

R. v. Williams

Ontario Judgments

Ontario Superior Court of Justice

G.D. Lemon J.

Heard: April 27-30, May 1, 5 and 6, 2015.

Judgment: July 6, 2015.

Court File No.: CRIMJ(F) 364/14

[2015] O.J. No. 6301 | 2015 ONSC 4182 | 2015 CarswellOnt 18297 | 127 W.C.B. (2d) 260 | 37
Imm. L.R. (4th) 301

Between Her Majesty the Queen, and ██████████ Williams

(101 paras.)

Case Summary

Criminal law — Evidence — Admissibility — Prejudicial evidence — Confessions and statements by the accused — Accused's pre-arrest statements ruled admissible and post-arrest statements ruled inadmissible — Accused flew into Toronto from Jamaica and was questioned by CBSA agents — He was arrested by CBSA agents after discovery of one kilogram of cocaine in luggage — He was detained by CBSA agents post-arrest until released to police — Pre-arrest statements were voluntary and made in course of routine customs investigation that was not akin to police investigation — Post-arrest statements occurred in absence and violation of right to counsel and were consequently ruled inadmissible.

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Procedural rights — Protection against self-incrimination, right to silence — Right to retain and instruct counsel without delay — Remedies for denial of rights — Specific remedies — Exclusion of evidence — Accused's pre-arrest statements ruled admissible and post-arrest statements ruled inadmissible — Accused flew into Toronto from Jamaica and was questioned by CBSA agents — He was arrested by CBSA agents after discovery of one kilogram of cocaine in luggage — He was detained by CBSA agents post-arrest until released to police — Pre-arrest statements were voluntary and made in course of routine customs investigation that was not akin to police investigation — Post-arrest statements occurred in absence and violation of right to counsel and were consequently ruled inadmissible.

Voir dire to determine the admissibility of statements made by the accused, Williams. The accused flew into Toronto from Jamaica. An indication on his passport regarding the smuggling of contraband resulted in referral for an immigration and customs secondary inspection by CBSA agents. The accused was interviewed for 90 minutes while agents checked his luggage. Irregularities in the lining of his suitcase led agents to discover one kilogram of cocaine. The accused was arrested for importing cocaine into Canada.

He was detained by the CBSA agents post-arrest for three hours until he was turned over to police. The Crown sought admission of the accused's statements. The accused submitted the utterances were not voluntary, or alternatively, should be excluded on the basis they were obtained in breach of his ss. 7, 10(a) and 10(b) Charter rights.

HELD: Pre-arrest statements ruled admissible and post-arrest statements ruled inadmissible.

The accused's statements were voluntary. The failure by CBSA agents to properly record the statements did not warrant their exclusion. The questioning by the CBSA agents could not be regarded as akin to a police interrogation. Although there were elements indicating a lack of professionalism, this was a routine examination. The questioning occurred in the context of a border investigation, and therefore the accused was not detained until his actual arrest. The accused was not provided with access to legal advice following his arrest. The failure to provide the accused's rights post-arrest justified exclusion of his statements post-arrest. The remaining statements were admissible.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 10, s. 10(a), s. 10(b), s. 24(2)

Customs Act, R.S.C., 1985, c.1,

Immigration and Refugee Protection Act, S.C. 2001, C.27,

Counsel

Sidney Thompson, for the Respondent/Applicant.

Alana V. Page, for the Applicant/Respondent.

RULING

G.D. LEMON J.

The Issue

1 The Crown seeks a ruling with respect to the voluntariness of statements that Mr. Williams gave to Canadian Border Services Agency officers prior to his arrest by the RCMP. In particular, the Crown seeks the admission of those statements and a finding that all of Mr. Williams' statements were the product of an operating mind and made voluntarily, without fear, oppression, threat or inducement.

2 In response, the defence submits that the utterances alleged to have been made were not voluntary. Alternatively, the defence seeks an order excluding those statements on the grounds that their admission would violate Mr. Williams' right to remain silent, and to be informed of his right to his own counsel pursuant to Sections 7, 10(a) and (b) of the *Charter of Rights and Freedoms*.

3 In order to resolve this issue, I need to determine:

- (a) Were Mr. Williams' statements voluntary? For the following reasons, I find that they were.
- (b) If Mr. Williams' statements were voluntary, should they be excluded from evidence because of the CBSA agents' failure to properly record them? As set out below, they should not be excluded.
- (c) Was Mr. Williams' questioning at customs secondary a routine border examination or was it "akin" to a police interrogation? I am satisfied that this was an unprofessional but routine examination.
- (d) At what point was Mr. Williams detained such that his rights under the *Charter* were engaged? Since the examination was in the border investigation context, Mr. Williams was not detained until he was arrested for importing cocaine.
- (e) Was Mr. Williams provided with access to legal advice to which he was entitled? For the reasons that follow, he was not.
- (f) If not, should his statements after that point be excluded from the evidence pursuant to section 24(2) or the *Charter*? Because of that failure to provide his rights, Mr. Williams' statements after his arrest will be excluded.

Background

4 Mr. Williams is charged with importing just under one kilogram of cocaine into Canada. From the evidence led on this blended *voir dire*, the following does not appear to be in dispute.

5 On October 21, 2013, Mr. Williams arrived at the Toronto airport on a flight from Jamaica. At primary inspection, a scan of his passport revealed that he had been targeted as a "lookout". Accordingly, he was referred to immigration and customs secondary inspection.

6 At immigration secondary, he was questioned by Officer Warne. His statements at that location are not in dispute by the defence and are therefore admissible at the trial.

7 After attending at immigration secondary, Mr. Williams was escorted to the baggage carousel and then to the customs secondary line by Officers Warne and Spencer. There, CBSA Officer Siscopulos carried out a customs secondary inspection. She accessed "lookout details" from her computer and learned that Mr. Williams was targeted for smuggling contraband.

8 Mr. Williams presented three pieces of luggage; two suitcases and a backpack. At approximately 7:36 p.m., Officer Siscopulos began questioning Mr. Williams about his luggage, his reasons for being in Canada and where he would be staying. Mr. Williams also responded to questions from Officers Warne and Spencer.

9 Officer Siscopulos' questioning continued over a period of approximately one and a half hours while she examined Mr. Williams' belongings and x-rayed each piece of luggage. She was of the view that Mr. Williams' responses were inconsistent.

10 Officer Siscopulos' investigation of Mr. Williams was conducted in a question and answer format but

first summarized in her notebook at 8:35 p.m.; one hour after the questioning began. No one else recorded Mr. Williams' responses.

11 Officer Siscopulos examined Mr. Williams' luggage, emptying and x-raying each piece. Neither the suitcases nor the backpack indicated any contraband. However, another backpack, located in the larger of his suitcases, showed an inconsistency when x-rayed. She examined it and noticed the lining had been tampered with. When she ripped the lining open, she was able to see clear plastic packaging. It contained what was eventually determined to be cocaine.

12 At 8:55 p.m., Officer Siscopulos arrested Mr. Williams for smuggling goods into Canada. She then handed him over to Officers Hatch and Samra to carry out a personal search and to hold him for the arrival of the RCMP to take over the investigation.

13 At 11:30 p.m., Officer Kim of the RCMP arrested Mr. Williams for importation of narcotics.

14 The defence admits that what Mr. Williams said to the CBSA officers before arriving at the customs secondary inspection, at approximately 7:30 p.m., on October 21, 2013, is admissible.

15 The Crown has confirmed that it will not be relying upon any statements made by Mr. Williams after his arrest by RCMP Officer Kim at approximately 11:30 p.m. Further, at trial, the Crown will not be relying on any statements made to Officers Warne or Spencer.

16 Accordingly, it is the interaction between Mr. Williams and the CBSA officers at customs secondary between 7:30 p.m. and 11:30 p.m., on October 21, 2013, that is in issue here.

Positions of the Parties

17 The Crown submits that following the principles laid out in *R. v. Oickle*, 2000 SCC 38, I should be satisfied beyond a reasonable doubt that Mr. Williams' statements were voluntary.

18 It is also the position of the Crown that Mr. Williams was subjected to a routine examination at the airport and was asked the type of questions that all travellers expect when entering Canada. The Crown relies on the jurisprudence that sets out that statements made during routine questioning at Canada's borders do not violate Section 7 of the *Charter*, or engage Section 10 of the *Charter*.

19 In response, the defence submits that the statements that were made were not voluntary, were compelled under the *Customs Act* and their admission would infringe Section 7 of the *Charter*. Mr. Williams submits that the statements were made at the time when he was detained and denied his rights, as guaranteed by Sections 10(a) and 10(b) of the *Charter*.

20 Further, he submits that the statements were not reliably recorded and should be excluded as evidence from this trial, pursuant to section 24(2) of the *Charter* since the admission of such evidence would bring the administration of justice into disrepute.

(a) Were Mr. Williams' statements voluntary?

The Evidence

21 The Crown must prove voluntariness beyond a reasonable doubt. The defence acknowledges that Mr. Williams had an operating mind and there were no threats or inducements. The defence, however, submits that the manner of the interrogation was "akin to a criminal investigation". As such, that interrogation breached the principles of investigative and trial fairness, and should raise a doubt as to whether Mr. Williams was aware of his circumstances.

22 In order to understand the issues, it is easiest to consider the evidence of Mr. Williams at its highest and then, if necessary, consider the evidence of the Crown.

23 Mr. Williams' testimony was that he was born in Jamaica and is 43 years of age. He came to the United States in 1991 on a track scholarship. He attended college for four years. He has a BSC in management and finance. He does not have a criminal record and, until this incident, had never been arrested.

24 Officers Siscopulos, Warne and Spencer were in secondary customs with him. They were there for about an hour and a half while he was interrogated.

25 The transcript of his evidence on this topic is:

MS PAGE: Q. Okay. So I'm going to change the topic of my questions now and I'm going to ask you a series of questions, but these questions all relate to the time period where Officer Siscopulos, Officer Warne and Officer Spencer were all with you down in that secondary area.

A. Yeah.

Q. And we heard Officer Siscopulos indicate that it was roughly an hour and a half time period from the time when she started asking you questions, the time when you were arrested. Does that seem like a reasonable estimate?

A. Yeah.

Q. Okay. So that's the time period that I'm asking you about.

A. Okay.

Q. At some point during -- well, let me ask you this, how would you describe what was going on during that one and a half hour period?

A. I was -- I think I was being interrogated because they wouldn't give me a chance to finish one question before they asked another one. So -- Officer Siscopulos would ask me a question and then before I finish answering that question then Officer Warne would ask me one and then -- Officer Spencer would be asking me something totally irrelevant to who was asking -- well, actually, he was talking about track and field and what event I run, so it was going all different questions was coming at me at the same time.

Q. At any time were any of the officers threatening you physically?

A. No. They weren't threatening me. They were just pushing questions at me and at, at one point Officer Siscopulos, I'm having a problem with that, I'm sorry, she was getting upset because

she sayin I kept changing my story. For example, at one point they asked me what year did I first go to America and I told them 19 - 1988...

Q. Okay...

A. ...which was...

Q. ...before you finish that, did you go to America the first time in 1988?

A. Ninety -- eighty-eight. That's when I was [REDACTED], so I visit the states at that time. Then his next question was well, you just told the officer you are in college 1991, so I'm like that's a different question. He asked me when was the first time I've been to the States and he was saying, yeah, you just changed your -- your, your, your answers again and I'm like it's two different questions.

...

MS. PAGE: Q. So my question to you, were they ever threatening to you physically and I think your answer was no.

A. No, not physically.

Q. Did they ever threaten you in any way?

A. No.

Q. Okay. Were they ever abusive in any way?

A. No.

Q. Okay. And yet you describe this as an interrogation. Why do you, why do you use that term?

A. Because that's the way I felt. I was being cooperative. I was giving them everything they asked for, was -- and saying all the questions, but they had still -- for example, at one point when Officer Warner [sic] took my, my firearm licence from, from my wallet and he was like, oh, he has a gun the same -- it, it -- either him or Officer Warner [sic] was saying, I had the same gun they had.

Q. I'm sorry, Officer Warne or Officer Spencer?

A. Yes.

Q. One of..

A. One of those...

Q. ...those two said that?

A. ...two was, was saying that...

Q. Okay.

A. ...and Officer Siscopulos was saying, where's the gun, where's the gun and she was started looking and asking where, where's the gun and they started laughing. I'm like you guys what is this all about, you know, you, you, you think it's funny. It's not funny. I was telling these guys it's not, it's not a joke. You, you're taking it for a joke and I'm not.

Q. Okay. So when you were just giving evidence about Officer Siscopulos saying, where's the gun, where's the gun, you raised your voice...

A. Yes.

Q. ...when you just did that in the courtroom. Is that what Officer -- is that to indicate something to us about the way in which Officer Siscopulos...

A. That's, that's -- yeah, exactly.

Q. Okay. And if you were to describe, using words, what type of tone she was using when she was asking about the gun, what words would you use?

A. Like, she was scared, nervous as if I really had a gun. She, she thought I had a gun the, the way she was reacting. She really thought I, I -- they found a gun that's why she was reacting like that.

Q. And how did that make you feel when she reacted in that fashion?

A. I, I started getting nervous because I'm like these three people are askin' me questions, telling me I'm lying and saying I kept changing my story.

...

26 One of the officers then found a pin that appeared to be a badge of some kind in Mr. Williams' wallet. This was given to him by his sister-in-law who was a [REDACTED] [REDACTED]

MS. PAGE: Q. In any event, what was the reaction upon Mister -- Officer Siscopulos locating that?

A. She's like what is this, oh, you, you, your -- impersonating a police officer, what are you doing with this badge, what are you doing with a police badge and before I even get a chance to explain what it was, Officer Warner [sic] was asking me another question about my passport, why -- where did you get this fake passport, so...

Q. Which passport were they alleging to you, or suggesting to you, was fake?

A. At that point, it was my, my U.S. passport.

Q. And was there something that had just happened when he made that suggestion to you that your U.S. passport was fake?

A. While I was at the desk with Officer Siscopulos, I was talking to her and, and Officer Warner [sic] was under -- to my -- to my left and he was looking at my passport. He had my laptop looking through the laptop as well and he have the cell phone, so he have the cell phone sitting beside the laptop and he was going through the cell phone, going through the laptop and he was looking at the passport as well.

Q. Okay. And when you say, "He was looking at my passport", which passport are you referencing?

A. My U.S. passport.

Q. Do you have a second passport?

A. Yes. And that's when, that's when I took out my [REDACTED] passport and I showed it to him. I said, this is my passport and this is also my passport.

Q. Okay. Are both real passports?

- A. Both of them are real, yeah.
- Q. So prior to -- when you came through immigration into Canada for the first time, which passport were you using?
- A. I gave them my U.S. passport.
- Q. Okay. When did you first produce your [REDACTED] passport?
- A. When he was telling me my passport was fake.
- Q. The, the U.S. one?
- A. He was telling me the U.S. passport was fake and I'm like here's a second form of identification, look at this, this is also my passport.
- Q. Okay. How did you feel when Officer Warne was accusing you of having a fake U.S. passport?
- A. As I said, at, at that point, I, I got nervous because I'm like you're trying to put something, something on me because I'm trying to tell him the truth, I'm trying to cooperate and he's saying I'm lying and he's saying I'm changing story, and this is coming from all three officers.
- Q. Okay. You heard Officer Siscopulos tell the Court that she asked you if you had ingested something?
- A. Yes.
- Q. You heard her testify to that the other day?
- A. Yes.
- Q. What is your recollection of how that conversation took place, if there is one?
- A. Yes. After -- while, while the, I would call it interrogation was going on with all three officers, I was in the middle and I was surrounded by all three of them. I was going back and forth, was turning to the left, turning to the right and it's like, like a triangle basically and I'm in the middle.
- So she, she said, while she was checking the bag, she was like, I know you swallowed something, I know you have -- you, you ingest something, I know you have something inside of you and I'm going to take you to the hospital, in a stern voice, I'm going to take you to the hospital and take it out. And I'm like I don't do drugs and I don't smoke. I don't do anything, so I don't, I don't know what you're talking about.
- Q. Did she ask you any other questions about anything else that you had consumed?
- A. Yeah. She asked me, "What did you eat on the plane? What, what did you have to eat on the plane?" And I told her I, I didn't have anything.
- Q. Was that true that you didn't eat anything?
- A. I didn't eat anything, no.
- Q. And how did that make you feel when she was saying to you, "I know you swallowed something"?

- A. I, again, I was like why she accusing me. If she's asking me questions that I'm, I'm here trying to tell her the truth, I'm trying to cooperate. Why is she saying I'm lying? Because all three officers, everything I said, they, they kept saying I'm lying and I'm -- and I kept changing my story.
- Q. And were you changing your story?
- A. No, I wasn't.
- Q. I'm sure you weren't counting, but how many times do you think, roughly, it was suggested to you that you were changing your story?
- A. A few times. More than five.
- Q. Okay. You told us about a situation in which your laptop was open in second -- secondary customs area and you had punched in the PIN.
- A. Yeah.
- Q. Were you told that you had that option of punching in the PIN, but you didn't have to?
- A. No.
- Q. Okay. Did you think you had the option, or why did you do it?
- A. Because I was cooperating because they askin' me questions. They wanted to verify if I had a, a ticket back to the States and it was on my laptop, so I -- he asked me to put my password in, I gave it to him when I put the password in and gave it to him...
- Q. Okay.
- A. ...Officer Warner [sic].
- Q. Okay. At any time, were any of the officers looking at photographs that was either on your phone or your laptop?
- A. On my laptop.
- Q. Okay. And which officer was it if you recall?
- A. Officer Warner [sic].
- Q. Okay. And specifically were you being asked about any photographs?
- A. Yes.
- Q. Which ones?
- A. I had some with my farm pictures, with some pigs and, and stuff on there, and he was askin' me is your farm then. There was a, a, a picture of a marihuana plant and he was asking me, "Do you farm, do you farm this in Jamaica as well?" I told him it was just a picture. I took a picture of, of a plant. Marihuana grow everywhere in Jamaica. You could find a plant to take a picture of.
- Q. Okay. And the other photos were of, you said pigs, or...
- A. My farm. Well...
- Q. Your -- okay.

A. ...my animals on the farm. I had horses and stuff he was going through. That's, that's what he called my attention, my attention to.

27 In cross-examination, he said:

MS. THOMPSON: Q. What else did Officer Siscopulos ask you about that you can...

A. If...

Q. ...recall?

A. ...if my wife knew I was coming to Canada.

Q. If your wife knew you were coming to Canada.

A. No.

Q. Sorry, I thought that's what you just said that...

A. No...

Q. ...she asked you...

A. ...she asked me, yes...

Q. ...if your wife was coming...

A. ...she asked me about if my wife was coming to...

Q. Mm-hmm.

A. ...if I -- if my wife knew I was coming to Canada.

Q. Anything else?

A. And if, if, if I'm having affair, havin' an affair.

Q. Okay. What else did she ask?

A. She, she asked me -- why am I impersonatin' a police officer, that's when she saw the, the, the badge -- in my wallet.

Q. Okay. We already talked about the, the badge. So she asked you about the badge.

A. Yes, but I'm talking about what she said. She said about impersonatin' a police officer. You asked about the badge.

Q. Fine. I'm asking you what else did Officer Siscopulos ask you about.

A. Okay.

Q. Anything else that you can recall?

A. I recall? I, I know she asked me about my return ticket.

Q. She asked you about your return ticket.

A. And I told her it was on my computer.

Q. Anything else?

A. I can't recall.

Q. You can't recall anything else that she asked you?

A. No.

Q. Okay. So in that hour and a half that you were being interrogated, can you recall anything else that she asked you?

A. As I said, three people are talking to me at the same time, so...

Q. Okay. What about Warne and Spencer? You've also -- already said that one of either Warne or Spencer asked you about when you first went to United States.

A. Yeah.

Q. Okay. What else did Warne or Spencer ask you about?

A. Warne was, as I said, he asked me for my PIN number. He was going through my cell phone and I gave him my laptop. He was lookin' at pictures on me laptop while Spencer's talking to me about track and field. He was sayin' he ran track and askin' the questions pertaining to my professional track career.

Q. Oh, so Spencer told you that he used to run track?

A. Yeah.

Q. Okay. What else did Warne or Spencer ask you about?

A. He asked me, I think Warner [sic] asked me how much money I had.

Q. Mm-hmm.

A. So I told him I had a hundred dollars cash and I had a credit card with a credit -- he, he, he asked me -- I told him I had a hundred dollars. He asked me what else you have. I said I have a credit card with a three hundred dollar credit limit and I told him I had other cards.

Q. Okay. Did they ask you -- did either Warne or Spencer ask you anything else?

A. I can't recall.

Q. So to the best of your recollection, in that hour and a half that you were being interrogated by Siscopulos, Warne and Spencer, there's nothing else that you can recall that you were asked about?

A. I know, I know most of the, the, the conversation that was goin' on was they mainly accusing me that I was changing my story.

Q. Okay.

A. And trying to asked the same questions over and over in different, in different ways and I...

Q. But other than those topics that we've covered, there's nothing else you can recall...

A. Not that I can...

Q. ...right now...

A. ...recall right now.

...

- Q. And when you first got to the secondary counter, the secondary examination counter, and what I mean by that is when you first stepped up to the counter...
- A. Yeah.
- Q. ...Siscopulos asked you about the ownership of your bags?
- A. Yes.
- Q. Okay. She asked you if you packed the bags yourself?
- A. I don't -- I don't remember if she asked me that. I don't, I don't -- I cannot recall...
- Q. Okay.
- A. ...if she did.
- Q. And what was her -- what was she like when she was asking you about the ownership of the bags? Was she angry, was she upset...
- A. As I said...
- Q. ...was she normal?
- A. ...I, I don't recall her askin' me that question. I know I put my bag on the, on the -- there was a, like, a table, like, a table and she...
- Q. Okay. But you just agreed that she asked you about the ownership of the bags?
- A. No. I said I can't -- I don't recall her asking me about the ownership of my bags.
- Q. When you first got to the -- to the secondary luggage counter, what was Officer Siscopulos like in terms of her demeanor? Was she angry, was she normal, was she upset?
- A. No, she, she was no -- she wasn't angry. She -- it was normal.
- Q. Normal.
- A. Yeah.
- Q. She got upset only later on, on your evidence, when she -- when you say she accused you of changing your story? Is that right?
- A. She, she, she got, she got angry a few times. She got upset a few times when her, her demeanor changed a few times. And when she was askin' me about I havin' an -- an affair and whatever, I was like -- that's, that's when I got upset and she...
- Q. So you were upset also?
- A. I got upset that time, yes, because I was -- I was, like, why -- what is this relevant to me trying to come to Canada.
- Q. Right. And she was upset, meaning she was angry, when she was suggesting to you that she -- that you changed your story, right?
- A. Well, she was not the only one saying that.
- Q. No. I'm just asking you when she -- on your evidence -- is it your evidence that when she was putting to you that you changed your sorry [sic]...
- A. Mm-hmm.

Q. ...she was upset?

A. Yeah.

Q. And she was angry?

A. Yeah.

Q. And then you said when she accused you of having a gun, she was scared, she was nervous. That's what you said, right?

A. Yeah.

Q. And at that time, when the accusations were being made about you having a gun, Warne and Spencer were laughing. That's what you said, right?

A. Yes.

Q. It's a serious thing to have a gun at the airport, you'd agree?

A. I know that, yeah.

Q. And after this, Officer Siscopulos asked you about swallowing drugs? Towards the end of the investigation, or I should say examination.

A. No. Not towards the end, no.

Q. Okay. When did she ask you about swallowing the drugs?

A. About midway, midway, midway...

Q. About midway.

A. Yeah.

Q. And you described her as being stern at that point, right?

A. Pardon?

Q. You described her as being stern when she was asking about that? That's what you said, right?

A. Yeah.

Q. It's a lot of different emotions, wouldn't you agree?

A. Yes because it's three different, three different people, three different...

Q. No, no. I'm not talking three different people...

A. You mean, you mean...

Q. ...I'm talking just about Officer Siscopulos. You said first she was normal, then she was angry, then she was scared, then she was stern. That's what you said, right?

A. Okay. If you, if you look at it that way, yes.

.....

Q. All of this you found it to be a stressful situation, right?

A. Very.

.....

- Q. I suggest to you it was a stressful experience to see the officer going through every single piece of your belongings.
- A. Well, it, it -- I wouldn't say it was stressful. She's doing her job and I'm just being patient and cooperating with, with her.
- Q. She was doing her job?
- A. She was doing her job searching, searching my, my belongings, yes. But what got stressful is when I saw three officers surround me and askin' me questions and then won't even give me a chance to finish one questions before the next one askin' another question. That was stressful.
- Q. Right. So being asked the questions was stressful?
- A. Being asked the questions wasn't stressful. It's askin' the questions without me or even answerin' the question he askin'. I, like, there's two outstanding question without me even answering. That's, that's the, that's the way it was going on at -- in that area.
- Q. So you're saying you were asked -- being asked questions constantly?
- A. Yes.
- Q. Throughout the whole hour and a half?
- A. Not throughout the whole hour, but different people are askin' me different questions...
- Q. Okay. So different people...
- A. You understand?
- Q. ...were asking, between Officers Warne, Spencer and Siscopulos [sic]?
- A. All three, yeah.
- Q. All three of them...
- A. Yeah.
- Q. ...at every moment that you were at...
- A. Not every moment.
- Q. ...the secondary counter?
- A. Not every moment, no.
- Q. Okay. So were there pauses...
- A. As I said...
- Q. ...in between?
- A. ...she walked over to a few times with, with my baggage. She's taking stuff from my suitcase passing it to Officer Warner [sic] and sometimes I'm, I'm the one passing, passing stuff to Officer Warner [sic] as well. I was, I was cooperating as much as, as I possible could.
- Q. So while BSO Siscopulos is away, or Constable Warner [sic] -- Warne and Spencer asking you questions?
- A. Yes.

Q. Constantly?

A. Back and forth.

Q. No pause?

A. There's pause. There's pause. There, there -- it wasn't -- but usually when one person is askin' me a question, the next person is askin' me a question at the same time and they -- constantly saying I'm lying, why I keep changing my story.

...

Q. So during that hour and a half -- and, and what about Spencer, anything else that Spencer asked you?

A. Spencer was askin' me about, he was askin' me about when I went to the States, what college I went to. Those type of questions he was askin' me. And how long I was in the States, and he was askin' me that as well. Both of them was askin' me that.

Q. I suggest to you that that questioning wasn't constant. And what I mean by that is that I suggest to you that when you were questioned by Officer Siscopulos, Officer Warne and Officer Spencer, they did not ask you questions constantly from the start of your examination at secondary, during that entire hour and a half, until the end without pause.

A. That, that, that's correct. They, they...

Q. That is correct?

A. ...yeah, they, they, they didn't ask me questions without pausing for that, for that full hour, no.

Q. Okay. But you said that they were questioning you constantly.

A. Yeah...

Q. What do you mean by that?

A. ...they, they were, they were asking me questions, the same questions, over and over.

28 The various officers deny that they were abusive to Mr. Williams. However, by and large, they have little memory of what occurred. Few notes were taken by them. Much of what was put to them in cross-examination with respect to the events, they could neither confirm nor deny. I found Mr. Williams to be generally credible. I will take his recitation of what occurred as fact for my analysis.

The Law

29 In *R. v. Oickle*, 2000 SCC 38 at paras. 33, 47, 68, 71, [2000] 2 SCR 3, Iacobucci J. said:

In defining the confessions rule, it is important to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes. Martin J.A. accurately delineated this tension in *R. v. Precourt* (1976), 18 O.R. (2d) 714 (C.A.), at p. 721:

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, whether or not such persons are suspected of having committed the crime being investigated. Properly conducted police questioning is a legitimate and effective aid to criminal investigation. . . . On the other hand, statements made as the result

of intimidating questions, or questioning which is oppressive and calculated to overcome the freedom of will of the suspect for the purpose of extracting a confession are inadmissible. . . .

All who are involved in the administration of justice, but particularly courts applying the confessions rule, must never lose sight of either of these objectives.

2. The Contemporary Confessions Rule

The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not always) be unreliable. The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession.

(e) *Summary*

While the foregoing might suggest that the confessions rule involves a panoply of different considerations and tests, in reality the basic idea is quite simple. First of all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Both the traditional, narrow *Ibrahim* rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.

Again, I would also like to emphasize that the analysis under the confessions rule must be a contextual one. In the past, courts have excluded confessions made as a result of relatively minor inducements. At the same time, the law ignored intolerable police conduct if it did not give rise to an "inducement" as it was understood by the narrow *Ibrahim* formulation. Both results are incorrect. Instead, a court should 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 all the aspects of the rule discussed above. Therefore a relatively minor inducement, such as a tissue to wipe one's nose and warmer clothes, may amount to an impermissible inducement if the suspect is deprived of sleep, heat, and clothes for several hours in the middle of the night during an interrogation. On the other hand, where the suspect is treated properly, it will take a stronger inducement to render the confession involuntary. If a trial court properly considers all the relevant circumstances, then a finding regarding voluntariness is essentially a factual one, and should only be overturned for "some palpable and overriding error which affected [the trial judge's] assessment of the facts".[References Omitted]

Analysis

30 The defence rightly acknowledges that Mr. Williams had an operating mind and was not threatened or induced to make his statements. There is no evidence otherwise.

31 In my view, based on Mr. Williams' evidence, the officers were unprofessional and apparently quite rude to Mr. Williams. However, the circumstances described by Mr. Williams do not rise to the intolerable or oppressive level described in the case law. While some of the questions, such as whether his wife knew that he was coming to Canada, might seem outside the range, I am satisfied that all fell within what is legitimate under the *Immigration and Refugee Protection Act*, s.c. 2001, C.27 and the *Customs Act*, R.S.C., 1985, c.1. On this record, it would not be appropriate to analyze each question without knowing the flow of questions and answers as they were made.

32 The defence relies on the cases of *R. v. Charles*, 2013 ONSC 6704, [2013] O.J. No. 5973 and *R. v. Laidley*, [2001] O.J. No. 6281, 41 C.R. (5th) 123 (Ont. Sup. Ct.) to suggest that, in brief, it would not be fair to rely on the statements given by Mr. Williams at customs secondary. Those cases are not applicable here. They can be primarily, but not solely, distinguished as not occurring in a border situation. I will turn to that explanation below.

33 I find, beyond a reasonable doubt, that the statements were voluntary.

(b) If Mr. Williams' statements were voluntary, should they be excluded from evidence as a result of the CBSA agents' failure to properly record them?

34 Although Officers Siscopulos, Warne, Spencer, Hatch and Samra had discussions with Mr. Williams or at least listened to what he responded to others, only Officer Siscopulos took notes of what he said. Those notes were first made at 8:35 p.m. when she had suspicions that Mr. Williams had contraband. She noted only the indicators of smuggling as opposed to her questions and his answers in any sort of verbatim form. She then made notes at 8:55 p.m. at the time of arrest. She then made a further set of notes to "recap" the events at 12:07 a.m. on October 22. Finally, she made a supplementary report at 12:21 a.m. which added the questions that she asked about whether the bags were his, whether he packed the bags himself and if he knew what was in the bags. Cross-examination uncovered several errors in her notetaking.

35 Defence submits that these multiple deficiencies should make the notes inadmissible as a matter of trial fairness. This position is not supported by the authorities. Officer Siscopulos' deficiencies in note taking go to weight and not admissibility. See: *R. v. Sahota*, 2009 CanLII 44280, [2009] O.J. No. 3519 (Ont. Sup. Ct); *R. v. Narwal*, 2006 BCSC 377, [2006] B.C.J. No. 526; *R. v. Sabogal-Ventocilla*, 2011 ONSC 974, [2011] O.J. No. 1438; *R. v. Menezes*, [2001] O.J. No. 3758, [2001] O.T.C. 705; *R. v. Brown*, 2014 ONSC 7096, [2014] O.J. No. 5995. It will be up to the jury to determine what to make of Officer Siscopulos' testimony and her notetaking. There is no basis here to exclude the evidence on this ground.

(c) Was Mr. Williams' questioning at customs secondary a routine border examination or was it "akin" to a police interrogation?

36 The defence submits that the three way "interrogation" of Mr. Williams was such that his *Charter* rights were in play.

The Law

37 Section 7 of the *Charter of Rights and Freedoms* sets out that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

38 The leading cases in this area are *R. v. Simmons*, [1988] 2 S.C.R. 495, [1988] S.C.J. No. 86 [*Simmons*]; *R. v. Jones*, [2006] O.J. No. 3315,, 211 C.C.C. (3d) 4 (Ont. C.A.) [*Jones*]; and *R. v. Darlington*, 2011 ONSC 2776, [2011] O.J. No. 4168 [*Darlington*].

39 In *Simmons*, Chief Justice Dixon said at paragraph 27:

It is, I think, of importance that the cases and the literature seem to recognize three distinct types of border search. First is the routine of questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin search of the nature of that to which the present appellant was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.

40 In *Jones*, Doherty J.A. commented on *Simmons* at paragraphs. 33, 40-42:

The Chief Justice's observation that those who are subject to routine questioning and searches suffer no "stigma" is germane to the self-incrimination analysis. **The absence of any "stigma" attached to routine questioning and searches at the border tells me that where state action does not become more intrusive than routine questioning and searches, the relationship between the state and the individual cannot be characterized as either coercive or adversarial. The absence of coercion or an adversarial relationship suggests that the principle against self-incrimination does not demand the exclusion in subsequent proceedings of statements made during routine questioning and searches at the border: *R. v. White*, [1999] 2 S.C.R. 417 at p. 278.**

...

...I do not regard the distinction between those who can be said to be targets of criminal investigations at the border and those who are not targets of such investigations in and of itself determinative of a s. 7 claim. In a general sense, everyone who is questioned at the border and whose luggage is examined is the target of an investigation. Questions are asked and routine searches conducted to find individuals who are in breach of border-related laws. **It only makes good sense that those responsible for enforcing border regulations will focus their routine questions and searches on persons who have for some reason attracted their interest. In my view, the mere fact that a person has attracted the suspicion of a Customs official, thereby causing that official to ask routine questions and conduct a routine search, should not give that individual any enhanced constitutional protection against self-incrimination.**

I think the proper distinction is between persons, like the appellant, who are not detained or subject to any violation of their reasonable expectation of privacy when the impugned statements are made and persons who are subject to detention, or interference with legitimate privacy expectations when statements are made. Persons who are subject to detention have the constitutional right to counsel and the constitutional right to remain silent. Persons who have a reasonable expectation of privacy can expect that the state will respect that expectation and not interfere with that reasonable expectation. The existence of these rights and the legitimate expectation of privacy reflect the values of autonomy and personal privacy that underlie the protection against self-incrimination. If a person is compelled to answer questions at the border while under detention, or while his or her reasonable expectation of privacy is otherwise interfered with, a strong argument can be made that an attempt to use those answers in a subsequent criminal proceeding will run afoul of the principle against self-incrimination. That argument does not have to be resolved on the facts of this case.

While I would not make the appellant's s. 7 self-incrimination claim turn on whether he could be said to have been a target of a criminal investigation at the border, the extent to which the border authorities suspect an individual of having committed a particular offence will impact on whether that individual is or is not detained when subject to routine questioning. **For example, if the border authorities have decided, because of some sufficiently strong particularized suspicion, to go beyond routine questioning of a person and to engage in a more intrusive form of inquiry, it may well be that the individual is detained when subject to that routine questioning. As indicated above, if the person is detained, the assessment of the s. 7 self-incrimination claim as it applies to statements made under statutory compulsion during routine questioning may well yield a different result. [Emphasis mine] [References Removed]**

41 In *Darlington*, Hill J. said at paragraph 75:

...Prevailing "border crossing jurisprudence" provides that:

- (1) Arriving passengers must accept that they will generally be the subject of routine scrutiny by Canada's border authorities.
- (2) The routine screening process inevitably involves questioning of the person seeking to gain entry to Canada. Such a person is legally obliged to respond truthfully to questions asked by an officer in the performance of his or her duties.
- (3) A person arriving at the border can also reasonably expect that luggage will routinely and randomly be searched. This may include x-raying or ion scanning. As well, routine screening, at a permissibly unobtrusive level not engaging a reasonable expectation of privacy, can include a pat or frisk of outer clothing.
- (4) Compliance with s. 10(b) only becomes an issue after the individual first establishes that he was detained... when he made a statement In the course of routine screening, the premise underlying the principle against self-incrimination is inapplicable and the aircraft passenger is not detained in a constitutional context requiring the authorities to comply with s. 10(b) of the Charter. Absent detention, he had no constitutional right to counsel and no constitutional right to remain silent.
- (5) Routine screening does not engage a coercive or adversarial relationship between government agent and an incoming traveller. This is so whether the screening is entirely

random or as a result of referral to customs secondary examination in an effort to focus the exercise on persons of interest, for example, upon a "look-out":

...Any number of factors may cause a customs officer to become suspicious of a passenger, including a tip that a person may be carrying drugs or other contraband. The existence of a tip or look-out, without any specific information to assess its reliability, would not amount to a "sufficiently strong particularized suspicion" sufficient to constitute detention.

- (6) However, constitutional interests of self-incrimination and right to counsel become engaged where the generality and routineness of the screening exercise give way to more specific and intrusive measures, for example:
 - (a) the individual becomes the target of a focused criminal investigation as in circumstances where there exists "a sufficiently strong particularized suspicion" of contravention of the law.
 - (b) when particularized *indicia* of contraband are discovered.
 - (c) where there is an interrogation ... relating to the possibility of customs' violations or other offences.
 - (d) when the person is detained for execution of a s. 98 *Customs Act* search or a "bedpan vigil" or dry loo collection.
- (7) Certainly, the more intrusive the category of border search upon personal privacy and bodily integrity, the greater the degree of constitutional protection.
- (8) A person detained within the scope of ss. 9 and 10 of the *Charter* must immediately be informed of the right to counsel and provided access to counsel when requested. This state obligation arises prior to a search of a person for drugs, whether the person is under arrest or under detention for example for a *Customs Act* personal search. The concept of immediacy leaves little room for misunderstanding. The authorities, to prevent a detained suspect from destroying evidence, may, pending contact with counsel, keep the detainee "in close custody and under close observation.
- (9) It is of course important that care be taken to ensure that persons are not gratuitously detained on mere suspicion or for arbitrary reasons at this country's borders.
- (10) An officer may perform a personal search of a detained person pursuant to s. 98(1)(a) of the *Customs Act* where he or she "suspects on reasonable grounds that the person has secreted on or about his [or her] person" anything in contravention of the *Act*.
- (11) As to this standard of belief, "[a] reasonable suspicion of the possibility of smuggling ... suffices. It is not an overly onerous threshold -- reasonable suspicion does not amount to belief at the level of a prima facie or reasonable doubt standard. Suspicion based on reasonable grounds must be based on something more than a mere suspicion and something less than a belief on reasonable and probable grounds.

The reasonable suspicion standard is akin to the standard required for an investigative detention. It combines a subjectively based suspicion with the objective requirement that the subjective suspicion be reasonable in all the circumstances.

It is essential that assessment of the existence of suspicion, and any review, not unbundle relevant circumstances but rather consider the collective totality of those factors..

(12) It is expected that a government official in assessing whether sufficient grounds exist "must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable. In deciding whether an officer had the necessary grounds, a court is concerned" only with the circumstances known to the officers. A "detracting factor does not necessarily deny the existence" of adequate grounds. There is no onus upon an officer to enquire as to possible causes of factors he or she has noted. And, of course, an official is entitled to disbelieve a suspect.

(13) The existence of 'reasonable grounds to suspect' is a fact driven case-specific exercise. An assessment of what is reasonable, "by its very nature, must be assessed in context. While case-to-case comparisons of border scenarios may be of limited utility, reasonable grounds of suspicion have been founded on various factors including arrival from a drug source/transit country, prior travel history; a plane ticket paid for shortly before departure, a ticket paid for in cash a low-paying job. [Emphasis mine] [Reference removed]

Analysis

42 As set out above, I do not find that Mr. Williams was subjected to a police interrogation. Rather, it was an unprofessional but routine border examination.

43 For reasons set out below, I find that Officer Warne said that Mr. Williams was going to be denied entry into Canada. However, that is with respect to an immigration investigation that had not been completed and not a criminal investigation. Only the latter engages *Charter* protections. See: *Jones; Simmons*; and *R. v. Kwok*, [1986] O.J. No. 1194, 18 O.A.C. 38 (Ont. C.A.) [*Kwok*].

44 The defence submits that the questioning of Mr. Williams falls somewhere between the first and second of Chief Justice Dickson's well known three scenarios. I agree, but something short of the second scenario does not amount to a detention and does not engage *Charter* protections. A very rude and unprofessional routine set of questions does not make the questions any different in this situation. I find that this was a routine border investigation.

(d) At what point was Mr. Williams detained such that his rights under the Charter were engaged?

The Evidence

45 Mr. Williams testified that, on the walk between immigration secondary and customs secondary, Officer Warne told him that he was not going to let Mr. Williams into Canada regardless of the outcome of his conversation. This was before his arrest. In cross-examination, Officer Warne agreed that it was possible that he may have said that to Mr. Williams.

46 However, Officer Warne testified that:

Q. But specifically with the decision to -- to take him down to customs secondary, what was that based on?

A. It was to complete the customs process as well.

Q. Why did you have to complete a customs process?

A. Normally when we believe, or have the belief, that someone is inadmissible to Canada, we complete the customs process. His luggage is sitting there for some times quite some time, so we'd like to get that process completed because when they are determined inadmissible, we have to bring them to customs anyways. So in order to locate that I brought him down to the customs secondary area.

Q. Okay. So at the moment that you brought Mr. Williams down to the customs area, the secondary customs area, had you made a final determination yet with respect...

A. No.

Q. ...to his admissibility?

A. No.

Q. And had any determination been made with respect to any customs related offences?

A. When I brought him down?

Q. At the point that you brought him down to see...

A. No, no, no. I don't believe so.

....

And if the secondary examination had been non resultant, what would you have done with -- what's the procedure, the process, with respect to a passenger at that point?

A. The examination would continue. We'd bring him back to the immigration secondary office and we would continue the examination to determine admissibility.

Q. That is the immigration examination?

A. Yes. That's right.

Q. Okay. So at the point you take him to the secondary examination, is your immigration examination complete?

A. No.

Positions of the Parties

47 The Crown submits that Mr. Williams was not detained until he was arrested by Officer Siscopulos. Only then would he have been entitled to be provided with his rights under s. 10(a) and (b). The defence submits that, since the decision to remove Mr. Williams from the country was already determined, his *Charter* rights were engaged at that point.

Analysis

48 I accept Mr. Williams' evidence on this point and find, on a balance of probabilities, that Officer Warne told him, before he reached customs secondary, that he would not be admitted to the country. Not

only does Officer Warne not deny that he said that -- he says that he could have done so - it fits with his general conduct of being unprofessional throughout these events.

49 However, Officer Warne had not completed his examination. Mr. Williams was still to have a customs secondary examination. If that did not unearth further information relevant to immigration issues, he was to return to immigration secondary. And then a determination would finally be made. Until that process was completed, Mr. Williams was not detained. See: *Kwok*. On this evidence, I am not prepared to find that Officer Warne had closed his mind to his determination until the process was completed. He seems to be a bully but I am not prepared to say that he is a fraud.

50 Further, there was no suggestion that Mr. Williams was being denied entry because of any criminal activity and certainly it had nothing to do with importing cocaine. There was no suggestion by any witness that such a particularized suspicion was in play before the cocaine was found.

51 At all times before Mr. Williams' arrest by Officer Siscopulos, he was under routine customs and immigration inspection. But at the point of his arrest, he was entitled to his *Charter* rights; particularly sections 10 (a) and (b).

(e) Was Mr. Williams provided with access to legal advice as he was entitled?

Positions of the Parties

52 The defence submits that Officer Siscopulos' reading of the rights to counsel was deficient in that it does not set out that Mr. Williams had the right to seek the counsel of his own choice. The defence submits that the evidence is clear that is what Mr. Williams wanted and, accordingly, his statements should not be admitted.

53 Further, with respect to the statements made to Officer Hatch, there was a delay between 9:00 p.m. and 9:42 p.m. before he had an opportunity to speak to a duty counsel lawyer and that delay should make the statements inadmissible.

54 In response, the Crown denies that there is authority for the proposition that Mr. Williams should have been advised of the right to his own counsel. In any event, he did not speak up when he had an opportunity to do so. The delay was as a result of officer safety and the need for Mr. Williams to be at the examination of his bags. Accordingly, the officers moved as quickly as possible.

The Evidence

Mr. Williams

55 At 8:55 p.m., Officer Siscopulos arrested Mr. Williams and read him his rights to counsel from her notebook. She admittedly did not tell him that he could phone his own lawyer.

56 At approximately 9:00 p.m., she turned custody of Mr. Williams over to Officers Hatch and Samra.

57 At 9:05 p.m., Officer Hatch read Mr. Williams his secondary caution and Mr. Williams indicated he understood. Officer Hatch took note of Mr. Williams' height, weight, eye, hair colour and address.

58 At 9:42 p.m., Mr. Williams was escorted to a search room by Officers Hatch and Samra and subjected to a personal search.

59 Officer Hatch offered Mr. Williams his right to speak with counsel after the search. Mr. Williams indicated that he wished to do so.

60 At 9:58 p.m., Officer Hatch placed a call to duty counsel who called back at 10:04 p.m. Mr. Williams was permitted to speak with duty counsel in private at 10:06 p.m. Afterwards, Mr. Williams indicated he was satisfied with the call.

61 At 10:15 p.m., Mr. Williams was placed in a detention cell.

62 At 11:30 p.m., RCMP Officer Kim arrested Mr. Williams for importation of narcotics.

63 Neither Officer Hatch nor Samra told Mr. Williams that he could speak to his own lawyer. Mr. Williams told Officer Hatch that he wanted to speak to his lawyer and Officer Hatch said yes. Officer Hatch had said he would get his lawyer but then gave him only to duty counsel.

64 Although Mr. Williams admitted that he is a "confident man", he was in a foreign country and had been interrogated by the three officers. They did not tell him that he had a right to call his own lawyer. He wanted to speak to his own lawyer. He knew that, in the United States, he would only have one call and he thought he would get a chance to make that call to his lawyer. He wanted to phone his friend who is a lawyer and he had his number in his wallet. He did not say he wanted to speak to his own lawyer because he was waiting for his "one call".

65 He spoke with duty counsel but was worried that this might be another police officer. He went along with that until he could get to his own lawyer. He did not know who duty counsel was and was not sure if this was a police trick.

Officer Siscopulos

66 After she arrested Mr Williams, she cautioned him by reading from her officer's handbook. She told him that he was being arrested for importing narcotics. She gave him his rights to counsel and he said he understood. She advised him that he could speak to duty counsel and he asked to do so. She provided him with the secondary caution and he said he understood. He then went into custody with Officers Hatch and Samra at 9:00 p.m.

67 Her notebook sets out the words she used to arrest and give Mr. Williams his rights. She did not tell him that he could choose any lawyer of his choice.

68 She did not take Mr. Williams to make his phone call. Rather, he asked to speak with duty counsel and she instructed Officers Samra and Hatch to call duty counsel.

Officer Hatch

69 Officer Hatch arrived at the customs secondary counter at 9:00 p.m. and he was advised that Mr. Williams had been arrested at 8:55 p.m. Mr. Williams was already handcuffed. As soon as Officer Hatch arrived, he gave a secondary warning to Mr. Williams. He said;

"If you have spoken to any police officer or to anyone, or if any such person has spoken to you in connection with this case, I want it clearly understood that I do not want it to influence you in making any statement."

70 Mr. Williams said he understood.

71 Inexplicably, to Officer Hatch's mind, this statement advised Mr. Williams that he could obtain counsel. However, Officer Hatch did intend to read Mr. Williams his rights when Officer Hatch took over.

72 Officer Hatch agreed that he knew that he was to contact counsel but he cannot recall what, if anything, he asked of Officer Siscopulos. He was aware that getting counsel for Mr. Williams was time sensitive. He was not aware if Mr. Williams had asked for counsel, if he been advised of his right to counsel or if the call was made. Despite that, the first thing he did was read the secondary caution to Mr. Williams.

73 He did not ask Mr. Williams any questions until Officer Siscopulos was finished her duties. Officer Hatch testified that he had to wait until Officer Siscopulos completed her examination of Mr. Williams' bags. He was also getting ready to take Mr. Williams into custody. This meant obtaining gloves, keys to the cells and radios. While he was waiting to take custody of Mr. Williams, he was nearby but in and out of the area.

74 He took custody of Mr. Williams at 9:42 p.m..

75 He then took Mr. Williams to be searched. The search room had a phone to allow him to call a lawyer.

76 He cannot recall if Mr. Williams or Officer Siscopulos told him to call a lawyer at 9:00 p.m.. In any event, the call was placed at 9:58 p.m.. He was not involved until 9:42 p.m. If either Officer Siscopulos or Mr. Williams had asked for a lawyer, he would have done so, but only after 9:42 p.m.

77 Between 9:42 p.m. and 9:50 p.m., he asked no questions of Mr. Williams but just explained what was going to happen. He did ask Mr. Williams if he wanted to call counsel or the consulate. Mr. Williams said he wanted to talk to duty counsel but Officer Hatch determined that he needed to be searched first. He does not specifically recall if Mr. Williams asked for counsel or duty counsel.

78 He has no recollection of taking any notes of anything said between 9:00 and 9:42 p.m. Although Officer Hatch did not ask, Mr. Williams said that he wanted to spend one day in Canada and take a bus to New York. This was not in response to a question and he was not sure if Mr. Williams was speaking to him or not. He did not know when the utterance was made but it was between 9:00 p.m. and 9:42 p.m.. These were not Mr. Williams' actual words but Officer Hatch's own summary of what he said. Mr. Williams could have said "I would have gone back" or "I wanted to go back tomorrow".

79 The search was from 9:50 to 9:52 p.m. He called for duty counsel at 9:58 p.m. and duty counsel called back at 10:04 p.m..

80 When duty counsel called, Mr. Williams was put in a room with a closed door; he spoke with counsel from 10:06 p.m. to 10:12 p.m.. When he came out, Mr. Williams said he was satisfied with the call. They then took Mr. Williams to a cell to wait for the RCMP. Mr. Williams was turned over to the RCMP at 11:30 p.m.

81 Between 9:58 and 10:15 p.m. there were no questions asked as he put Mr. Williams into the cells. He had no further contact with Mr. Williams.

82 He has made calls to duty counsel before. He agreed that the call could come back at any time and did not know when it might happen. It could be between 10 minutes and 60 minutes.

83 He cannot recall if Officer Siscopulos told him to call duty counsel. He did not ask Mr. Williams if he wanted to speak to a specific counsel. If Mr. Williams had asked for a specific lawyer, Officer Hatch would have placed the call to that lawyer but Mr. Williams did not ask for a specific lawyer.

Officer Samra

84 Officer Samra arrived within a few minutes of 9:00 p.m. Officer Hatch was already there with Officer Siscopulos and Mr. Williams. By that point, Mr. Williams was already under arrest and Officer Siscopulos was examining the baggage. While he waited for Officer Siscopulos to complete her investigation, he and Officer Hatch stood around the counter. He heard Officer Hatch give the secondary caution at 9:05 p.m. He confirmed to Mr. Williams that the caution was on behalf of both of them.

85 He took custody of Mr. Williams at 9:42 p.m. He and Officer Hatch escorted Mr. Williams to the cells around the corner from the secondary inspection area.

86 Officers Hatch and Samra carried out a personal search of Mr. Williams and called for duty counsel. He did not ask any questions of Mr. Williams except as part of the search. He asked, for instance, if there was something in his pockets or other general safety questions. The search took place between 9:50 and 9:52 p.m. At 9:52 p.m., Mr. Williams was placed in a cell. The only questions that Officer Samra asked him at that point was whether he was doing okay and if his health was okay. Mr. Williams answered yes, and he was asked no further questions.

87 Officer Hatch placed the call to duty counsel. He does not remember if Officer Hatch asked if Mr. Williams wanted to speak to his own lawyer.

88 While Officer Hatch placed the call, Officer Samra asked if Mr. Williams wished to contact the US Embassy and he said no. The duty counsel was called at 9:58 p.m. and returned the call at 10:04 p.m. Mr. Williams took the call at 10:06 p.m. At the end of the call, Mr. Williams said that he was satisfied with the call.

89 At 11:30 p.m. the RCMP took control of Mr. Williams.

Officer Kim

90 When Officer Kim arrested Mr. Williams, he read Mr. Williams his rights. He read what was printed in his notebook. It includes the statement "You have the right to telephone any lawyer you wish". Officer Kim confirmed that he asked Mr. Williams if he wished to speak with a lawyer and, in particular, his notes confirm that he asked "Do you wish to talk to your lawyer" and Mr. Williams said "Yup".

Analysis

91 The videotape of Mr. Williams' statement to Officer Kim makes it clear that he wished to speak with his counsel of choice. I accept Mr. Williams' evidence that he made that clear to Officers Hatch and Samra. Given their vague memories and lack of notes on the topic, there is no reason to reject Mr. Williams' evidence on this point.

92 As Hill J. said in *Darlington* at paragraph 75, referring to *R. v. Suberu*, 2009 SCC 33, and *R. v. Debot*, [1989] 2 S.C.R. 1140, [1989] S.C.J. No. 118 (S.C.C.):

A person detained within the scope of ss. 9 and 10 of the *Charter* must immediately be informed of the right to counsel and provided access to counsel when requested. This state obligation arises prior to a search of a person for drugs, whether the person is under arrest or under detention for example for a *Customs Act* personal search. The concept of immediacy leaves little room for misunderstanding. The authorities, to prevent a detained suspect from destroying evidence, may, pending contact with counsel, keep the detainee "in close custody and under close observation.

93 Mr. Williams made clear his request to speak to counsel. He was entitled to have that request complied with immediately. He was entitled to be told that he could speak to his counsel of choice. Officer Kim knew that; there is no reason the CBSA officers did not know that.

94 Although all of the officers said that Mr. Williams' request to speak with either duty counsel or his own counsel had to wait until the search was complete, there is nothing before me to support that view of necessity. Counsel should have been contacted when requested and not 58 minutes later.

95 On that basis, Mr. Williams' right to retain and instruct counsel of his choice without delay was breached.

(f) Should Mr. Williams' statements after his arrest be excluded from the evidence pursuant to section 24(2) or the Charter?

96 Following the analysis in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, I find that the statements of Mr. Williams after his arrest should be excluded.

97 The breach is a serious one. There is no excuse that the correct rights -- the right to his counsel of choice - were not read to Mr. Williams. There is no satisfactory explanation why the call to duty counsel was delayed. This appears to be simple ignorance on the part of the CBSA officers; by 2013, it is not acceptable that they did not know what was expected of them.

98 The admission of statements from the accused may have a serious impact on him. It is not clear to me that much, if anything, of significance was said by Mr. Williams after his arrest. However, I am not sure that I have the full record of what was said or how significant his comment to Officer Hatch might be in the full scope of the trial.

99 The only statement that appears to be an issue is Mr. Williams' comment to Officer Hatch. That does not appear, at this stage, to have a significant effect on the Crown's case. The exclusion will not affect the adjudication on its merits.

100 All three factors militate in favour of exclusion and I so order.

Result

101 In the result, all statements made by Mr. Williams prior to his arrest by Officer Siscopulos are admissible while the statements made after that arrest are excluded.

G.D. LEMON J.