IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Isenor, 2007 NSPC 36

Date: June 21st, 2007

Docket: 1649882

Registry: Halifax

Her Majesty the Queen

v.

Brett Isenor

VOIR DIRE DECISION - ADMISSIBILITY OF STATEMENTS

Judge:	The Honourable Judge Anne S. Derrick
Heard:	June 14, 15, 18, 19, 2007 in Shubenacadie Provincial Court.
Oral decision:	June 21st, 2007
Charge:	Criminal Code Section 236(b)
Counsel:	Crown - Richard Hartlen and Jill Nette Defence - David Bright, Q.C. and Jan Murray

By the Court:

[1] Brett Isenor is charged that on April 30, 2006, he did:

> Unlawfully kill Christopher Nicholas Moore and thereby commit manslaughter contrary to section 236(b) of the *Criminal Code*.

Introduction

[2] Mr. Isenor was arrested by police in the early morning hours of April 30 for aggravated assault on Mr. Moore. At 4 p.m. that day, he gave a videotaped statement to RCMP Cpl. Brian Richardson of the Major Crime Unit at the Bible Hill Detachment. Mr. Moore, who had suffered a severe head injury, subsequently died. On May 18, 2006, Mr. Isenor's counsel was contacted by the Crown so that arrangements could be made for Mr. Isenor to turn himself in to police custody as he was being charged with manslaughter. The RCMP intended to obtain a second videotaped statement from Mr. Isenor which Cpl. Richardson conducted that same day.

[3] The Defence argues that neither of these statements are voluntary and should be declared inadmissible. Defence submits further that the April 30 statement should be excluded from evidence by virtue of section 24(2) of the *Charter* for the reason that Mr. Isenor's arrest on April 30 was unlawful. The Defence position is that "but for" that unlawful arrest, Mr. Isenor would not have given a statement to police.

Preliminary Motion on Notice and the Evidentiary Basis for *Charter* Applications

[4] I heard evidence in what was effectively a blended *voir dire* with respect to these statements on June 14, 15, 18 and 19, 2007. In advance of the *voir dire* I heard a preliminary motion from the Crown on the issues of notice and the evidentiary basis for the Defence *Charter* motion relating to the arrest and the April 30 statement. I ruled that there had been adequate notice for the Defence motion relating the legality of Mr. Isenor's arrest and concluded I was satisfied that I should

exercise my discretion to hear the evidence on this issue. I noted the comments of Finlayson, J.A. in *R. v. Kytynec*, [1992] 70 C.C.C. (3d) 289 (Ont. C.A.), about the challenges faced by trial judges dealing with Defence motions to exclude evidence for *Charter* breaches:

> Rather than invent yet another procedural straightjacket [with rigid rules] to compound their problems, it is better to leave to these trial judges the discretion to determine the sufficiency of notice and the extent of the offer of proof.

[5] Finlayson, J.A. noted that his emphasis in *Kytynec* was on "flexibility on the part of counsel and the exercise of discretion on the part of the trial judge." *Kytynec* was referenced in *R. v. Loveman* (1992), 71 C.C.C. (3d) 123 (Ont. C.A.) where Doherty, J.A. held:

> A trial judge must control the trial proceedings so as to ensure fairness to all concerned and preserve the integrity of the trial process. The specific situations in which the trial judge must exercise that power are infinitely variable and his or her order must be tailored to the particular circumstances. In the exercise of this inherent power, a trial judge may decline to entertain a motion where no notice, or inadequate notice, of the motion has been given to the other side. This must be so even where the motion involves an application to exclude evidence pursuant to s. 24(2) of the Charter. Clearly, where a Charter right is at stake, a trial judge will be reluctant to foreclose an inquiry into an alleged violation. There will, however, be circumstances where no less a severe order will prevent unfairness and maintain the integrity of the process.

[6] I concluded that the issue of the legality of Mr. Isenor's arrest did not represent a situation requiring such a severe order and that fairness and maintenance of the integrity of the process were best served by my hearing the Defence motion.

[7] Consequently it was agreed that the Defence would lead its evidence on the arrest through the testimony of the accused and Erin Duffy, his girlfriend. The examination of these witnesses was followed by the Crown leading its evidence on the circumstances surrounding the taking of the statements with a view to establishing their voluntariness. Cross-examination of the police officers testifying on the voluntariness issue also elicited evidence concerning the arrest.

The Arrest of Brett Isenor

[8] It was close to 3 a.m. on April 30 when two police cars arrived at Brett Isenor's Stewiacke residence on Matthew Road. Mr. Isenor was at home with his girlfriend, Erin Duffy. They had earlier been at Whistlers Pub in Stewiacke where there had been an altercation involving Chris Moore. Mr. Isenor testified to not knowing if the headlights he saw coming up his driveway were "friend or foe." He and Ms. Duffy got off the couch in the living room and went into the adjacent kitchen. Ms. Duffy, hearing a knock, went to the side door. She recalls one of the police officers came in through the side door and while she does not remember inviting them in, she ackowledged that it is possible she did so. Ms. Duffy's recollection is that the other police officer came in through the patio door. She testified that Mr. Isenor had opened the patio door far enough to stick his head out.

[9] It was Ms. Duffy's evidence that she was standing behind Mr. Isenor when he stuck his head out the patio door at which time the police officers were still getting out of their vehicles. She testified that when Mr. Isenor saw who it was, he pulled his head in and shut the patio door.

[10] Ms. Duffy was very upset and crying. She was aware of the altercation that had occured earlier but was not expecting the police to come. She did not see Mr. Isenor being arrested. Mr. Isenor did not try to hide or run away. The police were not aggressive and did not have their guns drawn. Mr. Isenor was handcuffed and Ms. Duffy got sneakers for him and put them on his feet. Mr.

Isenor was taken out of the house by one of the officers while the second officer stayed and took a statement from Ms. Duffy at the kitchen table.

[11] Mr. Isenor's recall of events at his home was somewhat different from Ms. Duffy's and where they differ, I prefer his evidence. He said that when he and Ms. Duffy got off the couch to investigate the identity of the lights coming up the driveway, he was a few feet behind Ms. Duffy who went to the side door in response to a loud knock. Mr. Isenor went to the patio doors. He heard Ms. Duffy and a police officer talking which caused him to stick his head out to see who was there. He pulled his head in from the patio door when Ms. Duffy announced that it was the police who had arrived.

[12] Mr. Isenor testified that when he poked his head out the patio door he saw a short, stocky police officer at the side door and another officer standing by the hose reel at the corner of the house, to the right of the side door. It was Mr. Isenor's evidence that the stocky police officer came over and opened the patio door, entering the house, with the other officer entering through the side door. Mr. Isenor said he was arrested and handcuffed a few feet from the patio doors. He said the police had been anxious to get in the door: "When they were getting to me, they were getting to me", is how he put it. Once the police were within a foot of him in the kitchen area just inside the patio doors, "they slowed right down."

[13] Mr. Isenor described Ms. Duffy as more upset than he was by the arrival of the police, and more intoxicated. He said it was his opinion that having had only 6 - 7 beers since noon on April 29, he was suffering only minor intoxication. He said he tried to be cooperative and polite. He made no attempt to evade the police and had no plans to flee. He described the police as polite and professional throughout. While he does not recall them telling him he was being arrested for aggravated assault, he said it is possible the police said this when they informed him he was under arrest.

[14] The two RCMP officers at the Isenor residence on April 30 were Cst. Timothy Coneen from the Stewiacke detachment (the short stocky police officer described by Mr. Isenor) and Cst. David

Melanson from Millbrook. Csts. Coneen and Melanson were both in uniform. Cst. Coneen is a ten year member of the force; Cst. Melanson, a member for three and a half years. It was Cst. Coneen's first aggravated assault investigation.

[15] On that night, Cpl. Yorsten of the Stewiacke detachment was Cst. Coneen's direct supervisor and acting supervisor to Cst. Melanson who would not have otherwise have been under his direction except for the fact that he had offered to assist as back-up in the investigation into the Whistlers Pub altercation.

[16] Cst. Coneen arrived at Whistlers Pub on April 30 sometime around 2:30 a.m., a little after Cst. Melanson had got to the scene. Cst. Coneen observed EHS and fire personnel working on an prostrate male later identified to him as Chris Moore. He could see the man was badly injured as there was a lot of blood surrounding his head. Cst. Melanson was recording the scene on his in-car video camera which had an audio feed through a microphone attached to Cst. Melanson's uniform.

[17] At the scene, Cst. Melanson questioned witnesses and was told by Troy Priess that Brett Isenor "took right off." Mr. Priess went on to say: "He should be right here. Everybody knows him", then explaining that Mr. Isenor's father was a local business owner. It was Cst. Coneen's understanding that Mr. Isenor had left on foot with "Erin". Cst. Coneen received information that Brett Isenor was arrestable for aggravated assault having hit Mr. Moore who had then possibly struck his head. Csts. Coneen and Melanson were ordered by Cpl. Yorsten to find Mr. Isenor and arrest him. Cst. Coneen testified that he asked Cpl. Yorsten over the radio whether they would need a *Feeney* warrant for Mr. Isenor and was told "no." Cst. Coneen said they wanted to arrest Mr. Isenor as soon as possible in order to avoid the destruction of any bloody clothing he might be wearing.

[18] Csts. Coneen and Melanson set out in their patrol cars to find Mr. Isenor. Cst. Melanson's evidence was that Cst. Kenny radioed them an address some 15 minutes after he and Cst. Coneen had left the scene. They drove up to the Matthew Road house with Cst. Coneen in the lead. Cst. Coneen testified that he approached the side door of the Isenor residence and knocked while Cst.

Melanson stood at the corner of the house. This evidence was confirmed by Cst. Melanson. It was about 3 a.m. on April 30. A woman came to the door and said that Mr. Isenor was at home. Cst. Coneen observed a man lean out of the patio doors. He went over and the man confirmed that he was Brett Isenor. Cst. Coneen, standing outside on the deck area, told him he was under arrest for aggravated assault. When Mr. Isenor straightened up back into the house, Cst. Coneen followed him in through the open patio doors. Cst. Melanson testified that when he saw Cst. Coneen talking to a man at the patio doors, he moved over from his position at the corner of the house and when they stepped in through the patio doors, he followed them. He testified that the patio door was open. He was within arm's length of Mr. Isenor when he was being "Chartered" in the kitchen but his focus was on Ms. Duffy.

[19] Cst. Melanson testified that he did not observe Cst. Coneen apply any force in entering the Isenor residence. He does not recall if the arrest occurred inside or outside.

[20] Cst. Coneen testified that he arrested and handcuffed Mr. Isenor just inside the patio doors and established that Mr. Isenor had not changed his clothes since coming home. As Cst. Melanson stepped inside, Cst. Coneen was advising Mr. Isenor that he was under arrest for aggravated assault and was reciting his rights and caution from memory. Ms. Duffy was very upset and so Cst. Melanson explained to her what was happening. Cst. Melanson testified that he did not observe the interaction between Cst. Coneen and Mr. Isenor although he noted that Mr. Isenor was very cooperative. Cst. Melanson did not make many notes of the attendance at the Isenor residence, noting neither the time of arrival or departure or the time of the arrest.

[21] The arrest of Mr. Isenor was accomplished speedily. Cst. Coneen's notes indicate that it was 3:04 a.m. when he took Mr. Isenor back to his police car. There he read him his *Charter* rights and police caution from a card. When Mr. Isenor said his lawyer's number was in his cell phone, Cst.

Melanson went back to the residence to retrieve the phone while Cst. Coneen stayed with Mr. Isenor who was handcuffed in the back of the patrol car.

[22] Cst. Coneen confirmed that Mr. Isenor was very cooperative and seemed slightly intoxicated with a noticeable odour of alcohol on his breath. Cst. Coneen said he would not have arrested him for public intoxication.

[23] Cst. Coneen acknowledged on cross-examination that despite his awareness of the importance of note-taking for police investigations, he made no notes in his police notebook about Mr. Isenor's arrest. He had the opportunity to make such notes and made notes about other events on April 30. His written record of the Isenor arrest is contained in a supplementary report which he typed himself into the computerized police repository - PROSE - immediately after his visit to the hospital at 6:05 a.m. on April 30. It does not mention that Mr. Isenor stuck his head out of the patio door.

The Arrest and Its Implications for the April 30 Statement

[24] The Defence has the onus on a *Charter* application to establish, on a balance of probabilities that a *Charter* violation has occurred. The Defence asserts that Mr. Isenor's arrest was a breach of his section 8 *Charter* rights which provide that "Everyone has the right to be secure against unreasonable search or seizure". The Defence asks me to accept Mr. Isenor's evidence that his arrest occurred, unlawfully, inside his residence, in circumstances where police entered without a warrant. On the principles laid out by the Supreme Court of Canada in *R. v. Feeney*, [1997] 2 S.C.R. 13, a warrantless entry into a dwelling house to effect an arrest constitutes a section 8 violation unless the police have reasonable grounds to believe the person being arrested in present, a proper announcement is made, the conditions for obtaining a warrant exist, and there are "exigent circumstances" that make obtaining a warrant impracticable or the police are in "hot pursuit" of the suspect.

[25] It appears the police are relying on both exigent circumstances and hot pursuit to justify the arrest of Mr. Isenor if it did occur in his home. Exigent circumstances for entering a dwelling house without a warrant have been defined in section 529.3 of the *Criminal Code* as including

circumstances were it is necessary to do so "to prevent the imminent destruction of evidence relating to the commission of an indictable offence."

[26] The Supreme Court of Canada has defined hot pursuit in *R. v. Macooh*, [1993] S.C.J. No. 28 as follows:

> ...continuous pursuit conducted with reasonable diligence, so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction.

[27] The hot pursuit exception to the requirements for a *Feeney* warrant is intended to permit police to make what would have been a completely lawful arrest had the suspect not taken refuge in his home. The Court at paragraph 19 in *Macooh* noted that such a suspect loses the protection normally afforded by the sanctity and privacy of the home because:

> ...he has gone to his home while fleeing solely to escape arrest. In such circumstances, the police could not be obliged to end the pursuit at the offender's doorstep, without making his residence a real sanctuary...The flight of the offender, an act contrary to public order, also should not thus be rewarded.

[28] Such were the circumstances in *R. v. Haglof*, [2000] B.C.J. No. 2236 (B.C.C.A.) and *R. Hayer*, [2006] O.J. No. 585 (Ont. Ct. Jus.) where a hit and run driver and an intoxicated driver respectively were pursued by police into their homes and arrested without warrant. In both cases it was apparent on the facts that the suspects were trying to evade detection and arrest by taking refuge in their residences.

[29] At paragraph 21 of *Macooh*, Lamer, J. discussed a range of policy reasons for the exception in hot pursuit cases to the principle of the sanctity of the home, referencing: reduction of error in identification of the offender, securing of evidence that might otherwise be lost, preventing the

offender from further flight, and risk to others in the course of flight, and the prevention of a continuation of the offence. The police, said Lamer, J., "...cannot be required to keep an indefinite watch on the offender's residence in case he should come out."

[30] If Mr. Isenor's arrest did in fact take place outside his residence, then there is no issue of *Feeney* principles, hot or fresh pursuit or exigent circumstances exceptions nor any question of a section 8 *Charter* violation. It seems clear that the arrest occurred very quickly with the police and Mr. Isenor in the kitchen together almost, it seems, in the blink of an eye. This is more consistent with Mr. Isenor's description of the arrest: that Cst. Coneen opened the patio door and came in right after Mr. Isenor pulled his head inside. Mr. Isenor testified that the police were moving fast - "when they were getting to me, they were getting to me" - and that they slowed right down once inside the patio doors. And why would Cst. Coneen have inquired about a *Feeney* warrant unless he was intending to go into Mr. Isenor's residence to get him?

[31] While I remain uncertain about which door Cst. Melanson entered the house through, I think it is more probable that Cst. Coneen went in through the patio door, uninvited, to arrest Mr. Isenor than it is that he was arrested outside. Although Cst. Coneen testified that he believed he did not need a *Feeney* warrant to arrest Mr. Isenor because of the potential for the destruction of relevant evidence, I do not accept that any thought was given to bloody clothes. No seizure of Mr. Isenor's clothes was made at the home when it would have been logical to do so and Mr. Isenor was left in those clothes even after he was lodged in the Truro lock-up until they were taken from him by Cst. Coneen under Cpl. Yorsten's orders several hours later. Furthermore, I do not accept that the conditions justifying a fresh pursuit exception were present when Mr. Isenor was arrested. Cst. Melanson had been told at the scene that Mr. Isenor was well known in the community and would be easy to find. There was nothing to indicate that he was taking refuge in his home to avoid arrest. At 3 a.m. it was logical for him to be at home. Csts. Coneen and Melanson never requested that he step outside and surrender himself into their custody. The fact that he was so cooperative with them suggests that he would have done so but he was never given the opportunity. There was nothing to preclude the police obtaining a *Feeney* warrant for Mr. Isenor's arrest. If the circumstances under which Mr. Isenor was arrested do not constitute a *Charter* violation then it seems to me the

principles safeguarding the sanctity of the home have little meaning.

[32] I believe the arrest of Mr. Isenor occurred in his kitchen just inside the patio doors and that it constituted a violation of his section 8 *Charter* rights. I do not however find that the breach was temporally or causally connected to the evidence Mr. Isenor is seeking to exclude, that is, his April 30 statement. Mr. Isenor gave that statement at 4 p.m. on April 30. The evidence at the *voir dire*, which I will explore more fully in my discussion of the voluntariness issue, does not support an conclusion that Mr. Isenor's April 30 statement was connected to his unlawful arrest. He would have been lawfully arrested and taken into police custody, either through surrender or a *Feeney* warrant, in all likelihood in the early morning hours of April 30 in any event. For section 24(2) to be invoked, the evidence (here, the April 30 statement) would have to have been "obtained in a manner" that involved a *Charter* breach. (See, for example, *R. v. Griffen*, [1996] N.J. No. 291 (Nfld. C.A.)) While it is necessary to focus on "the entire course of events" leading to the obtaining of the impugned evidence (*R. v. Strachan*, [1988] 2 S.C.R. 980, paragraph 40), in this case, I am not satisfied that there is a temporal link between the unlawful arrest and the statement. Furthermore, even if I am wrong in concluding that, I am not satisfied that there is a sufficient causal link between the unlawful arrest and the obtaining of the statement to bring the administration of justice into disrepute as required by the second branch of section 24(2). (See *Strachan*, paragraph 47) My views on the issue of causation for the statement Mr. Isenor gave on April 30 will be evident in my discussion on the voluntariness issue and I am not satisfied that the unlawful arrest was a factor at all.

Voluntariness

[33] The Defence has taken the position that neither of Mr. Isenor's statements to police were voluntary and has challenged the Crown to prove that they were. Consequently, the Crown bears the onus of satisfying me beyond a reasonable doubt that the statements are voluntary and therefore should be admitted into evidence. A failure by the Crown to discharge their burden of proof will have the effect of the statements being excluded. There is no onus on Mr. Isenor with respect to the issue of voluntariness. He was not obliged to testify and he did not do so. That is his right. The onus of proof remains squarely on the Crown to meet the standard of proof beyond a reasonable doubt

that the statements given by Mr. Isenor were voluntarily given.

General Principles

[34] The concern with voluntariness is at least in part related to the issue of reliability and the danger of false confessions. As Iacobucci, J. stated in *R. v. Oickle*, [2000] S.C.J. No. 38, at paragraph 32:

> One of the predominant reasons for this concern [about voluntariness] is that involuntary confessions are more likely to be unreliable. The confessions rule should recognize which interrogation techniques commonly produce false confessions so as to avoid miscarriages of justice.

[35] Iacobucci, J. observed that the rights of an accused must be protected "without unduly limiting society's need to investigate and solve crimes. (paragraph 33)

[36] In *Oickle*, Iacobucci, J. also commented on what he described as the "growing practice of recording police interrogations, preferably by videotape." Quoting from W.S. White's article "*False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*" (1997), 32 Harv. C.R. - C.L.L.Rev. 105 at pp. 153-54, he noted the following merits of videotaping:

> First, it provides a means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the
>
> police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard accords with sound public policy

> because the safeguard will have additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.

[37] Mr. Isenor was in police custody on April 30 at the Truro Police lock-up and then at the Bible Hill RCMP detachment and on May 18 at the Bible Hill detachment. His statements were videotaped. The Defence has argued that the lack of videotaping of Mr. Isenor other than for his statements and the failure of the Crown to produce videotapes of Mr. Isenor documenting his detention in police custody is fatal to their proving beyond a reasonable doubt that his statements were voluntary and not the product of unacceptable treatment, conditions or prohibited practices. I will address this issue further in due course.

[38] The analysis of a statement's voluntariness is a contextualized process. As set out in paragraph 71 of *Oickle*, courts are to "strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness" taking into account specific factors. A court has to consider whether there were threats or promises made, whether the suspect was subjected to oppression and had an operating mind, and, as a separate inquiry, whether there was police trickery. If a confession is involuntary for any of the reasons, it is inadmissible. (*Oickle*, paragraph 69)

[39] There has been no suggestion by the Defence that Mr. Isenor did not have an operating mind when he gave his statements to the police of April 30 and May 18. It is apparent from viewing the videotaped interviews that Mr. Isenor was fully competent and in control of his faculties during the statement-taking process. He clearly had knowledge of what he was saying and that he was saying it to a police officer who could use it to his detriment. (This being the criteria mentioned with approval by Iaccobucci, J. at paragraph 63 of *Oickle*.) Mr. Isenor commented on his jeopardy explicitly during the interviews themselves, for example, on April 30 when he said: "What I think could possibly happen is the Crown Prosecutor will look at everything I've said and try to come up with his version of making me guilty." (4:00:21 p.m., April 30 videotaped statement) On May 18, Mr. Isenor said: "Like, I can't stay in jail. Like, I don't want to hurt myself and jeopardize myself any worse than I'm already at, I don't want to be six months down the road and say, holy fuck, I

can't believe I said that to him in front of that meeting." (8:55:57 - 8:56:06 a.m., May 18 videotaped statement) He made similar comments near the conclusion of the May 18 statement. (9:23:49 a.m., May 18 videotaped statement) I find that Mr. Isenor had an operating mind when he gave his statements to Cpl. Richardson on April 30 and May 18, 2006.

[40] I also find on the evidence that he was not intoxicated when he gave his statements. There has been no suggestion by the Defence that he was, at 4 p.m. on April 30 or on May 18.

[41] There is also no evidence of inducements or promises being offered to Mr. Isenor by police to obtain a statement from him nor has there been any evidence that police trickery was involved. These factors should not be examined as part of a discrete inquiry completely divorced from the rest of the confessions rule (*Oickle*, paragraph 63), however where there is no evidence at all that they are relevant considerations I am satisfied to find they are not material to my analysis on the voluntariness issue.

Relevant Factors in Relation to Mr. Isenor's April 30 Statement

[42] The factors identified by the Defence as relevant to Mr. Isenor's statements are the threat of jeopardy to his girlfriend, Erin Duffy, oppression, and the lack of police notes and video-recording to document Mr. Isenor's detention in police custody. I will deal with these now:

The References to Ms. Duffy

[43] The Defence has characterized the invoking by Cpl. Richardson of Erin Duffy's interview with police as a "tactic." The Defence argues that Cpl. Richardson was telling Mr. Isenor that Ms. Duffy might get into trouble if they found out she was not being forthright. I understood the Defence argument to be that Cpl. Richardson brought this up in his interview with Mr. Isenor to tighten the screws on Mr. Isenor, putting extra pressure on him to talk so as to take the heat off Ms. Duffy.

Such a tactic would be improper where, either standing alone or in combination with other factors, it was strong enough to raise a reasonable doubt about whether Mr. Isenor's statement was voluntary.

[44] This issue emerges out of Mr. Isenor's April 30 statement. Cpl. Richardson told him early on in the interview that Cst. Mark MacPherson had re-interviewed Ms. Duffy. Cpl. Richardson said:

> ...just recently, Cst. MacPherson of the Major Crime Unit re-interviewed her and obtained information from her in relation to what went on last night. It puts a whole lot of people in a bad situation because she's your girlfriend but yet she's in a situation where she can't lie either because if she lies to us then she could find herself in conflict with the law as well. So all these statements have been taken and as I've said, there's absolutely no doubt in my mind that you're the person who struck Mr. Moore and caused him to fall back and strike his head on the concrete which resulted in the severe head injuries. (3:29:04 p.m., April 30 videotaped statement)

[45] There is nothing in the videotaped interview to suggest that this was anything other than Cpl. Richardson telling Mr. Isenor that the police had information about the events outside the bar and that Ms. Duffy, who had told police Mr. Isenor had struck Mr. Moore, was not going to lie because it would get her into trouble. Indeed, at 3:56:23 p.m. of the April 30 videotaped statement, Cpl. Richardson said the following to Mr. Isenor after learning that he and Ms. Duffy had been involved for two years:

> ...I would suspect that anything she would tell us about what went on

> last night, she'd be, try and be one hundred percent honest with us. She's certainly not gonna try to say anything to harm you.

[46] Mr. Isenor replied: "No, I don't think she would ever try and harm me" and Cpl. Richardson continued:

> "No, no. I don't think so either. I think she's being a hundred percent honest with us in what she tells us and that's **just** why I'm trying to get a clear picture of what went on...." (3:56:32 p.m., April 30 videotaped statement)

[47] I do not view Cpl. Richardson's references to Ms. Duffy in the April 30 interview as anything other than him explaining to Mr. Isenor that Ms. Duffy was telling the police the truth about how Mr. Moore ended up on the ground with a severe head injury. He and Mr. Isenor agreed Ms. Duffy was not going to make up a malicious and misleading version of events. She was not going to say Mr. Isenor punched Mr. Moore unless it was true. She was going to tell the truth, which is what the police believed she had done, and Cpl. Richardson wanted Mr. Isenor to talk about the events as they understood them, in part, from their interviews with Ms. Duffy. I find nothing improper in what Cpl. Richardson said to Mr. Isenor and I do not accept the interpretation, which I find on a review of the statement is not a reasonable interpretation, placed by the Defence on Cpl. Richardson's comments. Furthermore, there is nothing in Mr. Isenor's April 30 statement to suggest, even faintly, that he interpreted Cpl. Richardson's references to Ms. Duffy as an indication she was in the police cross-hairs. His response to these references do not indicate he was being induced to talk because of them.

Oppression

[48] Iacobucci, J. held in *Oickle* that:

> Oppression clearly has the potential to produce false confessions. If police

> create conditions distasteful enough, it should be no surprise that the suspect would make a stress-compliant confession to escape those conditions. Alternately, oppressive circumstances could overbear the suspect's will to the point that he or she comes to doubt his or her own memory, believes the relentless accusations made by the police, and gives an induced confession. (paragraph 58)

[49] Factors that can constitute an atmosphere of oppression include depriving the suspect of food, clothing, water, sleep or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time. (*Oickle*, paragraph 60) Confronting a suspect with inadmissible or fabricated evidence can contribute to the oppressive conditions and lead to the exclusion of the statement for involuntariness. That was not a tactic used on Mr. Isenor by police in this investigation.

[50] The evidence disclosed that Mr. Isenor was taken into police custody at approximately 3 a.m. on April 30. Sometime after 5 a.m., Cst. Coneen on Cpl. Yorsten's orders, seized Mr. Isenor's clothes for evidence purposes and he was given a white "hazmat" or "evidence" suit to wear. According to the Bible Hill detachment logs, Mr. Isenor was given his own clothes at 2:58 p.m. on April 30 which means he had spent approximately 10 hours in the white evidence suit. He was wearing his own clothes when interviewed by Cpl. Richardson. The Bible Hill detachment logs indicate that at 12:55 p.m. Mr. Isenor asked about getting his clothes: there is no earlier request recorded although it is acknowledged that notes were not made of every interaction with Mr. Isenor.

[51] Mr. Isenor was evidently cold because as soon as he met with Cpl. Richardson in the interview room, he remarked on the temperature in the building. Cpl. Richardson asked him if he'd like a sweater and goes and gets him one which Mr. Isenor put on. There were no further comments by Mr. Isenor about discomfort.

[52] When Cpl. Richardson went on April 30 to the Truro lock-up to collect Mr. Isenor for

transport to the Bible Hill detachment, he inquired about whether he had eaten breakfast. When he learned he had not, Cpl. Richardson arranged for some to be ordered in. The Truro lock-up logs indicate that Mr. Isenor had refused breakfast at 8:32 a.m. when the guard had gone in to take his order. Mr. Isenor had "dinner", as it is described in the Bible Hill detachment logs, at 12:55 p.m. He finished his dinner at 1:10 p.m. according to the logs although it appears he did not eat much of it as the logs note: "wasted most - garbage collected."

[53] Cst. Bailey who drove Cpl. Richardson to Truro on April 30 noted that Mr. Isenor seemed "tired and worn out" from a night in cells, but not intoxicated. The Bible Hill detachment logs indicate that once booked in at Bible Hill, Mr. Isenor lay down for some time although there is no indication whether he was sleeping or merely resting. There is no indication that Mr. Isenor was deliberately kept awake following his arrest. He was obviously awake to speak to duty counsel from 4:09 to 4:21 a.m. according to Cst. Coneen's notes (slightly different times are noted on the Truro lock-up logs) and when he had his clothes seized. The Truro lock-up logs do indicate that Mr. Isenor was observed to be sleeping (the notations are "snoring" and "breathing") for a period between when he spoke to counsel and various booking procedures and when Cst. Coneen returned to seize his clothing, and then again after that. In the Truro lock-up logs there are also notations that Mr. Isenor was escorted to the washroom soon after being brought into the booking area and also later used the cell toilet. Lock-up cells contain a sink and tap with running water. The logs also note that Mr. Isenor requested and was given a blanket at 8:35 a.m.

[54] The evidence does not disclose that Mr. Isenor was deprived of food or water or access to toilet facilities in police custody on April 30, nor was he denied sleep or kept in cold, inhumane conditions. It cannot have been pleasant wearing the evidence suit, and Mr. Isenor must have felt chilled as he requested a blanket. However the suit, an example of which was tendered as evidence, is made of soft, if synthetic material, and was not provided to Mr. Isenor as part of a strategy to humiliate or degrade him. When he was taken from the Truro lock-up to Bible Hill by Cpl. Richardson and Cst. Bailey his hands were cuffed in front, rather than behind, a less awkward position. Cpl. Richardson testified that as Mr. Isenor was being very cooperative and polite, they were trying to make it as comfortable as possible for him.

[55] Mr. Isenor was held in police custody on April 30 as the police investigation was ongoing and statements were still be collected from witnesses. There was nothing in the evidence to suggest that Mr. Isenor was held in custody to deprive him of access to legal advice or "soften" him up for interrogation or subject him to oppressive and intimidating treatment. According to the Truro lock-up and Bible Hill detachment logs, there were relatively long periods of time when Mr. Isenor was left alone while police personnel went about their investigative business.

[56] There has been a heavy emphasis by the Defence on the paucity of notes by police officers involved with Mr. Isenor on April 30 and May 18. I will be addressing that issue. I am satisfied however that the Truro lock-up and Bible Hill logs provide me with a helpful picture of Mr. Isenor's treatment and condition while in cells at these locations. These logs were entered into evidence by consent and are a routine aspect of the cells guards' duties. In my opinion, the cells guards would not have had, in this case, an interest in, or reason for, falsifying the entries.

The Lack of Notes and Video/Audio Tapes of Mr. Isenor's Detention

[57] The Defence has effectively said that the evidence concerning Mr. Isenor's treatment in police custody is incomplete due to the lack of comprehensive notes and video/audio taping of Mr. Isenor's detention. I should be concerned, argues the Defence, by what may have occurred that the police failed to record. In the absence of a better record, I should not accept that the Crown has met its onerous burden of proof. Examples of omissions include: Cst. Melanson made no notes and had no recollection of going to the Truro lock-up and yet the logs indicate he arrived there at 3:44 a.m. on April 30. Cst. Melanson also made no notes of his attendance at Mr. Isenor's residence, noting neither the time of arrival or departure or the time of the arrest. Cst. Coneen made no notes at all of a purported inquiry with Cpl. Yorsten about a *Feeney* warrant and no notes in his police notebook about Mr. Isenor's arrest. Cpl. Yorsten made no notes of the *Feeney* warrant issue. Cst. Bailey made no notes at all, which surprised Cpl. Richardson when he learned this. (Cst. Bailey testified he had no contact with Mr. Isenor and no function to try and obtain a statement from him.) Cpl. Richardson made no notes of his interactions with Mr. Isenor when he was trying to facilitate his contact with

legal counsel on April 30. No notes were made of any conversation during transport of Mr. Isenor from Truro to Bible Hill on April 30 or from Bible Hill to Shubenacadie Provincial Court on May 18. Cpl. Richardson did say that he would not have discussed the matter under investigation as his practice is to conduct any interviewing of suspects on tape. No police officers requested or seized any of the videotapes that may have recorded Mr. Isenor in police custody at the Truro lock-up and the Bible Hill detachment. There is no note by Cpl. Richardson of Mr. Isenor telling him he had broken his wrist prior to the April 30 incident: during the May 18 interview Mr. Isenor comments on having told Cpl. Richardson this previously.

[58] The Defence has invited me to conclude that I should have a reasonable doubt about the voluntariness of both of the statements because every interaction with Mr. Isenor was not recorded in notes by police or captured on video or audio tape. I would have to be able to infer from the entire context of the statement-taking and all the surrounding circumstances that during the unrecorded contacts with police Mr. Isenor was subjected to conditions and treatment that rendered his statements involuntary. Such an analysis was undertaken by Cacchione, J. in *R. v. Walsh*, [2002] N.S.J. No. 230 where he excluded the accused's statement with the following comments:

> The lack of evidence concerning what was said to the accused during the times which were not recorded; the lack of notes about those times; the confusing nature of the interrogation caused by the interweaving of different and sometimes related offences; the perceived limited intellectual capabilities of the accused and his unfamiliarity with the police, detention and the criminal justice system; the unavailability of what was said at crucial times during the interrogation; the oppression caused by the threat of charges against a person for whom the police knew the accused held an emotional attachment; the manipulation of that emotional attachment to obtain a confession; the lack of persuasive evidence that the accused clearly understood what his precise jeopardy was in speaking to the police given the range of questioning from fraud to attempted murder offences; the length of the questioning together with the unaccounted for contact by police with the accused on June 5th all combine to raise a reasonable doubt as to the voluntariness of the

statement on which the Crown seeks to rely. (paragraph 33)

[59] I note that Cacchione, J. referred to the lack of notes as being one of the factors he considered in arriving at his determination that the statement should be excluded.

[60] There is no question that good note-taking is a critical policing skill and serves a number of important functions, as Cpl. Yorsten and Cst. Coneen both agreed on cross-examination, for example, for the timing of events and to record whether a suspect made any admissions. Notes are also valuable for refreshing memory and are routinely referred to in the court process when police witnesses testify. The note-taking in this case was not exemplary and, even acknowledging that an active investigation was underway, opportunities to make notes were missed by various officers. I am however not persuaded that the record of contacts with Mr. Isenor was so deficient in this case that it throws into doubt the officers' recollections of their dealings with him or fatally undermines their credibility. I accept that the police officers who dealt with Mr. Isenor, most directly, Cst. Coneen and Cpl. Richardson and to a lesser extent, Csts. Melanson, Bailey and MacPherson and Cpl. Yorsten, did not make promises or threats or offer inducements to Mr. Isenor or subject him to mistreatment or such unpleasant conditions as to cause him to make the statements he made. On all of the evidence I have not found a basis for disbelieving the police officers' evidence in this regard.
On all the evidence I have heard about the conduct of the police toward Mr. Isenor, it would not be reasonable to draw a negative inference about the unrecorded periods of his detention.

[61] I do not find this situation to be analogous to *Regina v. Vangent and Green* (1978), 42 C.C.C.(2d) 313 (Ont Prov. Ct.) where the judge found there to be an "almost grotesque disparity" as to what transpired during the statement-taking between the police officers' evidence (based on one set of notes) and the accused, without the benefit of a videotape. Here we have a videotape and know what occurred during the interviews of Mr. Isenor. I will note that the Crown is not seeking to introduce into evidence any other utterances by Mr. Isenor for which there may or may not be police notes.

Cpl. Richardson's Interviewing Technique

[62] I have also considered the nature of Cpl. Richardson's interrogation on both April 30 and May 18. The Defence has characterized his style as "relentless" and I will return to this description when I examine the issue of Mr. Isenor's resistance to continued questioning and his assertions of wanting to maintain his right to silence. At this point, I want to address the oppression that a suspect can experience when a police interview is, in the words of Iacobucci J. from *Oickle* at paragraph 60: "excessively aggressive, intimidating, or prolonged."

[63] It has not been suggested that Mr. Isenor was subjected to a prolonged interrogation. Such a suggestion would not be reasonable: each of the interviews were only approximately an hour long. Mr. Isenor had not otherwise been forced to endure lengthy interactions with police. And Cpl. Richardson's questioning does not come close to representing the interviewing tactics and tone employed by police in *R. v. Grouse*, [2003] N.S.J. No. 251 (N.S.S.C.),(upheld [2004] N.S.J. 346 ; leave to appeal to the Supreme Court of Canada denied [2004] S.C.C.A. No. 495). Murphy, J. in *Grouse* accepted that the questioning of Mr. Grouse, an 18 year old suspect in a police shooting, was distasteful, demeaning and included anger, yelling and repeated profanity. Interrogators also overstated the evidence they had against Mr. Grouse. Murphy, J. accepted that such techniques, employing trickery and oppression, could intimidate some suspects and induce a false confession. He was satisfied however that Mr. Grouse was able to withstand the interview without compromising his mental state or ability to speak voluntarily.

[64] I am satisfied that Mr. Isenor was not intimidated or oppressed by Cpl. Richardson's interviewing style which while dogged, can be seen from the videotapes to have been consistently benign, direct and respectful. By all accounts Mr. Isenor was cooperative and polite with police throughout all his dealings with them on both April 30 and May 18 and I find that police reciprocated in their treatment of him. Cst. MacPherson testified that Mr. Isenor was "very likeable" , a view that Cpl. Richardson shared as well, describing Mr. Isenor as "very easy to talk to" on the way to court on May 18 when they discussed Mr. Isenor's work.

The Request for the Breath Sample

[65] I also do not find that anything turns on Cpl. Richardson's request to Mr. Isenor on April 30 for a breath sample. Cpl. Richardson was looking for evidence, evidence which would have been conscriptive. Cpl. Richardson was entitled to look for conscriptive evidence, the subsequent statement-taking being another example of him doing so. He did not make a breathalyzer demand because he had no legal grounds to do so. Mr. Isenor's decision to decline to provide a sample was the end of the matter.

Mr. Isenor's Right to Silence

[66] I must endeavour to assess all of the circumstances surrounding the statements of Mr. Isenor to ascertain whether I have a reasonable doubt as to their voluntariness. One aspect of the interviews I must consider is the issue of Mr. Isenor's right to silence and his efforts to assert that in the face of persistent questioning from Cpl. Richardson. I turn to that now.

[67] The Defence has urged me to find that Mr. Isenor's statements on April 30 and May 18 were obtained through the over-riding of Mr. Isenor's determination to remain silent. The Defence asserts that Mr. Isenor's repeated statements that he had been advised by counsel to remain silent and wanted to follow that advice should have been respected and Cpl. Richardson should have stopped the interviews. Furthermore the Defence says, Cpl. Richardson belittled and marginalized Mr. Isenor's legal advice, with the effect that Mr. Isenor lost confidence in its value and gave a statement.

[68] The Defence points to the exchange between Cpl. Richardson and Mr. Isenor on April 30 where Cpl. Richardson has told Mr. Isenor he is holding back information. Mr. Isenor responds:

> No, I don't see it that way. The only thing I see is, I don't want, the lawyer said, don't say nothing and I've already said way, way too much. He must have said that to me for a reason. (4:02:38 - 4:02:50

p.m., April 30 videotaped statement)

[69] Cpl. Richardson remarks:

> Just standard advice, standard advice from a lawyer is that you not give the police a statement. Some people take that advice, some people don't. It's entirely, the bottom line is it's up to him to give his advice, it's up to you to decide what part of that advice, if any, you're gonna exercise, you know it's up to us as police investigators to try and determine the true facts of the case so we can present them to the court because the last thing I want to do is mislead the court in the prosecution. (4:02:51 p.m., April 30 videotaped statement)

[70] The Defence argues that this was insidious and undermined Mr. Isenor's resolve to withstand Cpl. Richardson's questioning. I do not see it that way. Cpl. Richardson did not tell Mr. Isenor that his lawyer had given him bad or flawed advice nor did he encourage Mr. Isenor to ignore it. He told Mr. Isenor it was his decision and fairly said that some people do follow the advice lawyers typically give, which is not to give a statement to police. The candid characterization of this as advice lawyers routinely give clients in police custody could not have reasonably been taken by Mr. Isenor as a suggestion that such advice should be readily disregarded. Mr. Isenor was told in effect that he had received the advice lawyers regularly give their clients who are under police investigation - don't talk. His videotaped statement shows that he understood the basis for that advice.

[71] While it emerges in the context of right to counsel under section 10(b) of the *Charter*, an example of undermining an accused's understanding of the value of legal advice is found in *R. v. Burlingham*, [1995] 2 S.C.R. 206 at paragraph 18. There police were held to have violated the accused's rights for failing to take "positive steps to facilitate [his] understanding" of his right to counsel. In *R. v. Daunt*, [2005] Y.J. No. 23 (Y.T. S.C.), police maligned the value of legal advice, calling it "legal schmegal bullshit." (paragraph 41) Nothing of the kind was said or implied to Mr.

Isenor. Cpl. Richardson accurately characterized the nature of the advice given by Mr. Isenor's counsel and there was nothing improper in him telling Mr. Isenor that it was up to him to decide if he wanted to follow that advice or not. I also find there was nothing improper in Cpl. Richardson telling Mr. Isenor (3:35:19 p.m., April 30 videotaped statement) that he was an adult, in other words, that he was entitled to make his own autonomous decisions about whether he talked to police or not.

[72] I turn now to the issue of Mr. Isenor's repeated comments, during the April 30 statement-taking, that he should not talk and was not going to say anything more and Cpl. Richardson's continuation, notwithstanding these comments, of the questioning. Can Mr. Isenor's failure to remain silent be attributed to Cpl. Richardson's conduct? Was his will over-ridden by an oppressive interrogation technique of bulldozing ahead without regard for Mr. Isenor's assertions that he did not want to talk? What was Mr. Isenor in fact saying and what should Cpl. Richardson have done?

[73] Iacobucci, J. in *Oickle* referred to *R. v. Precourt* (1976), 18 O.R. (2d) 714 where Martin, J.A. of the Ontario Court of Appeal talked about police interrogation:

> Although improper police questioning may in some circumstances infringe the governing [confessions] rule, it is essential to bear in mind that the police are unable to investigate crime without putting questions to persons...properly conducted police questioning is a legitimate and effective aid to criminal investigation...

[74] In testimony at the *voir dire*, Cst. MacPherson stated it was his view of police interviewing that most people being interviewed want to talk and "we facilitate that.". He said people want to give their side of the story and that Mr. Isenor wanted to talk, so he did. "He wanted to tell us his version" was the impression Cst. MacPherson got from monitoring both interviews. Obtaining statements from suspects is important, Cst. MacPherson, agreed, for a variety of reasons. Cst. MacPherson testified that information from a suspect would be followed up by police, "to seek the truth, to be fair" and to avoid "tunnel vision."

[75] Mr. Isenor was not reticent about the advice he had received from counsel not to talk. He stated that on a number of occasions in the April 30 interview, some of which I have referred to already. In fact, by 4 p.m. on April 30 Mr. Isenor had spoken to three lawyers, including Mr. Carruthers, while at the Bible Hill detachment. Early on in the interview, when asked by Cpl. Richardson to explain why the assault on Mr. Moore happened, he said he believed he shouldn't answer. He spoke about not wanting to get himself into worse trouble than he was already in but shortly after stating that, told Cpl. Richardson that he would like to offer an explanation but says he won't. After that he did start shedding some light on what occurred at and outside the bar and then pulled back, saying: "I think I'm doing what I don't want to do, I think I'm talking when I don't, I shouldn't be." (3:42:42 p.m., April 30 videotaped statement)

[76] The see-sawing of Mr. Isenor's resolve continues throughout the April 30 interview. Much of the time he talked quite freely and was responsive to Cpl. Richardson's questions. He was not antagonistic or belligerent toward Cpl. Richardson, nor did he defiantly or sullenly refuse to answer. He also did not appear to be intimidated or overwhelmed by Cpl. Richardson and Cpl. Richardson used a persistent but calm and reasonable approach to Mr. Isenor's balking at continuing the narrative. For example, when Mr. Isenor said in answer to Cpl. Richardson: "I don't want to. I think I have told you everything." (3:49:37 p.m., April 30 videotaped statement), Cpl. Richardson just put to him what Erin Duffy had told police about shoving Mr. Moore. Mr. Isenor answered by saying he didn't think Ms. Duffy's recollection was entirely accurate and the questions and answers continued.

[77] Mr. Isenor was clearly concerned about his jeopardy and how giving a statement to Cpl. Richardson could affect that. He commented on the Crown Prosecutor's role in the case saying:

> His job is to convict me, my lawyer's job is to set me free, so if he's doing his job as best he can possibly do, he's gonna come up with any little thing I said to convict me and I just don't want to give him

> any more, he'll wind this around and say this and say that and figure it out and he'll come up with something because that's his job. (4:00:38 p.m., April 30 videotaped statement)

[78] Cpl. Richardson responded to this by suggesting Mr. Isenor may be watching too much tv and saying the Crown Prosecutor's job is "to see that justice is done" and "not to fabricate evidence or twist the facts." (4:01:00 - 4:01:11 p.m., April 30 videotaped statement)

[79] The viewing Mr. Isenor's statement of April 30 leaves me with the impression that when he was speaking to Cpl. Richardson he was torn, torn between the advice from legal counsel not to talk and his desire to offer his version of events, his explanation of how and why things happened. I know from the evidence that Mr. Isenor was cooperative with police, a productive and contributing member of the community and law abiding. He wanted on the one hand to respect his lawyer's advice but on the other hand he wanted to talk, if it would help him, which he evidently thought it might, although he had reservations and struggled with whether he was successfully treading the delicate and fine line he was trying to walk of saying enough but not too much. He said at one point: "I'd like to tell you but I don't want to, I don't want to damage myself any worse than I'm already...I'd love to tell you, like, but I don't want to...I'm following my lawyer's advice I guess." (3:35:10 p.m., April 30 videotaped statement) He seems to have been an example of what Cst. MacPherson had in mind when he testified that "most people" want to talk to investigators.

[80] At no time did Mr. Isenor call for a time-out so he could speak to a lawyer again. He did not indicate he was getting confused about the advice he had received and needed a refresher. He did not ask for any kind of pause in the interrogation. He did not ask Cpl. Richardson to stop questioning him. Cpl. Richardson was not obligated, in my opinion, to abandon the questioning because Mr. Isenor seemed reluctant at times to continue. The interview came to a natural conclusion, brought about by Cpl. Richardson. It did not run aground with Mr. Isenor resisting any further inquiries only to be over-borne by Cpl. Richardson's insistence on answers.

[81] I do not find that the interviewing of Mr. Isenor by Cpl. Richardson was comparable to the

cases provided by Defence for my review, such as *R. v. Rhodes*, [2002] B.C.J. No. 1113 (B.C.S.C.); *Regina v. Otis* (2000), 151 C.C.C.(3d) 416 (Que. C.A.); *R. v. Elkadri*, [2003] O.J. No. 971 (Ont. Sup. Ct. Just.)

[82] The issue is whether Mr. Isenor freely chose to continue to speak to Cpl. Richardson. *(R. v. Hebert*, [1990] 2 S.C.R. 151, paragraph 66) I find that he did and that he understood his right to silence and chose to exercise it selectively. Cpl. Richardson's techniques for getting Mr. Isenor to continue to talk were effective but not improper. Cpl. Richardson testified that he dealt with Mr. Isenor's resistance by talking rather than shutting the interview down. Police investigation would be of little utility if, in the face of some expression by the suspect of reluctance to continue to talk, an interrogator had to end the interview. On the facts of this case I find Mr. Isenor was not seeking to have that occur: while he may have felt some ambivalence at some points in the April 30 interview about continuing the discussion with Cpl. Richardson, he continued to offer explanations and answers until the statement-taking concluded. As McLachlin, J. (as she then was) stated in *Hebert* at paragraph 53:

> The state is not obliged to protect the suspect against making a statement; indeed, it is open to the state to use legitimate means of persuasion to encourage the suspect to do so.

[83] I find Cpl. Richardson used legitimate means to persuade Mr. Isenor to talk. Mr. Isenor knew his rights and exercised them selectively throughout the interview as he was entitled to do, just as he would have been entitled to remain entirely silent, if he had chosen to, which he did not.

[84] Having considered the context and all of the circumstances surrounding the statement-taking of April 30, I am satisfied beyond a reasonable doubt that none of the possible factors fatal to voluntariness, either alone or taken together, such as threats, oppression which can include over-riding the right to silence, or the lack of completely comprehensive notes or a video/audio record of Mr. Isenor's pre-interview detention, render Mr. Isenor's statement of April 30 involuntary. Therefore it shall be admitted into evidence at trial.

Factors Relevant to Mr. Isenor's May 18 Statement

[85] Mr. Isenor was released from custody on April 30, charged with aggravated assault. On May 18 by agreement between Crown and Defence, Mr. Isenor presented himself at the Bible Hill detachment. Mr. Moore had died and Mr. Isenor was to be charged with manslaughter. Cst. MacPherson met Mr. Isenor when he arrived at the detachment and took him to a private room where he advised him he was under arrest for manslaughter, read him his right to counsel from a standard form and cautioned him. When Mr. Isenor indicated he understood, Cst. MacPherson asked him if he wanted to call a lawyer. He testified that Mr. Isenor's response was "no." Cst. MacPherson acknowledged that his notes indicate nothing about what was said to or by Mr. Isenor in a ten minute period, 8:45 - 8:55 a.m., after the arrest and before he was given his right to counsel. Cst. MacPherson maintained it was during this period he explained to Mr. Isenor that he was now looking at manslaughter which was much more serious and told him what was going to happen. Cst. MacPherson noted that from 8:45 - 8:55 a.m. on May 18 his purpose was not to elicit an inculpatory statement from Mr. Isenor. He said: "I was not to try and elicit any confessions or admissions or anything."

[86] Cst. MacPherson took Mr. Isenor to the interview room once he had used the washroom. He said that Mr. Isenor had wanted to "get on with things."

[87] Cpl. Richardson had been tasked to conduct a second interview with Mr. Isenor now that the charge against him was manslaughter: Cst. MacPherson was to monitor it. Cst. MacPherson's notes indicate he placed Mr. Isenor in the interview room at 9:05 a.m. with Cpl. Richardson entering the room at 9:19 a.m. At 9:26 a.m. Cpl. Richardson read the secondary caution and in Cst. MacPherson's view "anything worth noting" started at 9:29 a.m. (The start time on the May 18 videotape is 8:38 a.m. although it was agreed by counsel that nothing turns on the discrepancy between police notes and videotape recorded time.)

[88] In assessing the May 18 statement, I have considered the evidence carefully and the same law I reviewed with respect to the April 30 statement. Certain factors that I examined in relation to

the April 30 statement-taking have no relevance to the May 18 statement. Notably, Mr. Isenor was not in police custody for very long on May 18 before the interview with Cpl. Richardson got underway. There is no suggestion by the Defence that any promises, threats or inducements were made to Mr. Isenor and none appear on the videotape. All police officers dealing with Mr. Isenor both on April 30 and May 18 categorically stated that they made no promises, threats nor offered any inducements to him at any time. Mr. Isenor was not subjected to any conditions on May 18 that could remotely be considered oppressive or coercive: there is no evidence that he was hungry, thirsty, tired or in state of mental collapse. He made no complaints in the interview about his condition or his treatment nor did he complain to any of the police officers he encountered on May 18. As on April 30, he had an operating mind.

[89] Furthermore I repeat my findings on the April 30 issue of the note-taking and video/audiotapes of Mr. Isenor's police detention in relation to the May 18 statement. Any omissions do not cause me to conclude that there is a reasonable doubt about the voluntariness of the statement on that basis.

Mr. Isenor's Right to Silence

[90] The issue I will focus on therefore is that of Mr. Isenor's right to silence and Cpl. Richardson's conduct of the interview with him on May 18. Cpl. Richardson testified that there was no indication on May 18 that Mr. Isenor did not want to speak with him. On the videotape, Mr. Isenor can be seen as quite willing to talk and quite voluble. He presents in the interview as more forthcoming than on April 30 and more comfortable. He seems less reluctant to talk. As before, Mr. Isenor was cooperative and polite. Cpl. Richardson's demeanor is as before as well, respectful, cordial and low-key.

[91] Again, Mr. Isenor did not ask for the interview to be terminated at any point. He did not ask to call his lawyer and had declined to call him when this was offered by Cst. MacPherson at the time of his arrest. He does not show signs of being confused or needing help understanding his rights in the interview. Cst. Richardson testified that Mr. Isenor's lawyer, David Bright, did call during the

statement-taking and that he was advised of that by Cst. MacPherson when he interrupted the interview to speak to him. Cpl. Richardson did not inform Mr. Isenor of this call as Mr. Isenor had expressed no desire to talk to his lawyer. At this point, the interview was nearly concluded in any event. Cpl. Richardson said his intention was to terminate the interview and transport Mr. Isenor to court.

[92] The Defence has argued that the May 18 interview suffers from the same flaw as the April 30 one, that is, Cpl. Richardson's insistence on continuing the questioning even in the face of Mr. Isenor espressing a reluctance to keep talking. In addition, the Defence asserts that Mr. Isenor was confronted with Cpl. Richardson telling him that this was his last chance to talk to him, an inaccurate statement says the Defence as another statement could have been taken after that, and designed to intimidate Mr. Isenor into talking when he was showing signs of resistance. According to Cpl. Richardson's evidence this was not a tactic; in fact he was moving on to other investigations and did not expect he would be dealing with Mr. Isenor again.

[93] During the May 18 interview Mr. Isenor availed himself of the opportunity to establish that he had not used a weapon against Mr. Moore. This issue came up in relation to a pool cue found at the scene. After explaining his understanding of the origins of the pool cue, Mr. Isenor stated: "I never hit him with nothing." (8:47:19 a.m. ,May 18 videotaped statement) Cpl. Richardson explained that he had wanted to clarify that "the pool cue didn't come into play at all." (8:47:23 a.m., May 18 videotaped statement) Even when Mr. Isenor did tell Cpl. Richardson that he did not want to help the Crown and that he was "told not to say anything here today" (to which Cpl. Richardson responded: "I'm sure you were"), and that he did not want to talk further about what happened outside the bar, he chuckled, indicating a level of comfort and familiarity with Cpl. Richardson and the ebb and flow of their interaction. And Mr. Isenor followed this up with continuing to talk.(8:49:46 - 8:50:11 a.m., May 18 videotaped statement)

[94] Mr. Isenor's strongest statement on May 18 was where he stated: "I want to exercise those rights" referring to his right to remain silent. (9:00:19 a.m., May 18 videotaped statement) Cpl. Richardson told him he was not going to push him on it, "if that's the way you feel, that's the way

it will be, I just hope that down the road you don't look back and say I missed my opportunity to tell them exactly what my mind set was at the time..." (9:00:21 - 9:00:29 a.m., May 18 videotaped statement) Mr. Isenor responded to this, not by re-asserting his right to silence but by talking. And he kept talking even to the point of asking Cpl. Richardson whether he should write Mr. Moore's family. (9:07:02 a.m., May 18 videotaped statement) This is just one of several indications by Mr. Isenor that Mr. Moore's death was weighing heavily on him and demonstrates that Mr. Isenor was experiencing some need to talk about what happened. Cpl. Richardson made a similar observation, telling Mr. Isenor that he perceived him to be "struggling with this, emotionally."(9:06:09 a.m., May 18 videotaped statement)

[95] It is my finding on the evidence that Mr. Isenor chose on May 18 to speak to Cpl. Richardson and continued throughout the statement-taking to exercise that choice. I do not accept that Cpl. Richardson employed any unacceptable or improper techniques or tactics to over-ride Mr. Isenor's will. He used the same methods of persuasion he had used on April 30, again to good effect, to keep Mr. Isenor talking. It is my opinion that Mr. Isenor understood his right to remain silent on May 18 and resolved any dilemma that arose in his mind from time to time about whether to keep talking or not by continuing to answer Cpl. Richardson's questions.

[96] I am satisfied beyond a reasonable doubt on reviewing all the evidence and the videotape of the May 18 statement, that Mr. Isenor gave the May 18 statement, like the one on April 30, freely and voluntarily. It too will be admitted into evidence at trial.

Anne S. Derrick
Judge of the Provincial Court of Nova Scotia