IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Hunter, 2010 NSPC 62

Date: 20100922
Docket: 2121017
Registry: Amherst

Between: Her Majesty the Queen

v.

Thomas Hunter

Judge:	The Honourable Judge Carole A. Beaton
Heard:	10-11 August, 13August, 2010, in Amherst, Nova Scotia
Decision Rendered:	22 September 2010
Charge:	THAT between the 13th day of November 2009 and the 24th day of November 2009 at or near East Amherst, Cumberland County, Nova Scotia he did unlawfully endanger the life of S.R. there by committing an aggravated assault contrary to section 268 of the Criminal Code;
Counsel:	Bruce Baxter, for the crown Hazen Brien, for the defense

By the Court:

[1] Thomas Hunter stands charged that: Between the 13th day of November 2009 and the 24th day of November 2009 at or near East Amherst, Cumberland County, Nova Scotia he did unlawfully endanger the life S. R. there by committing an aggravated assault contrary to section 268 of the Criminal Code.
In anticipation of the trial, Mr. Hunter has made a Charter application asserting that his s.10(b) rights were violated on November 30th, 2009 and seeking relief pursuant to section 24(2) of the Charter. Specifically, Mr. Hunter asserts that he was denied appropriate and sufficient opportunity to exercise his right to counsel prior to providing a warned, cautioned, videotaped statement (hereinafter 'the statement") to Corporal Firth at the Amherst RCMP detachment on the evening of November 30th , 2009. In support of Mr. Hunter's application the court heard his evidence and that of his parents Laura and Dennis Hunter. The Respondent Crown witnesses were Constable Rustige, Corporal Firth, and Constable Matthews.

[2] The burden rests with the Applicant to establish, on a balance of probabilities, that his rights were violated. This court must ask: is it more probable than not, based upon the evidence before me, that a violation occurred? (R. v. Collins [1987] 1S.C.R. 265 at para. 277.)

[3] Despite the marked differences in the evidence of witnesses on behalf of the Applicant and those on behalf of the Respondent as to the operative timeline of events, there is no contest on the following elements:

1) Mr. Hunter was arrested on the section 268 charge by Constable Rustige who read from a card Mr. Hunter's right to consult with counsel and his right to remain silent.
2) During the arrest process Constable Rustige advised Mr. Hunter of the "informational component" (per R. v. Brydges, [1990] 1 S.C.R. 190) as to phone numbers for duty counsel and Legal Aid and the availability of free and immediate legal advice.
3) Mr. Hunter confirmed, through his exchanges with Constable Rustige and later with Corporal Firth, that he understood he had a right to speak to counsel, he understood his right to remain silent and he was satisfied with the advice he had received from the duty counsel lawyer he spoke with for approximately 20 minutes, shortly after his arrest (per R. v Whitford [1997] 115 C. C.C. (3d) 52).

4) Soon after speaking with counsel, Mr. Hunter provided the statement.

The Applicant's Position

[4] Mr. Hunter contends that his right to counsel was breached when he sought to contact his mother for the purpose of having her assist him in exercising his right to counsel and was denied that opportunity by the police, who rejected his request to place a phone call to his mother.

[5] The application before the court raises the question as to what, if any, duty the police have, when providing a person under arrest with opportunity to exercise their right to counsel, to assist that person if they wish to engage a third party to assist them in exercising that right.

[6] It may be trite to observe that not only must there be an opportunity for an accused to contact counsel, but the opportunity must be one which allows for meaningful information to be received by the person under arrest. In this application, Mr. Hunter is not suggesting that he was dissatisfied with the advice he received from duty counsel, but rather that his desire to enlist the assistance of his mother to help him access alternate legal advice was thwarted, thereby rendering his true ability to contact counsel meaningless.

Evidence of the Applicant's Parents

[7] The evidence of Mrs. Laura Hunter and her husband Dennis was, on most if not all material points, for all intents and purposes virtually identical. Mr. and Mrs. Hunter seemed throughout their evidence uncertain of the date of their son's arrest but both were adamant the events had transpired on the Saturday prior to Monday November 30th. Their son and his girlfriend JR departed from Mr. and Mrs. Hunter's home for JR's 6:00 p.m. appointment at the Amherst RCMP detachment. Mrs. Hunter received a text message from her son approximately one half hour later, in which he said only: "I'm arrested". Mr. Hunter and Mrs. Hunter arrived at the Amherst RCMP detachment between 6:30 p.m. and 6:45 p.m. and asked to speak to their son or to the officer in charge. Three officers came into the foyer, being Corporal Firth, Constable Matthews and an unidentified person. More than once Mrs. Hunter told Constable Matthews she wanted to talk to her son and he would not confirm whether her son was at the detachment. She told Constable Matthews there was "no way in hell" her son would give a statement without

talking to her first and Constable Matthews kept telling her that the police could not tell her anything. She told Constable Matthews she wanted to know if her son had a lawyer and she was told that if her son was 17 years old the police could give her information but her son was 20 years old and the police could not tell her anything. Mrs. Hunter then told the police she wanted her son to know she was there and that she was leaving to "go get him a lawyer".

[8] Mrs. Hunter described that during this first meeting with police she was "pissed, upset, angry" and that she "didn't like being stonewalled". She said Constable Matthews told her Mr. Hunter was "exactly where he needs to be". She told Constable Matthews she had "figured out what was going on" and that she was "going to go get Scott Fowler." (It is to be noted Mr. Scott Fowler is a lawyer practising in Moncton, New Brunswick).

[9] Mr. and Mrs. Hunter both testified they knew the police had twenty–four hours to charge their son so they returned to the detachment the next night at 6:00p.m. and met first with Constable Rustige and then Constable Matthews and Corporal Firth came to speak to them. Mrs. Hunter asked to see Thomas and asked "what was going on" and was told the officers couldn't tell her anything but that Thomas had been "charged". They offered her no assistance in determining the location of or contacting her son, or in getting him a lawyer.

[10] Mrs. Hunter described her son as being immature for his then twenty years of age, unsophisticated, not having "done the teenage scene", having a grade 8 education and having lived at home until he moved in with JR. She described her son as easily intimidated and unable to comprehend or understand the term "aggravated assault".

[11] Mr. Hunter described his son as lacking in maturity, lacking in learning ability, being fidgety, having his attention easily diverted, being able to be led along, being able to be intimidated, being easily scared, and emotional. In cross-examination Mr. Hunter described that he and his wife travelled to Amherst because they were" curious to see if he (Thomas) was under arrest and why and what was going on".

[12] On cross-examination Mrs. Hunter was asked whether her son had expressed to her prior to attending at the meeting at the police station any concerns about getting a lawyer and she replied “At that point we didn’t think he needed one”. She agreed she was aware her son had already applied for assistance from Nova Scotia Legal Aid regarding a related Family Court matter. She described she went into the detachment feeling angry and upset because she knew her son would be there “scared to death”. She was asked by the Crown whether she perceived that she had a right to see her son on that occasion and she replied “kind of, sort of because he is my child and has no idea about how to go about getting a lawyer”. She agreed she wanted the police to know she was going to contact Mr. Scott Fowler but that she never did do so.

[13] It is important to note at this point that in submissions on behalf of the Applicant, his counsel, Mr. Brien acknowledged that regardless of the conflicting evidence from both the Applicant and his parents as to pertinent dates, including the date of Mr. Hunter’s arrest, Mr. Hunter was nonetheless prepared to agree and accept that the events surrounding his arrest and subsequent efforts to exercise his section 10 (b) rights all occurred on Monday, November 30th, 2009. Given that admission, it is apparent the evidence of Mrs. Laura Hunter in particular, and to a lesser extent that of Mr. Dennis Hunter, cannot stand with the evidence of Constable Matthews and Corporal Firth, who both testified that they first met with Mr. and Mrs. Hunter almost twenty-four hours following Thomas Hunter’s November 30th arrest and the taking of his statement. Mrs. Hunter said she met with Constable Rustige on her second visit to the detachment, 24 hours after her son’s arrest. She said Constable Rustige went “inside” the office and then Constable Matthews and Corporal Firth came “out” to the foyer. This aligns much more closely with the evidence of Constable Matthews and Corporal Firth who said they never talked to Mrs. Hunter until the night after her son’s arrest. I appreciate this was a period of great stress for the Hunters and their son, and that time frames can easily become confused in one’s mind or seem to blend together; the apparent confusion on the part of the Hunters I am satisfied is only that, and does not impeach their credibility. Rather the Court, in looking carefully at all of the evidence, accepts that they are perhaps somewhat confused about the order in which and dates upon when their conversations with the officers occurred. I accept that Mr. and Mrs. Hunter’s demands to the police that the police convey to their son they would get him a lawyer happened in their evening meeting with Constable

Matthews on December 1st, 2009 when they learned their son had been charged. Accordingly, I am satisfied that the evidence of Mr. and Mrs. Hunter that they wanted to obtain counsel for their son is only that. It cannot assist in the court's consideration of the context surrounding Mr. Hunter's efforts to exercise his section 10 (b) rights at, immediately following, or shortly following his arrest. Once Mr. and Mrs. Hunter became involved in the question of whether their son had counsel he was almost 24 hours past the stages of having been arrested, having spoken to counsel, and having provided a statement. The "significant event" counsel for the Applicant characterized as being Mr. and Mrs. Hunter's meeting with Constable Matthews and Corporal Firth is therefore a moot point on the question before this Court. Further, I note the "significant event" referred to in R v. Rogers [2006] B.C.J. No.444, relied upon by the Applicant, dealt with the extent of any obligation on the police to inquire of an accused, once they have spoken to counsel, whether the accused is satisfied with the advice received, and not with the issue before the Court in this Application.

Evidence of the Applicant

[14] Thomas Hunter described to the court that JR had received a telephone call from the RCMP asking her to attend at the detachment and asking Mr. Hunter to "tag along". Throughout his evidence he described in considerable detail his movements at and the layout of the detachment. He described the process of being arrested by Constable Rustige; he knew Officer Rustige from speaking to him at the detachment at an earlier date. Mr. Hunter told the court he understood he was under arrest for something but he "didn't know what was going on"; the officer told him he would "read my rights and the normal stuff that I hear they do". Mr. Hunter stated the officer read to him about his right to a lawyer and "...how I could get one." After the arrest, the officer started to leave the room and Mr. Hunter said "I want to call my Mom". Constable Rustige told Mr. Hunter "this was not America and I wouldn't get that call." I note that Constable Rustige, in his evidence used much different language to describe the rationale or explanation he provided to Mr. Hunter about who he could or could not call, and what the "rules" were, but the essence of his message of refusal to Mr. Hunter was the same as that to which Mr. Hunter testified. Mr. Hunter told the Court he had wanted to call his mother and tell her he was arrested and let her know he needed help and he needed a lawyer, because he didn't have one.

[15] In his evidence Mr. Hunter went into some detail about the matter of his text message to his mother. He described that when the officer left the room after refusing Mr. Hunter's request to call his Mom, Mr. Hunter hid his cell phone under the table and typed the message. When he realized the officer was re-entering room he began removing the back of his cell phone so the officer would think only that he was simply working on the battery of his phone. He described the officer entered the room "about five seconds after I hit the 'send' button." Constable Rustige asked if there was a problem with his phone and Mr. Hunter said "no, I'm just disassembling it so you wouldn't think I was trying anything". I found this portion of Mr. Hunter's evidence to be rather curious in light of the suggestions from his parents that Mr. Hunter was somehow unknowing, unsophisticated or lacking in intelligence, given both the language he employed (e.g. "disassembling") and his intuitive assumption the police would not have been in favour of him using his cell phone.

[16] For a considerable portion of Mr. Hunter's direct examination he referred to his interaction with "Corporal Firth", although it became abundantly clear to the court as he testified, and indeed on the whole of the evidence on the Application, that he was periodically using the names of the two officers "Rustige" and "Firth" interchangeably.

[17] Mr. Hunter described that Constable Rustige asked him if he needed anything to drink or anything else and whether he wanted to speak to counsel. Mr. Hunter told the Court he hadn't understood because he "was not that smart". He described Constable Rustige asked him if he wanted to speak to a lawyer but said he wasn't listening to the officer, and then the officer took him to another room and dialled the phone and said" here's a lawyer and I'll leave the room and knock on the door when you're done." Mr. Hunter described that he spoke with the duty counsel lawyer Rob Gregan and he "just went with the flow"; he couldn't remember providing any input to the lawyer. After the call, the officer asked him whether the lawyer had given Mr. Hunter the information he needed. Mr. Hunter told the court he didn't know what the lawyer was talking about because the lawyer used terms that Mr. Hunter didn't understand, however, Mr. Hunter did not convey that information to the officer. Rather, he told the officer that the lawyer said the police would question him all night long because he was "in some pretty deep trouble from what the lawyer could tell". The officer then asked Mr. Hunter "if the lawyer had been nice to him". Mr. Hunter told the court the lawyer had spoken in a normal tone of voice.

[18] Mr. Hunter was asked his purpose in wanting to call his mother and he told the court he wanted her to know he was in trouble because she would know what to do - that he needed help and he needed a lawyer. He described he was "shut off" by Constable Rustige from talking to his mother, the person he "needed to talk to". He never asked Constable Rustige again to speak to him Mom because he figured he would "get shot down again". He stated he did not know any lawyers and so could not tell the police that he would like to speak to a particular lawyer. Mr. Hunter was asked whether he had any opportunities to make another call and he replied "I just didn't think in trying because I was shot down once and I didn't think on trying it".

[19] On cross examination Mr. Hunter agreed that when his rights were read to him, Constable Rustige also asked him if he understood them. He was asked by the Crown whether he recalled Constable Rustige telling him about free and immediate legal advice and Mr. Hunter replied "Yes, but I never got the chance". This answer was confusing, as the balance of Mr. Hunter's evidence, along with that of Constable Rustige supported the contrary conclusion – Mr. Hunter did speak to duty counsel, within minutes of his arrest.

[20] The Crown also asked Mr. Hunter whether Constable Rustige had told him about his right to remain silent and his right to Legal Aid and he replied "Yes, but I had no chance to call because I wanted to call Mom". Again, this answer made no sense, in light of the whole of the evidence before the court which establishes Mr. Hunter did have a chance to call a lawyer, but no chance to call his Mom. Mr. Hunter agreed that he had spoken with duty counsel between 6:13p.m. and 6:34p.m. He disagreed he still had his cell phone with him during the time that he spoke with duty counsel, saying "No if I had I would have used it to call a lawyer". I note this evidence contrasted with Mr. Hunter's earlier assertion he didn't know any lawyers to contact.

[21] Mr. Hunter maintained the cell phone was taken from him when his personal items were confiscated by the police, implying that the event had occurred prior to speaking to duty counsel. Mr. Hunter agreed that after he spoke with duty counsel, Constable Rustige had asked him if he was satisfied with his legal advice. Mr. Hunter further qualified this by telling the court he had told Constable Rustige "kind of.... I didn't want to have a legal aid lawyer ". It is clear to the court that Mr. Hunter never communicated anything of the sort to Constable Rustige at the pertinent time. Mr. Hunter also agreed with the Crown he had never told Constable Rustige he wanted to talk to his mother after he spoke to a lawyer, and

Mr. Hunter also qualified that answer by indicating to the court: “Because he had said ‘no’ and it’s a cop and I’m in enough trouble”.

[22] Mr. Hunter was unwilling to concede that Constable Rustige had been “very mild mannered” during the arrest process as proposed to him by the Crown, which I find to be in sharp contrast to what the court heard in the contents of the audio recording of the arrest process (Exhibit 2), which depicted a very calm, conversational, low-key event.

[23] Mr. Hunter agreed that when he met with Corporal Firth he was told his statement would be audio and video recorded and asked if he had been treated with respect by Constable Rustige. Mr. Hunter qualified his original confirmatory answer to Corporal Firth in telling the court it was “because he (Constable Rustige) was polite”. Mr. Hunter confirmed that Corporal Firth too asked him if he understood his rights and if he had spoken with a lawyer. He confirmed Corporal Firth had asked if he wanted something to eat or drink but was unable to recall if Corporal Firth had reviewed with him again his right to silence. The Crown asked Mr. Hunter whether he agreed that Corporal Firth had asked him if Constable Rustige had explained his rights and whether Mr. Hunter had any questions or concerns and Mr. Hunter had answered “no”, however Mr. Hunter never directly answered this question as put to him by the Crown. Rather, he responded with the rhetorical observation “well if I said yes, what would happen?” This was yet another example of those points in Mr. Hunter’s evidence where I was of the impression he seemed to be conveying the position he was taking upon further reflection of the events as opposed to what had taken place at the relevent time, being during and after his arrest. It was put to Mr. Hunter by the Crown that he had been given the opportunity to ask to call his mother when Corporal Firth asked Mr. Hunter if he had any questions. Mr. Hunter’s reply was “he should have asked if I wanted to call a lawyer or make a call; he told me to talk to <u>this</u> lawyer”. Once again, it was apparent that Mr. Hunter was referring to his conversation with Constable Rustige and yet the Crown was asking questions about his conversation with Corporal Firth, which, as I understood the whole of the evidence, was a conversation that began after Constable Rustige’s contact with Mr. Hunter ended, and indeed after the conversation between Mr. Hunter and duty counsel.

[24] The Crown challenged Mr. Hunter that he had indeed talked to a lawyer and Mr. Hunter replied “unwillingly, because I didn’t want to talk to <u>that</u> one, I wanted to talk to my Mom”. The Crown challenged Mr. Hunter that he had never told anyone he wanted his mom to get him a different lawyer, to which Mr. Hunter replied “no, because I was terrified out of my mind not knowing if I would ever see

them (his parents) again. The Crown challenged Mr. Hunter as to how the police were to know what was in his mind, to which Mr. Hunter stated "if they knew I was scared, they'd intimidate me more and more". It remains unclear to this court how telling the police he wanted to contact anyone, including his mother, could only be interpreted as an expression of fear on Mr. Hunter's part.

[25] The Crown took Mr. Hunter through a series of questions which confirmed he had discussed with Corporal Firth on two occasions prior to his arrest, specifically November 24th and November 27th, the definition of aggravated assault, his right to counsel, the right to leave those meetings at any time and his own thoughts about whether he needed or wanted counsel. This aspect of the cross examination served, at the very most, only to clearly demonstrate to the court that the general concept of accessing legal advice was clearly not in the mind of the Applicant for the first time only at the moment starting with his arrest . Further, on re-direct Mr. Hunter described that on both November 24th and November 27th, prior to going to the police station of his own volition, he talked to his mother about going there and she told him if anything happened he was to call her, because she would be able to get him legal help - a lawyer.

Evidence of the Crown Witnesses

[26] The Crown called Constable Rustige, Constable Matthews and Corporal Firth. Exhibit No. 2, heard in its entirety by the court, captured on audio recording the arrest process and the communication between Mr. Hunter and Constable Rustige prior to Mr. Hunter being turned over to Corporal Firth for the actual statement-taking process. That Exhibit very clearly establishes, and I am satisfied that:

a) the arrest of Mr. Hunter was a low key, calm process.
b) Mr. Hunter was advised of his right to counsel and immediately, albeit with almost monosyllabic brevity, he clearly communicated his desire to exercise that right.

[27] The evidence of Constable Rustige, corroborated in many respects by that of Mr. Hunter, satisfies me that:

a) Mr. Hunter was, very soon after his arrest, escorted to a room and in the face of his indication to the officer that he did not know the names of any lawyer, Constable Rustige dialled the phone and put Mr. Hunter in contact with duty counsel Rob Gregan.

b) Mr. Hunter expressed to Constable Rustige two times during their contact that he wanted to call his Mom. He never articulated why, or expanded on that thought, and Constable Rustige never asked why he was making that request.

The evidence of both Corporal Firth and Constable Matthews clearly establishes the time line of the relevant events. Despite the adamancy of all 3 Hunters to the contrary, I am satisfied the arrest of the Applicant and the first visit to the detachment by his parents occurred on Monday, November 30th. The evidence of Mr. and Mrs. Hunter as to the tone and contents of their conversation with Constable Matthews I have no hesitation in accepting, and I note Constable Matthews agreed in cross-examination with much of the description of that meeting as given by Mr. and Mrs. Hunter.

Argument of the Applicant

[28] The Applicant argues that Mr. Hunter spoke with duty counsel only because the police had a particular plan or process, expedited by the arresting officer, to have Mr. Hunter give a statement quickly, despite the fact Mr. Hunter sought to speak to his Mom about getting a lawyer, although he never expressed to the police the purpose behind that request.

[29] The Applicant referred this Court to R. v. Grimshaw, 2005 ABPC 152, in which the accused was offered the opportunity to call counsel but replied "no, but may I phone my father", a request which was refused. He was asked again whether he wanted to call a lawyer and he replied "I don't have a lawyer". Mr. Grimshaw testified that he didn't know the name of a lawyer and wanted to call his father because he knew his father knew a lawyer and he wanted to retrieve that lawyer's telephone number to obtain some advice. Mr. Grimshaw testified he didn't tell the arresting officer the purpose for the call to his father because he was scared, having been treated roughly at the scene of the arrest. Ultimately the court in Grimshaw found a problem with the credibility of the applicant and determined that it could not conclude on a balance of probabilities that the accused had requested a call to his father or indicated to the officer that he did not have a lawyer.

[30] The Applicant relies on Grimshaw as authority for the notion that because the court in that case had not specifically excluded the proposition that an inability on the part of a person to contact their parent for the purposes of obtaining legal counsel could constitute a violation of section 10(b), then the case must be said to support that proposition. With respect, while the court in Grimshaw may not have

specifically articulated a rejection of the interpretation that the Defence seeks to have this court take, this court cannot be confident what the court in Grimshaw might have decided absent its difficultly with the credibility of the applicant. Similarly, the Applicant argues that in R. v. Hill, 2005 NBPC 21, the court did not specifically state that a person exercising their right to counsel should not receive the benefit of a call to a third party. Again, it is difficult to infer, much less rely upon on an observation that was not made by the court in that case. The fact that a court does not discuss something cannot automatically lead to the opposite conclusion: it cannot be said that if a court did not specifically reject or dismiss a concept then its silence must have meant automatic adoption or endorsement of that concept. These decisions are of little assistance in the instant Application.

[31] Is there a blanket requirement on the police to inquire what purpose the accused might have in seeking to contact someone other than counsel? The answer to that is, in my view, no, on those occasions when there is no apparent nexus between the discussion about right to counsel and the discussion about calling a third party. Ultimately, the existence of such a requirement will be a matter of context in each individual situation.

[32] The Applicant relies on the decision in R. v. Russell, 2006 SKPC 55. At paragraph 25 of the decision the court noted as follows:

> *"There have been a number of cases in Saskatchewan that have considered factual situations in which police officers have placed calls to counsel on behalf of an accused person. Matheson J. in R. v. Kowalchuk 1999 CanLII 12437 (SK Q.B.), (1999), 179 Sask R. 31 (Q.B.) reviewed a case in which an officer had dialled the 24 hour Legal Aid line for the accused without being asked to do so by the accused and the court concluded that Mr. Kowalchuk was never given an opportunity to consult with counsel of his own choice. In R. v. MacLaren 2001 SKQB 493 (CanLII), (2001), 212 Sask. R. 204 at paragraph 22, Mr. Justice Foley held that where a police officer took the initiative and placed a call to Legal Aid for the accused, the person had not been given a reasonable opportunity to exercise his right. Shortly after that decision, Judge Whelan in R. v. Cohoon (2001), 52 W.C.B. (2nd) 512 (P.C.J.) commented critically on the police practice of controlling access to counsel although the case did not turn on the practice. Turpel-Lafond, P.C.J in R. v. Campbell 2003 SKPC 82 (CanLII), (2003), 235 Sask. R. 127 held that where an accused expressed a desire to speak to a specific lawyer and a police officer cannot reach counsel for the accused but placed a call to Legal Aid on his behalf, a section 10(b) breach had occurred. More recently, my brother Judge Jackson in R. v. Ryland [2006] S.J. No. 119 considered a case*

> *in which an accused wished to contact specific counsel. The officer called the lawyer's office (it was 4:35a.m.) but could not get a response. Ryland agreed with the officer's suggestion that the lawyer's residence should be called. Again the lawyer could not be reached. The officer then asked the accused whether he wished to call Legal Aid and, after receiving an affirmative response, the call was placed and the accused consulted with counsel. During the voir dire the accused testified that he did not know that he had any choice other than Legal Aid. He did not have access to a telephone book. My colleague concluded that the accused was not provided with a proper opportunity to contact counsel of his choice."*

[33] The Applicant argues there are many parallels between the Russell case and the instant case because Mr. Hunter was asked by Constable Rustige whether he had a specific lawyer or had a lawyer in mind and Mr. Hunter answered no. Following that, Constable Rustige dialled the phone number for Legal Aid. Constable Rustige never inquired of Mr. Hunter whether Mr. Hunter wanted him to call Legal Aid or whether Mr. Hunter wanted to speak with someone at Legal Aid; he simply called the duty counsel line and put Mr. Hunter in contact with duty counsel.

[34] With respect, I must disagree. Mr. Hunter's situation is easily distinguished on its facts from each case mentioned in Russell, because Mr. Hunter never said *anything,* at any single stage in the process, to indicate that (a) he wanted to speak to a different lawyer, or (b) he did not wish to speak to duty counsel, or (c) he wanted to employ another method to find counsel, or (d) he wanted to talk to a lawyer other than the one Constable Rustige had dialled for him, or (e) he was unhappy with the legal advice he had received, or, and perhaps most significantly (f) he wanted to speak to his mother for the purpose of getting assistance in contacting a lawyer.

[35] There are many different scenarios imaginable which might have occurred, and equally as many scripted responses that an officer might employ in any given scenario, but in the Applicant's case the fact remains that Constable Rustige embarked on a certain course which, I am satisfied from the whole of the evidence, was borne from or came about as a result of the nature and quality of the responses the officer was receiving from Mr. Hunter. If only Mr. Hunter had said something - anything - to expand upon his thoughts; however, he did not. Mr. Hunter never identified or articulated to anyone the purpose of his request in asking to speak to his mother and what if any relationship that request may have had to his desire to speak to a lawyer. This Court is not attempting to endorse a type of "don't ask – don't tell" policy that would unfairly protect police who fail to ask accused persons

appropriate questions in certain circumstances. Having said that, I am not persuaded it fell to Constable Rustige to mine the depths of Mr. Hunter's thoughts to try to assess what, if any, greater significance there was to his answers than might have been apparent. Clearly, if Mr. Hunter had said something about the connection between his desire to talk to his Mom and his desire to talk to a lawyer then the police would have been obliged to do something about it.

[36] The Applicant maintains there was a deficiency on the part of Constable Rustige, in failing to ask Mr. Hunter why he wanted to call his mother, that goes to the heart of the section 10(b) breach. Mr. Brien emphasized that his client was very young (twenty years old) and had been surprisingly and swiftly arrested, all under the pretence of accompanying his girlfriend to the detachment for a meeting. The Applicant argues the whispered conversation between Constable Rustige and Corporal Firth as captured in Exhibit #2 demonstrates that Corporal Firth was determined to have Constable Rustige block any efforts by Mr. Hunter to have contact with his mother. I am not persuaded there was anything in the evidence of the officers to suggest that denying Mr. Hunter access to his mother was part and parcel of an intention to deprive him of the opportunity to speak to a lawyer or to speak only to the lawyer chosen by the police. The Applicant further argues there was a failure by Constable Rustige to employ logic and common sense and inquire of Mr. Hunter as to why he might be asking to speak with his mother. The Applicant submits that when Constable Rustige communicated to the effect that Mr. Hunter was an adult and didn't have a right to call his mother, that Constable Rustige should have then further qualified his explanation by telling Mr. Hunter that if it was legal advice Mr. Hunter was looking for it could only come from a lawyer. Hindsight is always beneficial, and there are a myriad of possibilities that *could* have unfolded that evening, some of which could easily have taken the officer and Mr. Hunter down a different path, one on which Mr. Hunter might have spoken to his mother. It is of little surprise that police do not want accused persons having third party communication during the arrest process, for obvious reasons. However, I am not persuaded Constable Rustige failed to meet some type of questioning requirement or standard in communicating with Mr. Hunter about his s.10(b) rights, or in refusing Mr. Hunter's request to speak to his Mom which, on its face, bore no apparent, immediate or obvious connection to speaking to counsel.

[37] The Applicant says because the police choose to do nothing about his request to speak to his mother they intentionally violated his section 10(b) right. He asserts the police concocted a plan to simply "push through" or pay lip service to the section 10(b) component of the arrest process and get quickly to the

statement taking without letting him speak to anyone, including his mother, and the "plan" discussed in the evidence of the police clearly identifies that intention.

[38] The evidence of Corporal Firth establishes plainly that there was indeed a plan for the arrest of Mr. Hunter, a "script" as he referred to it in his evidence. Having said that, the plan also involved taping the arrest and Mr. Hunter's exercising of his right to counsel, which in my view assists in removing the sinister connotation the Applicant would have the court attached to the so called "arrest script".

The Position of the Crown

[39] I am inclined to agree with the Crown's submission regarding the potential for a "slippery slope" to develop if the court were to accept in this case that the moment Mr. Hunter mentioned his mother, the police should have then questioned him in detail about why he was raising the subject of his mother. If Constable Rustige had done so, armed only with the conversation he had with Mr. Hunter to that point, there was the risk that Mr. Hunter could have provided an answer or information contrary to his own interests. I agree with that when Mr. Hunter was asked by Constable Rustige if he wanted to speak to a lawyer and he confirmed he did, and when he replied in the negative as to whether he had a particular lawyer in mind, Constable Rustige took the logical step, he was required to do, of putting Mr. Hunter in contact with duty counsel. Mr. Hunter never tied the concept of speaking with his mother to the concept of his right to counsel despite being asked more than once if he had any questions about his rights. It is difficult for the Court to accept now that at the time Mr. Hunter raised the subject of his mother with Constable Rustige it was because it was related to his right to counsel. Even if I am wrong about that, nonetheless Mr. Hunter never made the connection between those two concepts – Mom and a lawyer - to Constable Rustige or Corporal Firth. Indeed Mr. Hunter testified he never expressed to anyone any desire to have his mother get him a lawyer.

[40] In rebuttal the Applicant posited a rhetorical question as to the ultimate hilarity (which the court inferred to mean irony) of the events if in fact Laura Hunter had been a lawyer, but one can never know the outcome of that because Constable Rustige never asked any questions about any connection between Mr. Hunter's request to talk to Mom and his request to speak to a lawyer. I am of the opinion that the hypothetical actually underscores the view of the Court: how would any officer dealing with Mr. Hunter connect Mrs. Hunter to her son's exercise of his section 10(b) rights unless her son communicated to the officer that

his mother was also a lawyer? Adequate communication of relevant information is what was lacking in this case.

[41] The police must do more in providing an accused with their right to counsel than simply being automatons; they cannot just follow a script in reading the standard right to counsel to an arrested person. Rather, the police must give meaning to the right to counsel in any given situation by expanding on concepts, asking and answering questions when appropriate, relevant and necessary, and making certain that people understand their rights and have the opportunity to exercise them in a meaningful way. Accepting as I do that Constable Rustige was being appropriately of assistance to Mr. Hunter, I ask myself did that also extend to a requirement that Constable Rustige ask questions of Mr. Hunter or explore requests that Mr. Hunter was making which on their face seemed to have no connection to Mr. Hunter's exercise of his section 10(b) rights? In my view the answer to that question, based on the facts before me as I have found them, is no. The Applicant has not persuaded this Court on a balance of probabilities that his s.10(b) right was denied, and the Application is therefore dismissed.

PCJ