times”.

[43] When Corporal Gaudet continued to ask about the gun, Kieran Daunt said “Can I go back to my cell”, to which Corporal Gaudet said, “you’re in police custody and we decide where you will be detained”.

[44] Corporal Gaudet then introduced the Cam Sigurdson strategy by stating that she was an “excellent friend” of Kieran Daunt’s and could become a party to an offence or get arrested for obstruction of justice if the gun was found behind her house. Kieran Daunt immediately stated, “I need to talk to my lawyer” followed by stating that Cam had no involvement. In response to the questions about whether the gun was at her house, Kieran Daunt repeated “lawyer” twelve times. Kieran Daunt finally pleaded, “I got to talk to my lawyer”, suggesting that if they were in Whitehorse, he would be able to see his

lawyer “right now”. Corporal Gaudet replied, “… no that’s not definitely, not entirely true.”

[45] Little progress was made for the balance of the interrogation. Kieran Daunt repeated that “I have to talk to my lawyer” and Constable Phillips and Corporal Gaudet left the room to speak to Corporal Brian Edmonds who was observing the interview. On their return, the police decided to “switch gears” and they asked about bruises on his chest and photographed his chest. They asked for and he provided a DNA sample. Kieran Daunt was emotional at this point and was crying. Constable Phillips brought the interrogation to a close by saying “you’ve been pretty insistent on talking to your lawyer again” and that they should give him another opportunity to speak to his lawyer and discuss the recovery of the gun for safety purposes.

[46] Although the interrogation was persistent and aggressive, it was not overtly physical and did not involve excessive deprivation of amenities. However, Kieran Daunt was completely overwhelmed as evidenced by his tears on two occasions at the end of the interrogation when he was “just trying to maintain right now”.

6. The Shower Statement on August 30, 2003 at 12:04 p.m.

[47] Kieran Daunt was allowed to have a shower prior to the interrogation which began at 12:15 p.m. on Saturday, August 30, 2003. Sergeant Ashmore was present and, without giving a secondary police warning, questioned Kieran Daunt about the location of Robert Truswell’s relatives. Kieran Daunt informed Sergeant Ashmore that Robert Truswell’s mother lived in New Zealand. He also told Sergeant Ashmore that Robert Truswell had two sisters who didn’t speak to Robert Truswell. He further stated

that Robert Truswell had threatened to kill his sisters because they had stolen a stereo system from him 20 years ago.

7. Statements made in the August 30, 2003 interrogation by Sergeant Ashmore and Constable Phillips.

The Remand into Custody

[48] It is necessary to go back to Friday, August 29, 2003, to set the context for the final interrogation on Saturday, August 30. Corporal Edmonds was part of the Major Crimes Unit at the Whitehorse Detachment. He had driven to Dawson in the evening of August 28, 2003, with Constable Phillips and arrived in the early hours of the 29th. He acknowledged that the vehicle was intended for transport of either the accused or the body back to Whitehorse. He was supervising the interviews of Kieran Daunt and assisting Sergeant Ashmore with warrants. He took responsibility to arrange for the remand of Kieran Daunt before a Justice of the Peace. He spoke to a Crown attorney in Whitehorse at 11:10 a.m. about bringing Kieran Daunt before a Justice of the Peace. Corporal Edmonds then called the Trial Coordinator in Whitehorse at 11:23 a.m. to discuss arrangements for a Justice of the Peace. Corporal Edmonds was told that a Justice of the Peace was available by telephone in Whitehorse at 1:00 p.m. but he had to inform the Trial Coordinator prior to 12:00 noon in order for Kieran Daunt to appear before a Justice of the Peace in Whitehorse. Otherwise, arrangements should be made for a Justice of the Peace in Dawson City.

[49] Corporal Edmonds did not interrupt the interrogation. At about 4:05 p.m., Corporal Gaudet and Constable Groves drove Kieran Daunt to the Dawson City courthouse for the remand hearing. Corporal Gaudet was in charge but he had no

memory of who told him to go or who had responsibility afterwards to take Kieran Daunt back to Whitehorse.

[50] Corporal Gaudet took Kieran Daunt into the courtroom and left him there with Constable Groves, while he went in to speak to Justice of the Peace Tyrrell. Apparently, the Justice of the Peace and Corporal Gaudet disagreed on the appropriate form to be used but the Justice of the Peace called Whitehorse and decided to use Form 8.

[51] Justice of the Peace Tyrrell held the remand hearing with Kieran Daunt, Corporal Gaudet and Constable Groves present at 4:30 p.m. He informed Kieran Daunt that he was required to detain him in custody until dealt with by law, pursuant to section 515(11) of the *Criminal Code*.

[52] Justice of the Peace Tyrrell said he could not release him on bail and ordered Kieran Daunt to be detained in custody and transported to the Whitehorse Correctional Centre "forthwith". The Form 8 Warrant for Committal did not contain the word "forthwith" but rather stated:

> "YOU ARE COMMANDED, in Her Majesty's name, to arrest, if necessary, and take the accused and convey him safely to the Whitehorse Correctional Centre at Whitehorse, in the Yukon Territory and there deliver him to the keeper thereof, …"

[53] Corporal Gaudet remembered the use of the word "forthwith", but he could not remember if he reported it to Sergeant Ashmore. He had no memory of communication with anyone about transporting Kieran Daunt to Whitehorse.

[54] Sergeant Ashmore did not recall any discussion about transporting Kieran Daunt to Whitehorse. He knew that Kieran Daunt was remanded into custody in Whitehorse but he did not recall the word "forthwith". He described the murder investigation as "kind

of a joint effort as to who is really in charge". He stated that the "common practice" was to have the RCMP plane fly in and wait while the investigation was conducted. Then all the investigators would fly out on completion of the investigation with the person in custody. He cited lack of manpower and "you try to save some money" as the justification for this practice.

[55] Sergeant Frank Campbell was the head of the Major Crimes Unit of the RCMP in Whitehorse. He had flown up in the RCMP plane Friday, August 29, 2003, and arrived at 3:00 p.m. in Dawson. He acknowledged that he had dispatched Corporal Edmonds and Constable Phillips in a vehicle on Thursday evening so that it could be used for transporting either the body or the accused to Whitehorse. He too was aware of the committal to the Whitehorse Correctional Centre, but was not aware of the "forthwith" aspect of the remand order. He could not recall any discussion of transporting Kieran Daunt to Whitehorse. He was concentrating on the investigation at the crime scene while Corporal Edmonds was responsible for the file in Dawson. Sergeant Campbell rationalized that the RCMP team wanted to leave together with Kieran Daunt to avoid two plane trips.

[56] Corporal Edmonds was vague about his role in the transport of Kieran Daunt. He was aware of the remand to the Whitehorse Correction Centre, but could not recall discussing it with anybody.

[57] Corporal Harlan Inkster is the pilot for the RCMP plane. He received instructions to fly to Dawson City on Friday, August 29, 2003, with Sergeant Campbell and the investigation team. He departed Whitehorse at 1:30 p.m. and arrived in Dawson at 3:00 p.m. He expected to remain in Dawson that night.

[58] The RCMP plane could fly at any time except during the dark hours from 11:00 p.m. to 6:00 a.m. There were no other restrictions. Corporal Inkster was aware that an accused had been detained and he was available for the possibility of transporting the accused on Friday the 29th before 11:00 p.m. He could easily have flown back to Whitehorse at 5:00 p.m. and returned on the 30th to pick up the Major Crimes Unit. The additional return trip would have cost $1,500 for fuel. Corporal Inkster did not learn of the departure time until advised by Corporal Edmonds on the afternoon of August 30, 2003. He flew out of Dawson on that day at 4:00 p.m. with the Major Crimes unit and Kieran Daunt. The result is that Kieran Daunt was transported to the Whitehorse Correctional Centre approximately twenty-three hours after the Justice of the Peace made the order.

The Justice of the Peace

[59] Justice of the Peace Tyrrell had previous contact with Robert Truswell before he remanded Kieran Daunt into custody. On July 9, 2003, Robert Truswell approached the Justice of the Peace in the court room at Dawson City. He proceeded to tell him about a mining claim boundary dispute with Kieran Daunt, that Kieran Daunt had threatened him, that Kieran Daunt had previously beaten him up, that Kieran Daunt had removed various items (including the will of Truswell's father) from his property and that he was fearful of further confrontation with Kieran Daunt. The Justice of the Peace explained that he was not the appropriate person to see and referred Robert Truswell to the Mining Recorder's office, having confirmed that the matter had been reported to the police by Robert Truswell.

[60] The next day, the Justice of the Peace went to the Mining Recorder's office to inform them of the concerns of Robert Truswell. They said it was a matter for the Mining Inspector. The Justice of the Peace met Robert Truswell by chance and informed him to go to the Mining Inspector.

[61] A week or so later, Robert Truswell appeared at the residence of the Justice of the Peace with a stack of photocopies from the Mining Recorder's office and asked him to hold them in safekeeping, as he feared Kieran Daunt would destroy the originals. The Justice of the Peace put the photocopies in an envelope which he marked "Hold for Robert Truswell" with the date July 2003. Robert Truswell repeated his allegation that his father's will had been taken from his cabin. The Justice of the Peace encouraged Robert Truswell to follow up with the Mining Inspector and, if necessary, hire a surveyor and obtain a legal survey of the claim's boundaries. He did not see Robert Truswell again. The Justice of the Peace turned the documents over to the RCMP on September 30, 2003.

The August 30, 2003 Interrogation

[62] The interrogation of Kieran Daunt took place on Saturday, August 30, 2003 between 12:15 and 2:55 p.m., after Kieran Daunt's shower. It was conducted by Sergeant Ashmore and Constable Phillips. Kieran Daunt was given the secondary police warning.

[63] Kieran Daunt told the police that he was told by his lawyer not to say anything. At this point, Constable Phillips asked if Kieran Daunt liked his lawyer and was satisfied with the advice of his lawyer. Kieran Daunt said he did not know enough to answer the latter question. Constable Phillips then asked Kieran Daunt what his lawyer had been

saying to him. Kieran Daunt replied “Don’t say anything.” The interrogation then proceeded on the basis that “we want to just talk to you about just a few things”. Kieran Daunt was told if “there’s things you don’t want to talk about that (*sic*), you let us know that, that’s fine.” Kieran Daunt said he would listen “but please don’t try to get too much out of me about, about stuff up there until I talk to my lawyer.” The references to “stuff up there” refers to the shooting on Gold Hill.

[64] The tone of this interrogation was relaxed and friendly. Sergeant Ashmore and Constable Phillips had decided on this strategy with Corporal Edmonds that morning. They began by telling him how many friends had asked about him and what an incredible amount of support he had in the community. Constable Phillips said, “We don’t think you are a bad guy … and they love you in this community”. It is worth noting that none of the friends were permitted to visit Kieran Daunt while he was in custody at the RCMP detachment. The minimizing of the offence was more pronounced in this interrogation. Sergeant Ashmore added “I’m not here to pressure you or anything else. We want to chat because there‘s a lot of facts we want to let you know about now.”

[65] Sergeant Ashmore then introduced a letter from Robert Truswell which Kieran Daunt had referred to in the first interrogation. Sergeant Ashmore brought an additional letter from Robert Truswell and asked Kieran Daunt to read them. Sergeant Ashmore stated that the events referred to in Robert Truswell’s correspondence had nothing to do with the shooting of Robert Truswell, but was something that happened two months before. The exact opposite was the truth, as the views and opinion expressed in the Truswell letters had everything to do with the shooting.

[66] Sergeant Ashmore suggested that Kieran Daunt should speak to them so that the judge and jury would have “a full picture”. Sergeant Ashmore downplayed the lawyer’s advice to remain silent by saying that even his lawyer if he knew the reason why “the mistake happened … would tell us”. He said that lawyers “automatically say ‘don’t say anything’ and sometimes saying something is a good thing”.

[67] Kieran Daunt proceeded to tell about how the shooting of Robert Truswell occurred. At one point (p. 56), he said, “I need a lawyer at this point”, “I’m going to have to talk to the lawyer” and “I don’t want to say anything more”.

[68] Sergeant Ashmore then changed the subject to Kieran Daunt’s “close friend” Cam Sigurdson; the location of the gun and Cam being implicated in that. Kieran Daunt said “I don’t want to say anything more”. Sergeant Ashmore continued the discussion of Cam Sigurdson and said, “I mean you don’t want to get her in trouble or, or right, umm, that’s why I need to know right now if you can tell me if that firearm is there.”

[69] Sergeant Ashmore said, “we’ll try to leave her out of it”, but raised the prospect of finding the firearms at the residence “and her being under charge”. Further on, he said to Kieran Daunt “she could be charged for the same offence you are for murder …” (p.60)

[70] Constable Phillips eventually stated there was an onus on Kieran Daunt to prove why he was afraid of Robert Truswell. Sergeant Ashmore implied that there was a benefit to co-operating in the investigation so Sergeant Ashmore could go into court and say “He advised us where the firearm was, and he told us why it happened and here are the reasons”. Sergeant Ashmore followed this with “I mean we’re not making any deals

or anything like that but we're just looking out for umm …" Constable Phillips chimed in with "We want the truth".

[71] Immediately following the RCMP assertions about Cam Sigurdson's involvement, Kieran Daunt related more about the events leading up to the shooting. He was given a coffee and he continued to describe the shooting and his fear of Robert Truswell. Kieran Daunt finally said, "Well I'm not listening to my lawyer very well, am I?" Kieran Daunt also said at this point "I gotta talk to the lawyer", that he wanted the statement to go through his lawyer and that the lawyer should be present.

[72] Constable Phillips changed the topic back to Cam Sigurdson getting into trouble and stated that "she's right now being re-interviewed". Kieran Daunt then stated that he came down from Gold Hill with the gun and put in it the blue building behind Cam's residence without her knowledge.

[73] Kieran Daunt then related the rest of the events on Gold Hill including the number of shots fired at Robert Truswell. He drew a map and marked where various objects were.

[74] The interrogation ended at 2:55 p.m. Kieran Daunt was flown to Whitehorse at 4:00 p.m.

THE ISSUES

1. Did the RCMP, on August 28, 2003, breach Kieran Daunt's *Charter* right to counsel during his detention at Cam Sigurdson's residence, during his attendance at the scene of the shooting or during his arrest and return to Cam Sigurdson's residence?
2. As to the interrogation of August 29, 2003;

(a) did the defence prove a breach of the *Charter* right to silence; and

(b) did the Crown prove the statement was voluntary?

3. Did the Crown prove that the statement of Kieran Daunt in the interrogation of August 30, 2003 was voluntary?

4. Did the RCMP have the right to delay the transportation of Kieran Daunt to the Whitehorse Correctional Centre after the order of the Justice of the Peace was made?

Issue 1: Did the RCMP, on August 28, 2003, breach Kieran Daunt's *Charter* right to counsel during his detention at Cam Sigurdson's residence, during his attendance at the scene of the shooting or during his arrest and return to Cam Sigurdson's residence?

[75] Section 10(b) of the *Charter of Rights and Freedoms* provides:

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

[76] In *R.* v. *Bartle*, [1994] 3 S.C.R. 173, the Supreme Court of Canada has interpreted section 10(b) as requiring both an informational duty and an implementational duty. The full extent of the police duty under section 10(b) is concisely summarized in *R.* v. *Luong,* 2000 ABCA 301 at paragraph 12. The following are the relevant portions of this application:

> "For the assistance of trial judges charged with the onerous task of adjudicating such issues, we offer the following guidance:
>
> 1. The onus is upon the person asserting a violation of his or her Charter right to establish that the right as guaranteed by the Charter has been infringed or denied.

> 2. Section 10(b) imposes both informational and implementational duties on state authorities who arrest or detain a person.
>
> 3. The informational duty is to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel.
>
> 4. The implementational duties are two-fold and arise upon the detainee indicating a desire to exercise his or her right to counsel.
>
> 5. The first implementational duty is "to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances)".
>
> 6. The second implementational duty is "to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger)".
>
> 7. A trial judge must first determine whether or not, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel; the Crown has the burden of establishing that the detainee who invoked the right to counsel was provided with a reasonable opportunity to exercise the right.
>
> 8. If the trial judge concludes that the first implementation duty was breached, an infringement is made out.
>
> … "

[77] *Bartle*, cited above, at paragraph 18, clearly stated that a detainee must invoke the right to counsel and be reasonably diligent in exercising it to give rise to the duty on the police to provide a reasonable opportunity to exercise the right to counsel and refrain from eliciting evidence in the meantime. At the same time, before an accused

can be said to have waived his or her right to counsel, they must have sufficient information to make an informed choice on whether to exercise the right.

[78] On the facts of this case, Kieran Daunt was the person who caused the call to be made to the police after the shooting incident with Robert Truswell. He did so by going to the residence of his close friend, Cam Sigurdson, and disclosing his shooting of Robert Truswell. He consulted legal counsel before the arrival of the police and was told to say nothing.

[79] Upon detention at the Sirgurdson's residence, Kieran Daunt was given his right to counsel and the police warning. His response was that he had already spoken to a lawyer.

[80] It was reasonable in the context of these circumstances for Sergeant Ashmore to conclude that he could proceed to request the assistance of Kieran Daunt to determine the location of Robert Truswell in case he was still alive. Kieran Daunt was in a position to exercise his right to counsel, having spoken to a lawyer and having understood his right to counsel. He clearly did not wish to do so and the police had no obligation to provide him with an additional opportunity without some indication that he wished to exercise that right.

[81] Defence counsel submitted that the extent of Kieran Daunt's jeopardy changed when Sergeant Ashmore detained him and informed that he was under investigation for homicide. That is undoubtedly the case and precisely why Sergeant Ashmore read him his rights. But that gives rise to an obligation on the part of Kieran Daunt to inform Sergeant Ashmore of a desire to speak to counsel.

[82] Upon being informed of the death of Robert Truswell, Kieran Daunt was arrested for murder. There is no question that Kieran Daunt's jeopardy changed. Once again, he was given his right to counsel and the police warning. This time, he chose to exercise his right to counsel. Sergeant Ashmore and Corporal Gaudet made no effort to elicit further evidence until Kieran Daunt called his lawyer at the RCMP detachment in Dawson City. The two statements made by Kieran Daunt to Corporal Gaudet, while dropping off Cam Sigurdson at her residence, were freely offered by Kieran Daunt without any police attempt to elicit information. There is no obligation on the police to ignore conversation initiated by the accused and they appropriately did not respond or encourage further conversation.

[83] I conclude that there was no breach of Kieran Daunt's right to counsel to the point of departing from the Sigurdson's residence the second time. I have found that there was no inducement to Kieran Daunt in these circumstances and the Crown has proved voluntariness beyond a reasonable doubt.

Issue 2: As to the interrogation of August 29, 2003:
(a) did the defence prove a breach of the *Charter* right to silence: and
(b) did the Crown prove the statement was voluntary?

[84] Although the Crown was not seeking to introduce the statement, its propriety must be considered in the context of whether it taints the interrogation of August 30, 2003.

[85] There are two legal principles that will be considered under this issue.

[86] The first is voluntariness. The Crown has the onus to establish that a statement is voluntary beyond a reasonable doubt. This is often referred to as the confessions rule.

[87] The second is the right to silence found in section 7 of the *Charter of Rights and Freedoms*. The defence has the onus of proving a breach of the right to silence on a balance of probabilities.

[88] A failure to prove voluntariness results in an automatic exclusion of the statement, while a breach of the *Charter* right to silence may be excluded under section 24(2) of the *Charter*, only if admitting the evidence would bring the administration of justice into disrepute.

Law - Voluntariness

[89] As Iacobucci J. stated in *R.* v. *Oickle*, 2000 SCC 38 at paragraph 47:

> "... The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession."

[90] There are four factors to be considered in whether there is a reasonable doubt as to the voluntariness of a confession: threats or promises, oppression, operating mind and police trickery.

Threats or Promises

[91] The classic confessions rule is that statements are inadmissible if they are the result of "fear of prejudice or hope of advantage". As stated in *R.* v. *Oickle,* cited above, at paragraph 49:

> "… It is improper for a person in authority to suggest to a suspect that he or she will take steps to procure a reduced charge or sentence if the suspect confesses. …"

[92] Threats or promises can also come in the form of inducements such as a threat to charge another person who has a relationship with the accused, unless the accused confesses. See *Oickle*, cited above, at paragraphs 51 and 52.

[93] Some inducements, like “it would be better if you told the truth”, do not always result in exclusion depending on the context of the entire confession. See *Oickle*, cited above at paragraph 54.

[94] Spiritual or moral inducements do no not generally produce an involuntary confession, since the inducement is not in the control of the police officer (*Oickle,* paragraph 56).

[95] Inducements are not always improper but rather become improper “when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne” (*Oickle*, paragraph 57).

Oppression

[96] A confession may be involuntary as a result of factors that create an atmosphere of oppression. These include depriving the subject of the necessaries of life as well as: “denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time” (*Oickle*, paragraph 60). The use of false or non-existent evidence may also be a relevant factor in making a confession involuntary.

Operating Mind

[97] This factor is simply part of the inquiry to ensure that the accused knows what he is saying and that he is saying it to police officers who can use it to his detriment (*Oickle*, paragraph 63).

Police Trickery

[98] This is a “distinct inquiry” and relates to the “integrity of the criminal justice system”. As Iacobucci J. stated in *Oickle*, at paragraph 67:

> “… There may be situations in which police trickery, though neither violating the right to silence nor undermining voluntariness per se, is so appalling as to shock the community. …”

In cases where police trickery “shocks the community”, the evidence will be excluded.

Analysis - Voluntariness

[99] I now turn to the issue of whether the Crown has proven the voluntariness of the statements and conscripted evidence beyond a reasonable doubt. In addition to the denial of access to counsel, there are a number of persuasion tactics to be considered:

1. the officers played down the significance of the interrogation by saying “we’re just talking to you”;
2. the offence was minimized;
3. Kieran Daunt used the word “lawyer” over eighty times to express his right to silence which was ignored;
4. he made over thirty references requesting to speak to his laywer;
5. he was told that if he talked now it would be more credible;
6. he was told he could be treated if he was traumatized;
7. his request to follow his lawyer’s advice was belittled as “legal schmegal bullshit” or the lawyer might be giving bad advice;
8. an explicit request to return to his cell was refused;

9. it was suggested that his close friend Cam Sigurdson could become a party to an offence if Kieran Daunt refused to disclose the location of the gun; and
10. the police ignored the fact that a Justice of the Peace was available at 1:00 p.m. in order to continue the interrogation of Kieran Daunt.

[100] The most serious transgressions in this interrogation were the belittling of legal advice, the offer of treatment and the suggestion that Cam Sigurdson could be charged. In my view, these alone raise a reasonable doubt as to the voluntariness of the statement. However, the combined effect of all the tactics was quite overwhelming for Kieran Daunt, who was crying at the conclusion. The interrogation became very aggressive as it progressed, with only one foot of distance between Corporal Gaudet's face and Kieran Daunt, who could not move away.

[101] Section 503(1)(a) of the *Criminal Code* requires the police to take the accused "before a justice without unreasonable delay, and in event within that period" referring to twenty-four hours where a Justice of the Peace is available. There was no justification for the delay in this case and it becomes another factor to consider in whether the Crown has established voluntariness.

[102] The Crown acknowledges the inappropriateness of the tactics like "legal schmegal bullshit", but submits that nothing came of it. The Crown says the tactics were not acceptable, but there was no effect. In other words, it was not the tactics that caused Kieran Daunt to speak, but his own desire or need to explain himself.

[103] I do not accept this submission, as the combined effect of the tactics clearly overwhelmed Kieran Daunt. He did show attempts to resist the subtle and not so subtle

inducements by asserting his right to silence and his desire to speak to his lawyer. However, the combined effect was such that the Crown has failed to prove beyond a reasonable doubt that his statement was voluntary.

Law - Right to Silence

[104] The right to silence is contained in section 7 of the *Charter*:

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

[105] A breach of the right to silence is a distinct issue to be considered. It provides, in the words of Iacobucci J. in *Oickle,* "a bare minimum below which the law must not fall".

[106] In *R.* v. *Hebert*, [1990] 2 S.C.R. 151, the Court considered a previous Yukon case where the accused consulted counsel and advised the police that he did not wish to make a statement. The police tricked him into making a statement by placing an undercover agent in the accused's cell. In discussing the rules underpinning the right to silence, McLachlan J., as she then was, stated at paragraph 73:

> "First, there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the Charter. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence."

[107] The question, then, is to determine when police persuasion has overridden the accused's choice not to speak. As stated in *Hebert,* cited above, at paragraph 80:

> "The essence of the right to silence is that the suspect be given a choice; the right is quite simply the freedom to choose -- the freedom to speak to the authorities on the one hand, and the freedom to refuse to make a statement to

> them on the other. This right of choice comprehends the notion that the suspect has been accorded the right to consult counsel and thus to be informed of the alternatives and their consequences, and that the actions of the authorities have not unfairly frustrated his or her decision on the question of whether to make a statement to the authorities."

[108] The case law on the right to silence is factually driven, but the general principles are clear. What is not so clear is the precise scope of legitimate police persuasion.

[109] The Supreme Court of the Northwest Territories has consistently ruled statements inadmissible once the accused clearly states that he does not want to answer any further questions. In *R.* v. *W.P.N*., 2000 NWTSC 25, Vertes J. stated that once the accused clearly states that he does not want to answer questions, it is a breach of the *Charter* to continue questioning and ignore the accused's wish. Although the police can try to get the accused to speak, they cannot ignore an express request to remain silent.

[110] In Manitoba, the courts have ruled statements inadmissible when the police have persisted in questioning despite one or more statements by the accused that they wish to remain silent. See *R.* v. *Guimond* (1999), 137 Man. R. (2d) 132 (Man. Ct. Q.B.); *R.* v. *McKay* 2003 MBQB 141 and *R.* v. *Chamberlain* 2003 MBQB 209.

[111] In *Guimond,* Oliphant A.C.J., stated at paragraph 44:

> "It seems to me that once the police are told by the suspect that he or she wishes to remain silent, the questioning by police must also stop. Otherwise, the suspect will likely feel that his or her right to silence is of no effect and may feel compelled to speak to the police despite the suspect having made a meaningful choice to the contrary."

[112] The Supreme Court of Canada has not addressed the limits to police persuasion since *Hebert*, cited above. However, the Quebec Court of Appeal has addressed the

subject in *R.* v. *Otis* (2000), 151 C.C.C. (3d) 416. In *Otis* the trial judge found that the accused had difficulty expressing himself, a limited vocabulary, limited cognition and a low I.Q. The Court of Appeal ruled that he had an operating mind but confirmed the breach of his right to remain silent. Proulx J.A., at paragraph 50, laid down principles so as to better define the scope of persuasion tactics the police can use to convince a person to confess despite having indicated an intention to remain silent:

> “ …
>
> (1) During the course of investigations, police officers are entitled to attempt to obtain confessions.
>
> (2) Although spontaneous confessions do occur, experience demonstrates that it is usually the interrogation which convinces a person to confess.
>
> (3) While police officers may attempt to persuade a person to confess notwithstanding his expressed intent to remain silent, the position of authority of the person who is interrogating the subject who is in a position of dependence must be taken into consideration.
>
> (4) When a person raises his right, it cannot be ignored and action pursued as if the person had waived such right.
>
> …
>
> (6) … the Charter guarantees the person detained the right to remain silent as long as he or she wishes to remain silent. ‘The state is not entitled to use this superior power to override the suspect’s will and negate his or her choice’.
>
> … ”

[113] In my view, *Hebert* and *Otis*, take a similar approach to the right to silence. Once the accused chooses to exercise the right to silence - it must be respected. The right to

choose silence is a meaningless right if the police simply ignore it and continue with police persuasion tactics.

[114] The difficulty arises with police persuasion. If *Hebert* is interpreted as permitting police persuasion tactics after the accused asserts the right to silence, the issue becomes confused with the aggressive police persuasion permitted in *Oickle*, where at paragraph 66, it was stated "courts should be wary not to unduly limit police discretion." This comment was made in the context of "dealing with shrewd and often sophisticated criminals" and should not, in my view, be employed in the face of an accused choosing to exercise the right to silence.

[115] In a useful statement of the law on the right to silence, Schulman J. in *R.* v. *Flett and Thomas*, 2004 MBQB 143 concluded at paragraph 28:

> "… It seems to me that, where an accused shows to the police a consistent decision to remain silent, a court may infer, in the absence of convincing evidence to the contrary, that a subsequent change of decision resulted from overbearing conduct. The initial decision may be made known by words or conduct. The words need not to take any particular form. …"

[116] Unfortunately, the case law leaves the field open for the police to try various techniques of persuasion, which some courts prohibit and others find tolerable. Because of the apparent inconsistencies that arise in the application of the principle of the right to remain silent, some alarm bells are ringing at the trial court level about police persuasion tactics. In *R.* v. *Rhodes*, 2002 BCSC 667, Stromberg-Stein J. stated at paragraphs 109 and 110:

> "Too frequently now, courts are faced with increasingly aggressive police interview tactics directed at suspects in custody who assert their right to silence on the advice of counsel. These tactics are designed to override counsel's

> advice to exercise the right to silence at a time when the suspect is under lock and key, at the mercy of jailers with unrestricted access day or night, who can wear a suspect down physically, emotionally and psychologically. …
>
> When does no mean no? How many times must a suspect say no? Can a suspect simply be ignored until his or her will is broken down or overridden? …"

[117] In my view, once the right to silence is asserted, it should be respected rather than open to endless police persuasion tactics, the results of which are dependant upon the skill of the interrogator or the frailty or inability of the accused person to continue to assert their rights.

Analysis - Right To Silence

[118] There was no question in this case that the accused attempted to exercise his right to silence eighty times during the course of the interview by stating "lawyer". That was clear from the videotape and acknowledged by Constable Phillips in her evidence on the *voir dire*. On virtually every occasion that the accused used the word "lawyer", Corporal Gaudet ignored the attempt to exercise his right to silence by saying "hear me out". The effect of this type of interrogation was to completely ignore the right to silence expressed by the accused and understood by the police. This interrogation tactic is designed to and did nullify the right of Kieran Daunt to choose not to speak to the police.

[119] Kieran Daunt's attempts to exercise his right to silence were also expressed by numerous requests to have his lawyer present and to speak to his lawyer. These requests were met with "forget about the legal schmegal bullshit" on one occasion and "you've talked to your lawyer three times" on others. The ultimate attempt to exercise his right to silence came in his request "Can I go back to my cell now?" The response was "you're in police custody and we decide where you will be detained".

[120] If the right to silence is to have any meaning at all, it must be upheld in situations of persistent ignoring and belittling the attempt of the accused person to remain silent. In this case, the right of the accused to silence has been ignored and frustrated. I conclude that the police clearly breached Kieran Daunt's right to silence on August 29, 2003. As a result of this breach, conscripted evidence including photographs of chest bruises and DNA evidence was obtained. Thus, the breach is significant and the admission of the evidence would bring the administration of justice into disrepute.

Issue 3: Did the Crown prove that the statement of Kieran Daunt in the interrogation of August 30, 2003 was voluntary?

[121] The interrogation on August 30, 2003 was conducted in a friendlier manner than the interrogation on August 29, 2003. However, the interrogation on August 30, 2003 quickly moved into similar police persuasion tactics as those adopted in the August 29, 2003 interrogation. On the latter occasion:

1. Constable Phillips, who participated in the previous interrogation, inappropriately questioned Kieran Daunt about his lawyer and legal advice. Kieran Daunt's statement that he didn't want to talk about the incident was ignored;
2. the police minimized the offence by telling Kieran Daunt of the incredible amount of support he had in the community and that he wasn't a bad guy;
3. although the secondary police warning was given, it was minimized by the suggestion that the officers just wanted to chat;
4. the letter of Robert Truswell raised by Kieran Daunt in the first interrogation was presented, along with a second one. This was

followed by the statement that this correspondence had nothing to do with the shooting of Robert Truswell, which was not true;

5. the police continued to downplay the right to silence and suggested that even his lawyer would tell why “the mistake happened”;
6. the police suggested that Kieran Daunt’s “close friend”, Cam Sigurdson, could be charged with the offence of murder if he didn’t disclose the location of the firearm; and
7. the RCMP held Kieran Daunt in the Dawson detachment for twenty-three hours after they were ordered to transport him to the Whitehorse Correctional Centre.

[122] The threat to charge Cam Sigurdson with murder was a very serious threat. It was a substantial escalation from the threat that she was a party to an offence in the first interrogation. The police were well aware that she was a close friend from the fact Kieran Daunt went to her place immediately after the shooting. She also accompanied Kieran Daunt to the scene of the shooting to support him. There is no evidence about the threat having any validity whatsoever, other than as a tactic to get him to say where the gun was located. Although Sergeant Ashmore said they were not making any deals, there was a clear inference that Cam Sigurdson would not be charged if Kieran Daunt confessed about the location of the gun.

[123] The inducement in this case is distinguishable from *R.* v. *Henri,* 2001 ABQB 290, where Nash J. ruled that the accused drew his own conclusions in concluding that his statement would help a woman he loved who was already charged with murder. In that

case, Nash J. was not prepared to draw the inference that the police suggested that the woman would be released upon receiving his confession.

[124] Although I would rule the August 30 statement inadmissible based upon the threat to charge Cam Sigurdson with murder in combination with the other persuasion tactics, there is also considerable tainting from the interrogation on August 29, 2003. The tainting arises because the August 30 statement involved: the Truswell letter, which was raised by Kieran Daunt in the August 29 interrogation; the threat to charge Cam Sigurdson with murder, which was an escalation from the previous statement; and the continued pursuit of the gun location, which occupied a considerable part of the previous interrogation.

[125] The delay in transporting Kieran Daunt to the Whitehorse Correctional Centre for twenty-three hours is also a factor, as it resulted in a continuation of the investigative custody of Kieran Daunt. I find that the delay in transporting Kieran Daunt to court ordered custody was not innocent, but rather part of a strategy to permit the August 30 interrogation to take place in police custody. I will return to this later.

[126] The defence submitted that the Justice of the Peace had the appearance of a lack of impartiality because of his previous contact with Robert Truswell and the allegations that he heard against Kieran Daunt. It is certainly the case that there was an appearance of a lack of impartiality which should have resulted in the Justice of the Peace not hearing the remand application. However, section 515(11) of the *Criminal Code* gives the Justice of the Peace no discretion whatsoever except to order Kieran Daunt into custody. Thus, in my view, it cannot be considered to be a significant factor in the assessment of voluntariness.

[127] Because of the combination of improper tactics used, I am not satisfied that the Crown has proved voluntariness beyond a reasonable doubt. The statement of August 30, 2003, the gun and the map are inadmissible.

Issue 4: Did the RCMP have the right to delay the transportation of Kieran Daunt to the Whitehorse Correctional Centre after the order of the Justice of the Peace was made?

[128] This issue is about the fact that Kieran Daunt was not transported to the Whitehorse Correctional Centre for twenty-three hours after the Justice of the Peace made the remand order under section 515(11) of the *Criminal Code*. Defence and Crown counsel made submissions about this incident in the context of whether the statement taken on Saturday, August 30, 2003 in the RCMP detachment, was voluntary.

[129] I am raising the failure to transport Kieran Daunt to the Whitehorse Correctional Centre as a separate issue because of its importance to the criminal justice system. My observations are not to be considered as a precedent ,since the delay in transporting the accused was not argued by counsel as a stand alone issue.

[130] Section 9 of the *Charter* states:

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

[131] Pursuant to section 469 of the *Criminal Code*, only a judge of a superior court of criminal jurisdiction may release an accused pending the trial of a murder charge. The result is that the accused in a murder case is taken before a justice of the peace under section 515(11) of the *Criminal Code* which states:

> "Where an accused who is charged with an offence mentioned in section 469 is taken before a justice, the justice shall order that the accused be detained in custody until he

> is dealt with according to law and shall issue a warrant in Form 8 for the committal of the accused."

[132] The Form 8 Warrant in this case states:

> **"YOU ARE COMMANDED**, in Her Majesty's name, to arrest, if necessary, and take the accused and convey him safely to the Whitehorse Correctional Centre at Whitehorse, in the Yukon Territory and there deliver him to the keeper thereof, … "

[133] The RCMP officers did not appear to appreciate the importance of transporting Kieran Daunt from the RCMP detachment in Dawson City to the Whitehorse Correctional Centre. That no doubt had something to do with the fact that they wished to keep him in their custody for the purpose of conducting the second interrogation. That interrogation was ultimately quite successful, as the RCMP were able to elicit from Kieran Daunt the location of the gun used in the shooting and his explanation of what happened immediately prior to the shooting. The issue to be addressed is whether the failure to transport Kieran Daunt to the Whitehorse Correctional Centre as ordered by the Justice of the Peace may have resulted in an "arbitrary detention".

[134] In *R.* v. *Precourt* (1978), 18 O.R. (2d) 714 (Ont. C.A.), there was a similar occurrence. The accused was remanded into custody in a provincial jail by a provincial court judge in the morning of August 22, 1973 for a show cause hearing on August 24, 1973, at Windsor, Ontario. Following the remand, the accused was not taken to the provincial jail, but was kept in cells at the police headquarters on the direction of a police officer. The accused confessed on August 22, 1973 at the police cells before he was transported to the provincial jail in Windsor at 9:30 p.m. that evening. Martin J.A. made a number of observations:

1. “In my view, it was *prima facie* improper to hold the appellant in police custody after he had appeared before the provincial Judge and had been remanded into custody on the morning of August 22, 1973”. (page 722)
2. “When the accused has been taken before a judicial officer and remanded on an information the investigative process incidental to arrest, previously referred to, has terminated, a decision to invoke the machinery of the criminal law to try the accused has been made, and he is thereafter under the jurisdiction of the Court. I do not intend to imply, however, that the police may not thereafter, in appropriate circumstances, interview the accused, or conduct procedures involving the accused, for example, an identification parade”. (page 725)
3. “It is implicit, however, in the provisions of the *Code* and the statutory form of warrant remanding a prisoner that ordinarily where a prisoner is remanded in custody he is to be held in a custodial facility separate from mere holding cells connected with the police function where such a prison is available”. (page 725)
4. Martin J.A. did not go as far as saying that in every case the prisoner must be taken to prison immediately. He envisioned circumstances where finding a missing child or a concealed bomb, or lesser circumstances would justify delaying the transportation of the prisoner to a prison. (page 726)

5. “In the present case, however, no circumstances emerged on the *voir dire* by way of explanation for the delay other than Detective Sergeant Lavergne’s explanation that he did not know that the warrant of remand required the prisoner to be forthwith conveyed to the provincial jail. I can only conclude that, *prima facie*, the detention of the appellant at police headquarters in the circumstances of this case was not a [*sic*] compliance with the warrant remanding the appellant in custody”. (page 726)

6. “The unwarranted detention of the appellant at the police station did not of itself preclude the appellant’s confession from being voluntary but it was a relevant circumstance to be weighed by the trial Judge in deciding whether the onus resting upon the prosecution to prove that the statement was voluntary had been discharged. …” (pages 726 - 727)

[135] The *Precourt* decision was made before the *Charter* was proclaimed on April 17, 1982.

[136] The issue of arbitrary detention under section 9 of the *Charter* was considered in *R.* v. *Warren*, [1994] N.W.T.J. No. 82 (N.W.T.S.C.). In that case, the accused was charged with murder and the Justice of the Peace remanded Mr. Warren into the custody of the RCMP on October 16, 1993. The Justice of the Peace incorrectly followed the procedure under section 516 of the *Criminal Code* and used Form 19, not Form 8. The accused was then kept in the RCMP holding cells for two days, rather than being transferred to the Yellowknife Correctional Centre.

[137] De Weerdt J. concluded that the delay in transferring the accused to the Yellowknife Correctional Centre did not prejudice the accused, since he would have been confined in any event under section 515(11) (he mistakenly referred to section 515(10)). He distinguished the *Warren* case from *Precourt* as follows at paragraph 184:

> "… The justice of the peace expressly ordered that the accused by kept in the custody of the R.C.M.P., unlike the situation in R. v. Précourt. The evidence is that the accused made no objection to this at the time. Furthermore, the evidence reveals that no suitable alternative custodial facility was then available and ready to accept him. The evidence does not reveal any oblique motive on the part of the police in their request for his remand into their continued custody until he could appear before the Territorial Court the following Monday."

[138] De Weerdt J. also outlined the practice of keeping accused in custody in the Northwest Territories. He noted most communities had only police holding cells making it unreasonable to detain remand prisoners elsewhere.

[139] The *Warren* case is distinguishable from the situation in the present case. There was no evidence that the Whitehorse Correctional Centre was unable to accept Kieran Daunt. The geographical circumstances in the Northwest Territories are somewhat different from those in the Yukon, where all but one northern community have good road connections to the Whitehorse Correctional Centre.

[140] The Yukon practice, on the evidence before me, is to delay the transportation of the accused to the Whitehorse Correctional Centre until the investigation is completed, even though the accused has been detained and remanded into custody at the Whitehorse Correctional Centre by a court order. That practice raises concerns because, as stated in *Precourt*, "the investigative process incidental to arrest, previously referred to, has terminated, a decision to invoke the machinery of the criminal law to try

the accused has been made, and he is thereafter, under the jurisdiction of the court." While I agree with Martin J.A. that the accused can still be interviewed "in appropriate circumstances", in my view those circumstances did not exist in the case of Kieran Daunt. Waiting for the investigation team to complete its work is not an "appropriate circumstance", nor is the saving of $1,500 of fuel. The court order was made and should have been executed within a reasonable time - in this case, it was not. The RCMP chose to delay transporting Kieran Daunt pursuant to the court order and continue their interrogation of him under investigative custody. The delay was inexcusable and in breach of the court order. Because of this, the delay could very well amount to a violation of Kieran Daunt's rights under section 9 of the *Charter*.

[141] Although the word "forthwith" used by the Justice of the Peace when he made the remand order, was not in the Warrant of Committal, court orders must always be executed without undue delay.

[142] There is a vast difference between the investigative custody prior to a remand into the Whitehorse Correctional Centre and the process that must be followed after a court order has been issued and the accused is in court-ordered custody.

[143] Although counsel made some submissions on what should happen when the accused moves from investigative custody of the police to court-ordered custody, the issue was not fully researched and argued before me. Nevertheless, given the importance of the issue, I make the following *tentative* recommendations:

1. The remand order under section 515(11) of the *Criminal Code,* in Form 8, contemplates that the accused will be transported to a prison and

not the police holding cells. This is based upon the principle set out in *Precourt* that the accused is now under the jurisdiction of the court.

2. The general police investigative power to interrogate the accused person has terminated. The right to question the accused in the absence of counsel without his consent and the use of police persuasion to convince the accused to waive his or her right to silence do not exist at this stage, because the accused is under the jurisdiction of the court. The statutory powers, such as executing a DNA warrant, will always remain. A spontaneous utterance of the accused in the course of a DNA warrant may be admissible as in *R.* v. *Portillo*, [1999] O.J. No. 3528 (Ont. Sup. Ct. J.) at paragraph 88.

3. There undoubtedly will be circumstances where the accused cannot immediately be transported to a prison. Reasonable delays caused by lack of personnel or transport, for instance, which result in the accused being held in holding cells at courthouses or in detachments cells in small communities are not breaches of remand orders. However, once the remand order is made, the accused is in court-ordered custody, not investigative custody of the police.

4. It will always be a factual determination as to when delay is reasonable and justifiable. The important principle is that the transportation of the accused is paramount and the investigative custody over the accused’s person is terminated.

5. If a circumstance arises where the police are not able to transport an accused in a reasonable time, it is incumbent on the police to bring the matter back to the Justice of the Peace, if it is not raised in the first instance. The accused must have an opportunity to consult and be represented by counsel or duty counsel in person or by telephone. Presumably, counsel will advise the accused that interrogations or interviews are not permitted without the accused's consent. In other words, the police do not have the right to interrogate the accused as if the accused is in investigative custody. The accused must be advised that in addition to the right to silence, the accused cannot be interviewed without a full and informed consent.

[144] As there was no application to exclude the August 30, 2003 statement under section 9 of the *Charter*, I need not decide the point. However, I note that any future such application would, of course, require a consideration of section 24(1) of the *Charter.*

SUMMARY

[145] I have made the following rulings:

1. The statements made by Kieran Daunt on August 28, 2003, in the police cruiser, at the scene of the shooting and in the police cruiser at Cam Sigudson's are admissible. I find that there was no breach of the right to counsel and the Crown proved voluntariness beyond a reasonable doubt.

2. The statements and evidence seized in the interrogation of August 29, 2003, in the shower on August 30, 2003, and in the interrogation of August 30, 2003, are not admissible. The statement of August 29, 2003, is not admissible because of the breach of the right to silence and the failure of the Crown to prove voluntariness beyond a reasonable doubt. No secondary police warning was given for the shower statement. The statement on August 30, 2003, was inadmissible as the Crown failed to prove voluntariness beyond a reasonable doubt.

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VEALE J.