

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Campbell*, 2019 NSPC 44

Date: 20191001
Docket: 731632
Registry: Sydney

Between:

Her Majesty the Queen

v.

Peter Joseph Campbell

Judge:	The Honourable Judge Diane McGrath,
Heard:	April 18 and August 20, 2019, in Sydney, Nova Scotia
Decision	September 30, 2019
Charge:	Criminal Code section 253(a) Criminal Code section 253(b)
Counsel:	Steve Melnick, for the Crown William P. Burchell, for the Defendant

By the Court:

[1] **INTRODUCTION**

[2] Peter Joseph Campbell was convicted on May 10, 2018 of impaired operation of a motor vehicle (*Criminal Code* section 253(a)) and refusal of a breath demand (*Criminal Code* section 253(b)) as a result of events that occurred in the early morning hours of April 17, 2016.

[3] Following the completion of events in the breath room at the Cape Breton Regional Police Service Headquarters, Mr. Campbell was lodged in cells at 3:06 am. Mr. Campbell remained in police custody until 9:56 am when he was served with a temporary driving suspension and PTA and released from custody. Mr. Campbell argues there was no lawful authority to detain him during the 6 hours and 50 minutes he was kept in custody and as a result his Rights, pursuant to Section 9 of the *Canadian Charter of Rights and Freedoms*, have been violated. He further argues that as a result of this violation the charges against him should be stayed. A separate *Charter Voir Dire* was held on April 18 and August 20, 2019 in relation to that issue during which evidence was called and the evidence from trial was admitted by consent.

[4] **THE EVIDENCE**

[5] Shortly after 2 am on April 17, 2016 Cst. Shane Oldford of the Cape Breton Regional Police Service placed Peter Joseph Campbell under arrest for impaired operation of a motor vehicle and read him his rights and police caution. Cst. Oldford was satisfied Mr. Campbell understood what was read to him. Once at police headquarters, Mr. Campbell exercised his right to counsel and spoke to duty counsel. Again, Cst. Oldford did not express any issues with Mr. Campbell's ability to speak with duty counsel or appreciate what was occurring. Cst. Oldford described Mr. Campbell as being highly intoxicated indicating at trial it was because he was quite unsteady on his feet together with the presence of a strong odour of alcohol that he formed this opinion. Mr. Campbell was, however, able to walk and his ability to understand what was being said to him and what was occurring around him was never questioned.

[6] Following events in the breath room, Mr. Campbell was advised he was also being charged with refusal. Cst. Oldford then escorted Mr. Campbell to the lockup where he was lodged. At trial Cst. Oldford testified he placed Mr. Campbell in a cell because he did not believe it was appropriate to serve him with any legal documents due to his level of intoxication. At trial he testified that he checked on Mr. Campbell

at 6 am prior to completing his shift, however, Mr. Campbell was sleeping, and, in any event, he did not think he would have sobered up after 3 hours.

[7] During evidence called on the Charter Application, Cst. Oldford testified that following the attempted breath tests he did not have any further personal contact with Mr. Campbell, but based on his opinion of his level of intoxication at 3 am he would not have been sober at 6 am. It was Cst. Oldford's evidence it would only be appropriate to release Mr. Campbell when he was sober or if he had someone who could care for him. He restated he did not think it was appropriate to serve him with any legal documents when he was intoxicated. He further did not think it was safe to release Mr. Campbell because the police station is close to a highway.

[8] Cst. Oldford readily admitted that Mr. Campbell's identity had been clearly established, there was no further evidence to secure or preserve, and there was no reason to believe he would not attend court. With respect to a repetition of the offence in question, Cst. Oldford indicated Mr. Campbell had provided an address that is quite a distance away, the vehicle he had been operating was impounded and he did not know anything about Mr. Campbell's access to other vehicles. There was no evidence given about whether or not Cst. Oldford made any inquiries about whether Mr. Campbell had anyone he could call to come pick him up although there

was clear evidence provided that Mr. Campbell had more than enough money in his possession to hire a taxi to take him anywhere on Cape Breton Island.

[9] Cst. Oldford testified that he holds all arrested persons until they are sober and that he does not like to serve legal documents on a person who is impaired by alcohol.

[10] At trial Cst. Keith Power, a qualified breath technician, provided evidence concerning his observations and opinion of Mr. Campbell's level of intoxication at the time he dealt with him. Cst. Power described Mr. Campbell as being highly intoxicated. He indicated Mr. Campbell was unsteady on his feet, however, was able to walk the 30 feet into the breath room unaided and did not need to steady himself with the wall nor did he fall down. He further indicated Mr. Campbell was slurring his speech, although he had no trouble understanding what Mr. Campbell was saying. As well, he observed Mr. Campbell to have glossy, blood shot eyes and a smell of alcoholic beverage coming from him. With respect to Mr. Campbell's ability to comprehend events, Cst. Power indicated at trial "he was very clear when, when responding to me that he did understand what I was saying to him."

[11] Sgt. Russell Baker, the Sergeant in charge of the lockup and therefore the continued detention or release of prisoners on the day in question, had no specific recollection of Mr. Campbell. He did testify however that arrested persons should never be held unless it is absolutely necessary and they should always be released as soon as possible. With respect to the issue of intoxicated persons, he testified that if someone can function on their own or in someone else's care without causing problems in the community they should be released.

[12] The Cape Breton Regional Police Service has an Operational Policy with respect to the care and handling of prisoners. This policy has been in effect since March of 2013. Sections 8.2 and 8.3 of that policy state:

8.2. Prisoners released shall be encouraged to make transportation arrangements and provided with a phone or have a call made to do so. (Taxi, family members, friend, etc.)

8.3. No person under the influence **shall** be released from custody without transportation.

NOTE: These precautions **shall** be strictly obeyed due to the location of the roadway in relation to the Police Building.

[13] The policy then goes on to state in Section "**L. NON-RELEASE OF PRISONERS**" at 9.1

9.1 No person is to be released from custody where it is believed on reasonable and probable grounds that it is necessary in the public interest to hold the person(s) to:

- 1) Establish the identity of the person.
- 2) Secure or preserve evidence of or relating to the offence.
- 3) Prevent the continuation or repetition of the offence or another offence.
- 4) Or, there are reasonable and probable grounds to believe that the person will fail to attend court.

[14] Sgt. Baker agreed that the cell log indicated that Mr. Campbell had \$275 in cash when he arrived at the cells and went on to say he was detained to ensure there was no continuation of the offence or commission of another offence despite having no recollection of Mr. Campbell.

[15] At trial, Mr. Campbell testified that upon his eventual release from custody he phoned a taxi to take him to a friend's place and from there a friend drove him home as his vehicle had been impounded.

[16] During the course of the Charter Application the Crown called two jailers who dealt with Mr. Campbell during the time he was in lockup to discuss their observations, as well as Department Policy with respect to retention and release of prisoners.

[17] Sp/Cst Sharon MacLeod was working in lockup on the date Mr. Campbell was in custody. She indicated the prisoner log form was filled out by her and that the information was provided by Mr. Campbell. She indicated on that form that Mr.

Campbell was intoxicated. The notes on the form up to and including the note made at 4:41 am were made by her. None of her entries are initialed as required by policy as Sp/Cst MacLeod testified that everyone knows her writing. She does not recall anything specific about Mr. Campbell other than stating she had information about the police call but went on to add independent recollections of signs of impairment such as slowed, slurred speech, staggering and a strong odour of alcohol. What she knew or thought she knew about the police call was not elaborated on during the hearing.

[18] Sp/Cst MacLeod's notes indicate Mr. Campbell was sitting up in the cell on a number of occasions when he was checked and was laying down on other occasions. She testified he was asleep during all these checks, including those when he was sitting up otherwise, she would have indicated he was awake. She testified she did not recommend to the Duty Sergeant he be released because of his intoxication level and she would never recommend anyone who is intoxicated be released in the middle of the night unless they have someone to take control of them because that is their policy.

[19] Sp/Cst MacLeod testified it is by engaging prisoners in conversation that she assesses their level of intoxication, however, there is nothing to suggest she had any conversation with Mr. Campbell after he was placed in the cells. Sp/Cst MacLeod

went on to indicate she did not know what Mr. Campbell's level of intoxication was as he did not take the breath test and this was a big concern for her.

[20] In assessing the evidence of Sp/Cst MacLeod I find I am able to put very little weight on her testimony. Sp/Cst MacLeod appeared to be guessing with respect to large parts of her testimony. While she readily admitted at first she had very little independent recollection of Mr. Campbell, she then went on to attempt to fill the gaps where necessary. She appeared very defensive almost to the point of self-righteousness in providing her evidence. Sp/Cst MacLeod continually stressed the importance of following policy with respect to the release of prisoners, however, was unable to indicate what the law required in this regard. She as well demonstrated that policy concerns were really not as significant to her as she originally indicated when she admitted to not following policy with respect to the monitoring of prisoners or completion of the prisoner log. For these reasons, I find her evidence that Mr. Campbell was asleep while in the cells every time she checked on him unreliable in the absence of any supporting documentary evidence. As well, I find her assessment of Mr. Campbell's level of intoxication to be of little assistance beyond confirming he was sober enough to provide her with the necessary information to initially fill out the prisoner log.

[21] Sp/Cst MacLeod was relieved at 5 am by Sp/Cst Richard MacMullin. Sp/Cst MacMullin recalls Mr. Campbell from cells as Mr. Campbell looked a lot like someone else Sp/Cst MacMullin knows. Sp/Cst MacMullin made a number of entries on the prisoner log sheet with respect to his observations of Mr. Campbell in the cells. Where his entries indicated Mr. Campbell is sitting up, he testified Mr. Campbell would have been awake as he notes when prisoners are sleeping.

[22] At 6:31 am Sp/Cst MacMullin made a notation that Mr. Campbell was speaking to the other jailer on duty, Jailer Rahey about when he would be leaving. Sp/Cst. MacMullin has no independent recollection of this interaction or occurrence. Again at 8:35 am there is a notation in the log indicating Mr. Campbell spoke to the jailer about leaving. Again Sp/Cst MacMullin has no independent recollection about that interaction. Sp/Cst MacMullin indicated he generally does not note intoxication levels on the prisoner log.

[23] Sp/Cst MacMullin testified he uses his interactions with prisoners when he photographs and fingerprints them to assess their level of intoxication. He indicated he usually performs these tasks just before individuals leave lock-up. He has no independent recollection of taking Mr. Campbell's prints, however, testified that when Mr. Campbell was removed from the cell for fingerprinting, he would have

done so as a means of assessing sobriety. The log indicates this was not done until 9:22 am and Mr. Campbell was released at 9:56 am.

[24] Sp/Cst MacMullin was unable to recall if the arresting officer checked on Mr. Campbell prior to the completion of his shift that day. He further stated he would never release an intoxicated person to take a taxi as they require someone to take responsibility for them due to the proximity of the police station to the highway. Sp/Cst MacMullin's testimony with respect to policy as well indicates that policy is not uniformly followed, particularly with respect to the completion and signing of forms.

[25] Sp/Cst Julian Rahey as well testified. He indicated he had no recollection of Mr. Campbell from his time in police custody. With respect to his entries on the prisoner log, he could not recall if Mr. Campbell had been awake or asleep when he preformed his checks as he did not indicate such on the form. When cross-examined on the release policy, he admitted the policy indicates that prisoners are to be encouraged to arrange transportation which specifically includes a taxi and that the section with respect to non-release of prisoners, in certain circumstances, is to be followed.

[26] **THE LAW**

[27] Section 495 of the *Criminal Code* sets out when a peace officer may and may not arrest a person without a warrant. Subsection 1 of that Section reads:

495 (1) A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
- (b) a person whom he finds committing a criminal offence; or
- (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

[28] Section 495 should be read with Section 497 of the *Criminal Code* which applies once an arrest is effected without a warrant. The relevant subsections for this inquiry are Subsections 1 and 1.1 which read:

497 (1) Subject to subsection (1.1), if a peace officer arrests a person without warrant for an offence described in paragraph 496(a), (b) or (c), the peace officer shall, as soon as practicable,

- (a) release the person from custody with the intention of compelling their appearance by way of summons; or
- (b) issue an appearance notice to the person and then release them.

Exception

(1.1) A peace officer shall not release a person under subsection (1) if the peace officer believes, on reasonable grounds,

- (a) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to
 - (i) establish the identity of the person,
 - (ii) secure or preserve evidence of or relating to the offence,
 - (iii) prevent the continuation or repetition of the offence or the commission of another offence, or
 - (iv) ensure the safety and security of any victim of or witness to the offence; or

(b) that if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.

[29] These sections require that an officer who has arrested a person without a warrant must, once the necessary investigation has been concluded, consider the issue of release. If the person has been arrested for either a summary conviction offence or a hybrid offence, they may be detained only if such detention is required to: 1) establish their identity; 2) prevent the continuation of the offence; 3) preserve evidence; or 4) secure the safety of any witness or victim of the offence.

[30] Section 9 of The Canadian Charter of Rights and Freedoms states:

s. 9. Everyone has the right not to be arbitrarily detained or imprisoned.

[31] The meaning of the word “arbitrary” in the context of *Charter* litigation has been the subject of much judicial comment. The definition of an arbitrary detention as found by the Ontario Court of Appeal in **R v. Cayer** (1988), 6 M.V.R. (2d) 1 (Ont. C.A.) is most often cited in the authorities provided by both Crown and Defence. Indeed in **R. v. Petrie**, a 2006 decision of then Associate Chief Judge Brian R. Gibson of this Court, the definition as enunciated by the Ontario Court of Appeal in **Cayer** was relied upon in determining whether or not an arbitrary detention had occurred on the facts of that case. I find that definition is applicable today and adopt

the view of the Ontario Court of Appeal in the **Cayer** decision at page 13 wherein they state:

“In our view, an arbitrary detention for the purpose of these appeals is a detention which is capricious, despotic, *or* unjustifiable.”

[32] While both parties have provided numerous cases¹ on the issue of arbitrary detention in the context of impaired driving and refusal charges what becomes abundantly clear upon reviewing the authorities is that each turns on its own specific fact scenario. It is from the specific facts of each case that a determination of whether or not the detention of the accused was capricious, despotic **or** unjustifiable must be made.

[33] **ANALYSIS**

[34] Mr. Campbell was arrested at approximately 2:17 am on April 17, 2016 outside a friend’s residence. At 3:06 am he was placed in cells at Cape Breton Regional Police Headquarters having been advised he was being charged with impaired operation of a motor vehicle and refusal of a breath demand.

¹ A list of cases submitted by Counsel and reviewed and considered by the Court in rendering this decision are attached as Appendix “A”

[35] At the time of his arrest Mr. Campbell's keys were taken from him and his vehicle was impounded. He provided an address in Red Islands, a community in the neighboring county approximately an hour's drive from Sydney and Police Headquarters. Mr. Campbell had friends in Sydney and had approximately \$275 dollars in his possession at the time of his arrest.

[36] The arresting officer and the breath technician both testified Mr. Campbell was "highly" intoxicated when they dealt with him. The arresting officer, Cst Oldford, when pressed as to what lead to his conclusion in this regard, testified that he based his assessment on the driving he observed, the fact Mr. Campbell fell from the truck when he was dismounting, was unsteady on his feet and had a strong odour of alcohol. He, however, did not articulate any issues with respect to Mr. Campbell's ability to comprehend what was occurring, his rights, police caution or legal advice. The breath technician, Cst. Power, testified he based his assessment of Mr. Campbell's level of intoxication on his observations of Mr. Campbell being unsteady on his feet, having slurred speech and glossy, blood shot eyes, together with the smell of an alcoholic beverage coming from him. Cst Power admitted Mr. Campbell did not require any assistance to walk nor did he have to steady himself on anything when walking down the hall and into the breath room. Cst Power readily admitted Mr. Campbell had no issues comprehending what was being asked of him and went

further to say Mr. Campbell was very clear when he responded to Cst. Power that he understood what Cst. Power was saying to him.

[37] Mr. Campbell, as stated previously, was lodged in the cells at 3:06 am and remained there until released at 9:56 am, 6 hours and 50 minutes later. Cst. Oldford testified he took Mr. Campbell from the breath room to the cells and was not prepared to release him because he felt he would not understand the legal papers he had to serve on him, those papers being a temporary driving suspension and a PTA. That was the only reason articulated by Cst Oldford for Mr. Campbell's detention at trial. At the *Voir Dire* Cst. Oldford added that he did not think it was appropriate to release Mr. Campbell until he was sober or until someone could come for him, because of the legal documents that had to be served on him and the proximity of Police Headquarters to the highway. He admitted he did not know if Mr. Campbell even had access to other vehicles.

[38] The evidence before this Court is that Mr. Campbell was taken directly from the breath room to lockup, there is nothing to indicate Mr. Campbell was provided an opportunity to locate someone to attend at the police station to pick him up, in fact Cst. Oldford, at trial, indicated he would not release him because of what he perceived to be Mr. Campbell's inability to understand the temporary driving

prohibition and PTA at the time. It is clear Cst. Oldford did not consider Mr. Campbell releasable until he was sober.

[39] The law is quite clear that in order to detain a person in police custody certain preconditions must be met. The circumstances in which police may exercise their power to detain someone is set out in section 497 of the *Criminal Code*. Clearly the first two circumstances enumerated in s. 497 (1.1) (a) did not exist in Mr. Campbell's case. The police knew who he was, and the investigation was complete prior to him being lodged in the lockup. The applicability of the third consideration cannot be maintained as Mr. Campbell's vehicle was impounded and police had no information to indicate he had access to other vehicles. Likewise, the fourth consideration, as it is expressed in the *Code*, is equally inapplicable as there were no victims or witnesses to the offence identified by the police other than the officers themselves and no information led that their safety would, in any way, be jeopardized by Mr. Campbell's release. Finally, the justification set out in s.497 (1.1) (b) is not made out as there is nothing to suggest Mr. Campbell would not appear in court as required.

[40] It is clear from the case law provided and reviewed, as set out in Appendix "A" to this decision, police may be justified in detaining someone in police custody in circumstances where they are so intoxicated that they present a danger to themselves or the general public if released. Cst. Oldford did not articulate this as being an issue

in this case. His rationale for detaining Mr. Campbell was articulated clearly as being based on his opinion that Mr. Campbell could not comprehend his release documents. From his testimony it appears that holding intoxicated persons until they are sober is his regular practice.

[41] I find it impossible to give any credence to Cst Oldford's contention that Mr. Campbell was so intoxicated he would not have been able to understand the documents the officer had to serve on him given his clear ability to understand the reason for his arrest, his rights to counsel, the police warning and breath demand. These facts, taken together with the evidence of Cst. Power that Mr. Campbell was very clear in his interactions with Cst. Power, that he understood everything being asked of him, makes it clear, there is no doubt Mr. Campbell would have been able to comprehend he was temporarily suspended from driving and had to attend court on a date specific. To conclude otherwise defies logic. In any event, the ability to comprehend release documents, in the absence of a real concern that the arrested person will continue the offence in question or commit another offence upon his release, is not a justification for detaining someone at law. Likewise, the proximity of police headquarters to the highway is not a justifiable reason in and of itself to detain a person under the influence of alcohol in police custody. While the police may be concerned that someone may wander onto the road, there is no more assurance that

someone leaving with another individual won't run into traffic than someone getting into a taxi that picks them up at the door of the building.

[42] With respect to the release of intoxicated persons the Cape Breton Regional Police Service Policy, which has been in place in since at least March 2013, allows for the release of intoxicated persons to a taxi.

Section 8.2 states:

8.2. Prisoners released shall be encouraged to make transportation arrangements and provided with a phone or have a call made to do so. (Taxi, family members, friend, etc.)

Section 8.3 goes on to say:

8.3. No person under the influence **shall** be released from custody without transportation.

[43] Under their own policy which requires intoxicated persons to have transportation, a taxi is considered transportation. Under that policy all individuals are to be encouraged to arrange transportation. However, even if the police policy did not consider a taxi to be suitable transportation that would not affect the outcome of this matter as policy cannot justify detaining a person whose detention is not justifiable at law.

[44] In the present case, I find the articulated reason for detaining Mr. Campbell in police lockup, that being his inability to understand the release documentation, is

unjustifiable in that it is not supported by the evidence, and furthermore is not a ground permitted at law for detention. There is no evidence to indicate Cst. Oldford ever had any concerns about Mr. Campbell being a danger to himself or others if released, beyond his unsupported statement that he may drive a vehicle. Given the inability of the arresting officer, who placed Mr. Campbell in police lockup, to articulate any justifiable reason for his detention I must find his detention was unjustified and therefore arbitrary. I find Mr. Campbell has established, on a balance of probabilities, that his s. 9 *Charter* Right not to be arbitrarily detained or imprisoned was breached.

[45] The failure to reassess or evaluate Mr. Campbell until more than 6 hours later is troublesome. However, having found that Mr. Campbell's initial detention in lockup was a breach of s. 9 of *The Canadian Charter of Rights and Freedoms* I do not consider it necessary to provide a further analysis of police conduct post detention except to say that the unlawful detention continued throughout his stay in police custody until such time as he was finally released.

[46] **REMEDY**

[47] Having found Mr. Campbell's s.9 *Charter* Right was breached I turn now to the issue of what, if any, remedy should be granted.

[48] Before delving into that issue I wish to address an issue raised by the Crown in submission, that being their position this court is not the proper forum in which to deal with a *Charter* issue such as the one raised by Mr. Campbell as the issue arose post offence and post investigation. In support of their position in this regard the Crown referred the Court to decisions of the Nova Scotia Court of Appeal in **R. v. Davidson** [1988] N.S.J. No. 459, and **R. v. Mailman** [1990] N.S.J. No. 300, as well as the decision of the Alberta Court of Appeal in **R. v. Cutforth** [1987] ABCA 179.

[49] The Crown submission was that these cases stand for the proposition that where a *Charter* violation occurs post offence and is not related to any of the evidence sought to be adduced at trial, the matter should not be dealt with by the trial court and a stay of proceedings is not the appropriate remedy.

[50] Respectfully, this court cannot agree with the position of the Crown on either of these two points. All of the cases cited by the Crown predate the decision of the Supreme Court of Canada in **R. v. O'Connor** [1995] 4 S.C.R. 411. In **O'Connor**, the majority of the Supreme Court of Canada, in holding that a stay of proceedings was only available in the “clearest of cases”, described a “residual” category for consideration of whether or not a stay is appropriate in a particular case. While a stay of proceedings is to be restricted to those cases where the applicant has proven the

breach or abuse of process affected trial fairness, this “residual” category is described by Justice L’Heureux-Dube as follows:

This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses a panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[51] This residual category which contemplates situations beyond those in which police conduct has affected the investigation or collection of evidence requires two preconditions to be met before a stay is to be considered:

1. The prejudice caused by the abuse will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome, and
2. No other remedy is reasonably capable of removing the prejudice.

[52] The situation before this court is one that I find falls into this residual category as contemplated by the majority of the Supreme Court of Canada in **O’Connor** and is properly before this Court. In addition, I do not agree **Davidson** goes as far as the Crown submits, in removing cases such as the one at Bar from consideration by trial courts for a *Charter* remedy. Justice Jones of the Nova Scotia Court of Appeal, writing for the majority in **Davidson** stated:

The remedy must be ‘appropriate and just in the circumstances.’
Where there is no reasonable connection between the *Charter*

violation and the offence charged then a stay or dismissal of the charge **may** not be the appropriate remedy. (*Emphasis added*)

[53] From the words used by the Court in **Davidson** it is clear that even pre-**O'Connor** they recognized there may be other appropriate situations not previously enumerated or contemplated that could result in consideration of a stay of proceedings. I find **Davidson** thus does not support the proposition as put forward by the Crown. The subsequent decision of the Nova Scotia Court of Appeal in **Mailman** did not expand on this statement in **Davidson**, but simply found that if a Charter violation had occurred in those particular circumstances, which are similar to the ones in Mr. Campbell's case, a stay was not appropriate and just. Again, I would note that **Mailman** was decided before the articulation of the residual category in **O'Connor**.

[54] In turning to Mr. Campbell's situation, this Court has read and considered all of the cases submitted by both Crown and Defence as set out in Appendix "A" to this decision. As stated previously, it is clear from these cases, some of which do grant a stay of proceedings in circumstances similar to Mr. Campbell's and some that do not, each case turns on its own specific facts and the balancing of the rights of the individual with the right of society to an adjudication of the matter on its merits.

[55] In looking at the right at stake on the facts of this matter this Court must hold that an individual's right to be free from arbitrary detention and imprisonment is one of the most fundamental and sacred rights of every individual in Canadian Society. This right must be protected, not just for Mr. Campbell, but for every Canadian. Police are given great powers under Canadian Law; they are also trusted to not abuse such powers. To quote Voltaire "with great power comes great responsibility". Police must ensure they use their powers in the appropriate situations for the appropriate reasons. In this case, we are dealing with an individual who was unlawfully detained for a period of almost seven hours in police custody. I find his detention is aggravated by the cavalier attitude displayed and expressed by Cst. Oldford when he testified to the reason for Mr. Campbell's detention in the lockup at Police Headquarters. He did not appear to give much thought to Mr. Campbell's specific situation but rather was simply doing what he always does and lodging an individual charged with impaired driving in a cell until he was sober. There was no real consideration or analysis of whether or not he was authorized at law to detain Mr. Campbell once the investigation was complete.

[56] Against Mr. Campbell's s. 9 *Charter* Right I must balance the interest of the public in having the matter adjudicated on its merits. In this situation we are dealing with charges of impaired operation of a motor vehicle and refusal to provide a breath

sample. These are very serious charges. The destruction and mayhem caused by the commission of these types of offences on Canadian roads and highways must be considered. These types of offences claim the lives of many individuals and harm even more every year. Society has a real and genuine interest in ensuring these types of offences are adjudicated on their merits and those convicted of committing them sentenced accordingly.

[57] In applying the test for granting a stay of proceedings in a situation that falls within the residual category as articulated by the Supreme Court of Canada in **R. v. O'Connor**, I must consider the “potential or likelihood that the abuse will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome” and I must find that “no other remedy is reasonably capable of removing that prejudice”.

[58] The Crown has argued that even if I find, as I did, that Mr. Campbell’s s. 9 *Charter* Right was violated there is little risk of this being a chronic or continuing problem as the police have in place their policy with respect to release and detention of prisoners and a more recent directive from the Deputy Chief dated January 26, 2018, (Exhibit #2 at the *Voir Dire*), which specifies what material from police holding cells and breath testing room must automatically be included in Crown

disclosure packages. The portions of that Directive which the Crown indicates will ensure this problem does not continue into the future reads:

This should include some comments on the rationale for holding the prisoner after completion of breath tests, level of sobriety, safety issues, repetition of offence, etc. And details as to how they are leaving, i.e. taxi, drive by police, family or friends pickup, or walking from the Lock Up. See sections 497 and 498 of the Criminal Code.

[59] While it is admirable the Deputy Chief has attempted to remind his officers of their responsibilities under the law this Directive does nothing more than direct officers to follow the existing policy, which was in place during the time Mr. Campbell was dealt with by police, and ensure documentation is more fulsome than it was in Mr. Campbell's situation. There is nothing new in this directive. As we have seen from the testimony of both Cst. Oldford and Sp/Cst MacLeod officers seem to be either unaware or unacceptably cavalier of what their responsibilities are with respect to the holding and release of arrested persons at law and less than diligent in following their own policies. In light of this, I fail to see how the issuing of the directive in question will facilitate an attitudinal shift.

[60] Mr. Campbell was detained for almost 7 hrs in police custody for no justifiable reason. In considering available remedies I have considered that he would be liable to two mandatory minimum fines and driving prohibitions, one for each of the charges

for which I found him guilty. I am also mindful of the fact that both of these penalties are mandatory minimums below which the court cannot go in imposing sentence.

[61] Mr. Campbell is entitled to a remedy. The remedy imposed must be one which ensures the breach of s.9 of *The Charter* experienced by Mr. Campbell is not behaviour police will continue to display in the future. In other words, the remedy I grant is not to punish past bad behaviour by the police but to prevent the perpetuation of the wrong suffered by Mr. Campbell and to ensure it is not further perpetuated by police continuing to engage in this type of behaviour.

[62] Given the vital importance of every individual to be free from arbitrary detention and imprisonment as guaranteed by s. 9 of *The Charter* and the clear failure of police to exercise their considerable power in a manner that respects that Right and also giving consideration to the aggravating factor that not only did police breach Mr. Campbell's s.9 *Charter* Right but also demonstrated a complete disregard for their own policy which sought to protect against such breaches, I find this to be one of the clearest of cases calling for a stay of proceedings.

[63] I therefore enter a judicial stay on all charges against Peter Joseph Campbell as set out on information #731632.

APPENDIX “A”

R. v. Aird, 2013 NSPC 63
R. v. Allen [2015] A.J. No. 871
R v. Angnetziak, [1996] N.W.T.R 331
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