

CANADA / JUDGMENT

R. v. B.J.

2020 BCSC 2251

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2251 R. v. B.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.J.,

2020 BCSC 2251

Date: 20200826

Docket: 28298

Registry: Vancouver

Regina

v.

B.J.

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Matthews

Oral Ruling on Voir Dire No. 4

Re admissibility of accused's statement to police

Counsel for the Crown:

M. Myhre

Counsel for the Accused:

T. Anderson

T. Au (Articling Student)

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 8-10, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 26, 2020

[1] I delivered these reasons for judgment orally. I have edited them without changing the substance.

Overview

- [2] The accused, B.J., is charged with sexual assault, sexual interference, invitation to sexual touching, and incest in relation to his daughter, R.J., between January 1, 1999 and December 31, 2005.[1]
- [3] I will refer to the accused as B.J. and the complainant as R.J. because of the publication bans in this proceeding.
- [4] The Crown seeks a ruling that the statement made by B.J. on the same day of his arrest was made voluntarily. The purpose of the ruling is so that the Crown can use the statement in cross-examination if B.J. testifies at trial.
- [5] B.J. argues that several aspects of the arrest and interview amount to trickery, inducement, and oppressive circumstances. He submits that because of those circumstances, he did not make his statement voluntarily. B.J. submits that he was given insufficient information to exercise his s. 10(a) right to know the reasons for his arrest and his s. 10(b) right to counsel. B.J. argues that the statement was not made voluntarily and so is not admissible for any purpose, and alternatively applies to exclude the statement pursuant to s. 24(2) of the Canadian Charter of Rights and Freedoms on the grounds that it was taken in breach of s. 10(a) and/or (b) of the Charter.
- [6] The Crown argues that the police tactics in the interview were proper and, when viewed as a whole, clearly did not overbear B.J.'s will. With regard to s. 10(a) of the Charter, the Crown argues that the information he was given upon arrest was sufficient for him to understand the seriousness of the charges he was facing, as s. 10(a) requires. With regard to s. 10(b), the Crown submits that the arguments that B.J. makes about his arrest and detention only apply to a potential breach of s. 10(a) and do not fit within the s. 10(b) breach analysis.

- [7] By consent of the Crown and defence, these applications were heard on a blended voir dire. Both the Crown and defence submit that any submissions on s. 24(2) should be deferred until I rule on voluntariness and the alleged breaches of s. 10(a) and s. 10(b) of the Charter.

The Arrest and Interview

- [8] B.J. was arrested at around 6:00 a.m. on January 18, 2018, in the west side of Vancouver, near his place of employment. The arresting officers, Constable Silzer and Constable Rotherham, placed B.J. in handcuffs and read to him from what was described as an "arrest script" that had been agreed upon by the investigative team prior to the arrest. B.J. was advised that he was under arrest for the following offences under the Criminal Code, R.S.C. 1985, c. C-46: sexual assault (s. 271(1)), sexual interference (s. 151), invitation to sexual touching (s. 152), incest (s. 155(1)), and anal intercourse (s. 159(1)).
- [9] With regard to the right to legal advice, Constable Silzer said as follows:
- You have the right to retain and instruct counsel without delay. You may call any lawyer you want. There's a 24-hour Legal Aid lawyer, who can give you legal advice in private. This advice is given without charge, and the lawyer can explain the Legal Aid Plan to you.
- [10] Constable Silzer asked B.J. whether he understood what he had been told. B.J. replied that he understood what Constable Silzer was saying, but he did not understand why he was being arrested and asked him if he had the right person. Constable Silzer confirmed that they had the right person, after which B.J. said he wanted to call his partner because he did not have a lawyer's number.
- [11] Constable Silzer provided a secondary warning to B.J. in which he told him that anything that had been said to him previously should not influence him or make him feel compelled to say anything, and whether he felt influenced or compelled to say anything earlier, he was not now obliged to repeat nor to say anything further, but anything he did say may be given as evidence.
- [12] Constable Silzer asked B.J. if he understood that and B.J. replied that he did. Constable Silzer asked him if he had any questions. B.J. asked him to elaborate as to what he was being accused of and whether it was correct that he was being accused of sexual assault. Constable Silzer said there were five different charges: sexual assault, sexual interference, invitation to sexual touching, incest, and anal intercourse. Constable Silzer asked him if he had any questions. B.J. replied that he hoped they had the right person because he was not aware of what "you're relating to". Constable Silzer told him they would elaborate on that and that B.J. would be allowed to talk about it if he wished. He told B.J. that "elaboration" would happen, so B.J. should not worry about that.

- [13] During the period between the arrest and B.J.'s transportation to the Vancouver Police Department, B.J. continued to seek more information about why he was arrested. Constable Silzer confirmed B.J.'s right to speak to a lawyer and that he could do it there on the side of the road or wait until they arrived at the Vancouver Police Department where he would have a chance to speak in private.
- [14] B.J. asked Constable Silzer when "this was filed". Constable Silzer replied that he believed "it came to us in November".
- [15] During the drive from the place of arrest to Vancouver Police Department headquarters, Constable Silzer advised B.J. that they were recording the conversation, but they would not be talking because of B.J.'s right to counsel.
- [16] B.J. said he understood, but continued to ask questions about the factual basis for the arrest. Constable Silzer replied that B.J. was going to have an opportunity to speak to a lawyer and then afterward he would have the opportunity to speak to the lead investigator. Constable Silzer said that he was sure that B.J. had a lot of questions, but everything would be explained.
- [17] B.J. continued to ask questions and Constable Silzer repeated that they were going to facilitate his right to counsel and that everything would be made clear to B.J., but they could not speak to him about it right now. He reiterated they would take him to the lead investigator and B.J. could speak to him about the case.
- [18] B.J. asked whether he should assume that the investigation had been going on for two months and Constable Silzer replied that it started in November, and that was about all the information he had for him.
- [19] Once they arrived at the Vancouver Police Department headquarters, Constable Silzer provided B.J. with a copy of the arrest script so that he could refer to it when he had his chance to speak to a lawyer. B.J. asked about the sections of the Criminal Code and the meaning of some of the words. Constable Silzer explained that the arrest script contained "definitions of the offences" and "the sections of the Criminal Code of Canada" for the charges.
- [20] The police obtained the names of two lawyers from B.J. and his partner, both of whom they called but did not reach. They left messages for the lawyers to call the police regarding B.J. B.J. did not speak to either of those lawyers, but did speak with a legal aid lawyer for slightly less than five minutes. Subsequent to that call, B.J. confirmed that although he had not spoken to the lawyer of his choice, he had spoken to legal aid and received legal advice that he understood. Just over an hour later, Constable Silzer returned and asked B.J. if he wanted to speak to either of the two other lawyers that he had provided names for and for whom voicemail messages had been left by the police. B.J. said he thought he should speak to the second of these two lawyers, but he had spoken to legal counsel and would speak to that second lawyer another time later on. He confirmed he was satisfied with speaking with legal

counsel. Constable Silzer confirmed again that he was satisfied with having spoken with legal aid counsel and had understood the advice that he received.

- [21] Just short of four hours after B.J. was arrested, Sergeant Lee (then Detective Lee), the interviewing officer, met B.J. B.J. requested to use the washroom. Sergeant Lee escorted him there. Sergeant Lee advised B.J. that his work supervisor had been notified that he was going to miss work that day. He told B.J. that whenever he needed a break, he should say so, including a washroom break. He told B.J. to tell him if he was thirsty or hungry and they would get him something to drink or eat.
- [22] B.J. advised Sergeant Lee that he had a lot of questions. Sergeant Lee advised B.J. that he was not going to let B.J. leave until he answered all of his questions. Sergeant Lee spoke with B.J. about the information he had been provided about his arrest. B.J. said he had been reading the information on the arrest script, but he wanted to know why he was being arrested and Constable Silzer had told him it was for the things set out in the arrest script. B.J. told Sergeant Lee that he wanted to know what those things were based on. Sergeant Lee told him that he had been provided with the basic information that must be told to someone upon arrest. Sergeant Lee explained that if the police have a certain level of evidence and belief that a person has committed a crime, they can arrest that person. The police recommend charges, but do not charge people. The police forward their recommendations to the Crown, who look at it and determine whether charges should be laid based on their own criteria. He told B.J. that the purpose of the meeting they were having at that time was to have a long and in-depth conversation about the things that led to him being arrested. Sergeant Lee said that whether Crown counsel decides to lay charges is completely different. He said that the role of the police was to find the truth.
- [23] Sergeant Lee went back to the right to counsel and told him that he was going to ask him whether he had access to a lawyer. B.J. told him that he had spoken to a legal aid lawyer and explained that the police had contacted two other lawyers for him, Pam and Neil, and left messages. He explained that he did not think Pam could help, but he would talk to Neil later. The following exchange occurred:

[Sergeant Lee] M'kay. So let me just ask you then and, and thank you for that explanation. So, do you [think you] still want to speak to Neil before we continue?

[B.J.] Um, well if you, I don't know what we're gonna discuss here, um, it's, the, the, the original understanding when you first spoke to me was basically to clarify a few issues and procedures. Is, am I, do I understand you correct?

[Sergeant Lee] We're gonna talk about everything.

[B.J.] Hm.

[Sergeant Lee] We're gonna go back into the past, we're gonna talk about these allegations

[B.J.] Mm-hmm.

[Sergeant Lee] I really want to hear from you. I, I firmly believe there's not just two sides to the story, there, usually there's more

[B.J.] Mm-hmm.

[Sergeant Lee] so I need to hear from you, it's very important that I get a statement from you.

[B.J.] Mm-hmm.

[Sergeant Lee] So those are the types of things that we're gonna talk about.

[B.J.] Oh, I see. Well if, if, if you require a statement from me then maybe it is prudent then that I have counsel on, on, before I even say anything. See I don't know, like this is not something I do every day.

A few moments later:

[Sergeant Lee] So, I know you spoke to a lawyer, but out of . . . an abundance of caution, and because you named a specific lawyer you wanted to speak to, I'm just [going to ask] you right now, do you want to speak to Neil, I don't know his last name.

[B.J.] Steinman.

[Sergeant Lee] And it's, it's, it's, it's totally up to you. Now, as far as whether or not you want to, or how much you want to disclose to me, really it's up to you, again.

[B.J.] Mm-hmm.

[Sergeant Lee] But I'm trying to be very up front . . . with you, and explain, you know the types of things that we're gonna talk about today.

[B.J.] You know, I'd like to know what's going on, to start off with. And, um, and I guess I won't know unless I talk to you.

[Sergeant Lee] Sure.

[B.J.] So, yeah I'm, I'm, I'm bewildered and I'm taken aback, so nothing on you, I, don't get me wrong, I'm not saying

[Sergeant Lee] Mm-hmm, I understand.

[B.J.] you know I'm just

[Sergeant Lee] Thank you.

[B.J.] confused, like w-, where is this going like what does this entail?

[Sergeant Lee] Mm-hmm.

[B.J.] Um, you, I see this on the news sometimes on TV but I don't know the ramifications of before and after, 'cause I don't follow it all the way through.

[Sergeant Lee] Mm-hmm.

[B.J.] You know, um, but now I'm in part of this here, I don't really know the detailed procedure, honestly.

[Sergeant Lee] And part of my job will be to explain

[B.J.] Okay.

[Sergeant Lee] a lot of these, uh, questions that you have for yourself.

[B.J.] Mm-hmm.

[Sergeant Lee] I've been interviewing people for a [very] long time. And I can tell you that what you're experiencing is very normal. You have a million questions in your head and we're gonna chip away at them, I'll do my best to answer them. Um, but I don't wanna beat a, a dead horse. Um, what you told er-, or told me earlier was you're not exactly sure you're gonna know if you need to talk to someone like Neil until you get there, and that you're prepared to answer some questions, is that right?

[B.J.] yeah, yeah that'd be

[Sergeant Lee] Okay, so can I

[B.J.] (unintelligible).

[Sergeant Lee] can I proceed with

[B.J.] Yes, yes, let's proceed

[Sergeant Lee] (unintelligible) questions.

[B.J.] and, and you know what I'm thinking, like if something doesn't sound quite right here I'm gonna have to heed in caution, if you don't mind.

[Sergeant Lee] Yes, of course.

[B.J.] If that makes sense.

[Sergeant Lee] Absolutely.

[B.J.] Yeah, yeah, okay.

[Sergeant Lee] Absolutely. You know, one of your rights is to not speak to me at all. So if you exercise your right to silence I'm not gonna take it personally, you've treated me with respect, I intend to treat you with respect in, in kind. So, uh, why don't we just continue and I'll answer questions and you'll answer based on how you feel and what you want to tell me.

[B.J.] Fair enough.

[Sergeant Lee] Okay.

[B.J.] I mean I know I was advised to not say anything

[Sergeant Lee] You don't need to share that information

[B.J.] Yeah. No.

[Sergeant Lee] with you, that information

[B.J.] But

[Sergeant Lee] that you were told by the lawyer

[B.J.] Yeah.

[Sergeant Lee] it's for you alone

[B.J.] Oh I didn't

[Sergeant Lee] and, and because you're

[B.J.] I know.

[Sergeant Lee] because you're such an honest guy and because you're respectful you disclosed that to me, but I just want to just be fair and tell you, you know, whatever you were told

[B.J.] Yeah.

[Sergeant Lee] it's really for you, it's

[B.J.] Yeah.

[Sergeant Lee] it's to your benefit

[B.J.] Yeah.

[Sergeant Lee] and I don't want you to feel any obligation to tell me anything you don't want to.

[B.J.] You know, I don't necessarily want to disclose anything that will jeopardize me, but I do wanna know what's going on here. That's, that's the thing, like you know, it's, it's like, um, well gosh, how do I explain this? I guess it's like, you, you tell a kid to study, study, study and get good grades and, well why, studying is not fun. But if you don't realize, once you get the good grades eventually you finish school you're gonna get a good job.

[Sergeant Lee] Absolutely.

[Emphasis added]

[24] Sergeant Lee proceeded to establish a rapport with B.J. During this process, B.J. raised again that he had asked the arresting officers what the charges were and why and Constable Silzer had replied that he could not answer his questions about why he was arrested. Shortly after that, Sergeant Lee asked B.J. if he had been threatened, promised anything, or offered any inducements to speak with Sergeant Lee that day and B.J. said he had not. In response to a question from Sergeant Lee about what threats or promises of inducement meant to B.J., B.J.

said he would see that as collusion and that there was no collusion, no bargain or deal or whatever. Sergeant Lee said that was right and there were no bargains, no deals.

- [25] Sergeant Lee advised B.J. that he was not obliged to provide a statement to him but anything he said would be used as evidence. B.J. confirmed that he understood. However, B.J. asked what a statement was, including whether a statement was something in writing or something stated verbally. Sergeant Lee replied that a statement could take a written format and it could also take a verbal form. B.J. asked whether the answers he was giving right then were part of the statement, and Sergeant Lee confirmed that they were.
- [26] Sergeant Lee told B.J. that the purpose of the interview was to afford everyone an opportunity to give their side of the story and that it would give B.J. an opportunity to correct any facts they had that were wrong. He told B.J. that they had been investigating and were starting to see a narrative play out and the story begin to build. He told him about another incident where he had an investigation going and started to believe the accusations that were being made, but when Sergeant Lee spoke to the alleged perpetrator and heard his or her recollection of events, that person provided information to the police that allowed them to corroborate the alleged perpetrator's story. They stopped the investigation and drove the alleged perpetrator home with an apology. Sergeant Lee provided that example as to why it would be advantageous for B.J. to take advantage of the opportunity to correct information. Sergeant Lee told B.J. that if he did not take advantage of the opportunity, they would be forced to base their decisions on what had been told to them "on the one side".
- [27] Sergeant Lee also asked B.J. to tell him if he was feeling oppressed, in the sense of being sleep deprived or that he had no choice or was being forced. He asked if that made sense, at which point B.J. replied:

Yes, it does. But you know, as much as the, the initial thought was, I have nothing to say until I know more about what's going on here. But if I, I can tell that if I don't talk to you I won't know what's going on here.

- [28] Sergeant Lee replied with, "hmmm". B.J. said that in a way he felt like he was pressured to talk to Sergeant Lee because he needed to know what was going on and why this came about.

- [29] A few minutes later, the following exchange took place:

[Sergeant Lee] So, what is your understanding of the reason that you're here today?

[B.J.] Well you know, this one sentence over here, incest. So when this word incest got into there I thought, are my kids involved in this? And why? So, you know, and then at the bottom here, it says, anal. So I thought, why, why would my sons make a claim like that? I mean, we didn't have an argument or nothing, so I'm, I'm perplexed. Uh, uh, just on the last two here (clears throat) uh, means to me it's obviously, like I have a dojo, but I d-, I just closed it. It's not, it's not a, a, um, a, a student I had from my past that may have misunderstood something. You know maybe I, I may have pushed him or just guided him to a stance or something. So it just, I don't know it's, it's,

it boggles me, it, it's, it doesn't, uh, it doesn't jive. Uh, and this invitation to sexual touching, how do you invite somebody to, to, for sexual touching?

[Sergeant Lee] Yeah, that offence concerns a situation where an adult indirectly or directly has a person under the age of 16 touch you in a sexual way.

[B.J.] Hm? How do you invite somebody?

[Sergeant Lee] B-, essentially asking them or telling them. But th-, that word is invite, like don't get caught up on that, but y-, y-, what, the essence of the offence is, when you're encouraging someone under the age of 16 to touch you.

[30] Following that is a series of exchanges between Sergeant Lee and B.J. in which B.J. was asking questions about what the various offences in the arrest script mean. During this exchange, B.J. was still trying to guess who the complainant was. He guessed that it might be his kids, it might be someone he was teaching martial arts. Sergeant Lee asked him why he thought it might be one of his kids. B.J. explained that it was because one of the matters for which he was under arrest was incest, which usually indicates a family member. Sergeant Lee referred to the fact that B.J. had mentioned his sons and that he did not think it was his son, and asked him which of his children he had in mind. Sergeant Lee showed B.J. Sergeant Lee's interview outline in which Sergeant Lee had prepared a family tree that showed pictures of B.J.; B.J.'s former spouse, who is the mother of two of B.J.'s four children; B.J.'s current spouse, who is the mother of the other two of his children; his four children; and his stepchildren, who are the other children of his current and former spouses. The complainant was not shown in the family tree with a photograph, but rather with a digitalized graphic drawing. Sergeant Lee told him that they were not there to talk about some of B.J.'s children and stepchildren. Eventually, Sergeant Lee revealed to B.J. that they were there to talk about the elder of B.J.'s two daughters, R.J.

[31] Sometime later, Sergeant Lee advised B.J. that R.J. alleged the offences began in 1999 at which time R.J. recalled being about four or five years old. That information was incorrect. R.J. had advised the police that the offence had started when she was about nine or ten years old (although the year he stated, 1999, was the correct year).

[32] Later on in the interview, Sergeant Lee referred to the fact that typically the police wait for the Crown to make a decision and once the Crown has made a decision about charges, then a person's name will be connected to the offence publicly. He asked how B.J. thought it would affect his relationship with his martial arts students if the Crown decided to proceed with the charges and it became public.

[33] Later in the interview, Sergeant Lee also asked B.J. how he would prove that his version of events was more accurate than that given to the police by R.J. Sergeant Lee asked B.J. why he should believe him. B.J. replied that he hoped Sergeant Lee believed what he had to say, but if he did not, he was "done".

[34] Later in the interview, Sergeant Lee asked B.J. how he would have prepared for the interview if he had known in advance it was going to arise. B.J. said:

Like I don't know what this is all about, so I said, you know the only way to find out is, no point in procrastinating, just, if you ask me a question I'll answer it and, and hopefully I'll find out what happened here.

[35] Towards the end of the interview, Sergeant Lee asked B.J. how he, Sergeant Lee, had treated B.J. that day. B.J. replied that he had no complaints. The following exchange took place between Sergeant Lee and B.J.:

[B.J.] I know, and you know what, I wanted to know what was going on. I, I don't know what's going, no one's explaining to me what's going on. All they told me I've been accused of this, and I wanted to know why

[Sergeant Lee] Mm-hmm.

[B.J.] and what, and what for.

[Sergeant Lee] Mm-hmm.

[B.J.] So I thought the only way I'm gonna find out (clears throat), yes I was advised to seek legal advice but, you know what, how long is this, I, I don't want to procrastinate something inevitable, let's, let's deal with it. I've got nothing to hide, just tell you, tell you what I know.

[Sergeant Lee] M'kay.

[B.J.] And if, if, you know if someone says I hit him in the face and I know I didn't hit him in the face, I say, no I did not do it. They said yes I did, and maybe they fell down and hit their face, and they accuse me of hitting their face and then accused me of hitting their face. Where it's just the fall that hi-, that's caused them to bleed or whatever. If you ask me a question, if I said no I don't answer until you see counsel, I says why? I did not hit him in the face

[Sergeant Lee] Yeah.

[B.J.] he fell down and he, you know he broke his nose, what can I say?

[36] B.J. takes issue with several aspects of the arrest and detention. He asserts that he was not given the information he should have been given to understand his jeopardy on arrest, such as the name of the complainant or the timeframe of the historical sexual crimes for which he was being arrested. He argues that because that information was withheld until well into the interview, his s. 10(a) and (b) rights were breached. He argues that he was induced to make a statement by Sergeant Lee, who offered him the hope of advantage and fear of prejudice. B.J. submits that Sergeant Lee did this by telling B.J. that he had the opportunity to give his version of the events and he might be cleared. Sergeant Lee told B.J. his version would be included in what would be provided to the Crown Counsel when the police made recommendations about charges and if he did not make a statement, the police recommendations would not be based on his version of events. B.J. submits that Sergeant

Lee threatened prejudice by referring to media releases and asking B.J. what effect that would have on him. B.J. argues that Sergeant Lee allowed B.J. to believe that the only way he was going to get more information was an improper inducement to make a statement, was oppressive, and was a trick to make a statement. He also argues that he was given inaccurate information about R.J.'s complaints to the police and the time at which the events commenced, which amounted to trickery.

Legal Principles

- [37] The voluntariness and s. 10(a) and (b) applications overlap factually and legally. However, they are distinct applications with different burdens and onuses of proof.
- [38] The Crown bears the burden beyond a reasonable doubt to prove that the statement was voluntary. The accused bears the burden on a balance of probabilities to prove a breach of s. 10(a) and s. 10(b). If a breach is proved under s. 10(a) and/or s. 10(b), the evidence is not automatically excluded, but rather depends on the outcome of a s. 24(2) analysis. In contrast, an involuntary statement must always be excluded.

Voluntariness

- [39] The Crown seeks to use B.J.'s statement in cross-examination. The Crown has the onus to prove the voluntariness of an accused's statement to a person in authority beyond a reasonable doubt: *R. v. Oickle*, 2000 SCC 38 at paras. 30 and 68.
- [40] The Crown argues that the recordings of the arrest and the interview demonstrate that B.J. understood what was going on, understood his rights, exercised his right to counsel, and then gave an interview because, as he expressed at the end of the interview, he felt he had done nothing wrong and wanted to address it as soon as possible. The Crown argues that there were no inducements, oppressive atmosphere, or trickery and that B.J. exhibited an operating mind.
- [41] B.J. says the Crown has not met its burden to demonstrate the statement was given voluntarily beyond a reasonable doubt because B.J. repeatedly indicated that he did not understand why he was arrested, he asked a question that demonstrated that he did not know what a statement was immediately after saying he understood his right to silence, and he was subjected to the following inducements, oppressive tactics, and trickery:
- a) Sergeant Lee held out the hope of advantage and fear of prejudice and thereby induced B.J. to talk to him by saying that he might not be charged if he convinced Sergeant Lee of his innocence, but if he did not talk to them, they would have no choice but to make a recommendation to the Crown based on the information they had;
 - b) in combination with the fear of prejudice, Sergeant Lee painted a picture of hopelessness by conveying that they had nine investigators and many statements which convinced the police that B.J. had committed the sexual crimes he had been arrested for;

- c) Sergeant Lee used the threat of media interest to convince B.J. to talk to him;
- d) B.J. was threatened and induced to believe that he had to convince the police of his innocence or "he was done" because Sergeant Lee told him of another instance where the arrestee provided him with information that cleared the arrestee, and so Sergeant Lee apologized and drove the arrestee home;
- e) from the time of the arrest until the beginning of the interview, B.J. repeatedly asked questions to get information about the subject matter of the charges. He was told that he would have the chance to discuss the matter during the police interview. Sergeant Lee did not provide him with any information or any other options--other than submitting to an interview--to understand the basic facts underlying the arrest;
- f) shortly after the arrest, B.J. asked Constable Silzer when the matters he was being arrested for were filed and Constable Silzer told him the file came to the police in November 2017, instead of telling him that the charges pertained to events that took place over several years and many years previously. B.J. submits that this answer was misleading in replying to what B.J. was clearly asking and amounted to trickery; and
- g) the interview technique was to incrementally divulge information to B.J. so he would talk to understand what the charges were about.

[42] The common law voluntariness rule exists to protect the rights of the accused and protect against the admission of false confessions without unduly limiting society's need to investigate and solve crimes. The court must determine whether there is a reasonable doubt that the accused's decision to speak to the authorities was the product of his or her free will: *R. v. Singh*, 2007 SCC 48 at para. 53.

[43] *Oickle* is the leading case on the test for determining the voluntariness of statements made to persons in authority. In that case, the Supreme Court of Canada described circumstances that raise a reasonable doubt about voluntariness:

- a) the statement was obtained through unacceptable threats or promises;
- b) the statement was obtained in oppressive circumstances;
- c) the accused lacked an operating mind in providing the statements; and
- d) police trickery.

See *Oickle* at paras. 48-67 and *R. v. Kumar*, 2015 ABQB 172 at para. 5.

[44] These factors are to be considered contextually with a reference to the facts of the case and the particularities of the individual accused.

[45] In this case, the issue is whether B.J. was induced or tricked into making a statement because he did not understand why he was arrested and thought he had to talk to the police to get more details about who he was alleged to have committed the alleged offences

against.

Inducements

- [46] Threats or promises will render a statement inadmissible if they raise a reasonable doubt about whether the accused's will was overborne. For example, holding out the prospect of leniency from the courts or threatening violence or torture will render a statement involuntary and inadmissible: *Oickle* at paras. 48-49.
- [47] Other lesser inducements must be considered in the context of the circumstances as a whole. An example of such a context-specific inducement is an offer of psychiatric assistance, where it depends on how the accused perceives his or her need for assistance: *Oickle* at para. 50. Moral or spiritual inducements will generally not render a statement involuntary, provided what is offered is not in the authority's control: *Oickle* at para. 56.
- [48] In *R. v. Heatley*, 2015 BCCA 350 at para. 6, the Court of Appeal explained that the term inducement should be "understood as referring to a benefit or other consideration of value to an accused, promised or held out in return for a confession - a quid pro quo offered expressly or impliedly by the authorities." Inducements are unlawful when, on their own or in combination with other factors, they are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne: *Oickle* at para. 57. The focus of the inquiry is on the strength of the inducement: *Heatley* at para. 23. The question is, "did the inducement effectively deprive this accused in these circumstances of a real choice?": *Heatley* at para. 23 (emphasis in the original).
- [49] In *Oickle* at para. 57, the majority summarized the appropriate approach to analyzing threats and promises as including the recognition that some inducements are an acceptable part of police investigations because "[f]ew suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess."
- [50] Accused persons often perceive that there is a hope of leniency if they confess. This hope is usually generated by the accused. Even if this hope is based on something the police have said, the statement is not rendered involuntary for that reason alone, unless what the authority said amounts to a quid pro quo: *Oickle* at para. 57, citing *R. v. Rennie* (1981), 74 Cr. App. R. 207 (C.A.) at 212. The court in *Oickle* went on to explain that there is a distinction between the police explaining the potential benefits of the confession and making offers that are conditional on receiving a confession (at para. 78). The former is appropriate but the latter is not.
- [51] In *R. v. Spencer*, 2007 SCC 11 at para. 14, the majority also clarified that the presence of any quid pro quo will not "automatically render a statement involuntary". The strength of the inducement must be considered in the context of all the circumstances.

- [52] B.J. argues that the hope of advantage was conveyed to B.J. through Sergeant Lee's account of a previous arrest after which the arrested person gave Sergeant Lee information that he was able to use to clear the arrested person, and Sergeant Lee drove him home with an apology. Sergeant Lee told B.J. that he was going to take into account what B.J. told him and if B.J. told him something that cleared him, the investigation could end.
- [53] B.J. argues that the "fear of prejudice" was conveyed to him by Sergeant Lee's description of the charge approval process and Sergeant Lee's statement to B.J. that if they did not know his version of events, they will provide their recommendations to the Crown based on what they learned from R.J. and the witnesses they had interviewed. He also conveyed to B.J. that the information they had gathered was strong and caused them to believe R.J.'s complaints.
- [54] In my view, this fear of prejudice argument is the other side of the coin of the hope of advantage argument. It is not an inducement with a quid pro quo attached. There is no threat that if he does not talk, charges will be approved and he will be convicted. While Sergeant Lee clearly attempted to convey that it was to B.J.'s benefit to make a statement, he did not offer to do anything that was conditional on him making a statement. Sergeant Lee explained to B.J. that the charge approval process is not in the control of the police. He described that the police make recommendations and then the Crown Counsel have their own process and standards to apply. Where the benefit to making a statement is not in the control of the party who is alleged to be offering the inducement, inducements are not necessarily fatal to voluntariness: Heatley at para. 14, citing Oickle at para. 56. A statement that the police will take into account what the detained person says in making recommendations is not an implied inducement: Heatley at para. 52. Nor is the statement that if the accused convinces the police of his innocence he will be released, unless the circumstances demonstrate that the accused's will has been overborne: Kumar at paras. 13-16.
- [55] Sergeant Lee impressed on B.J. that he was seeking the truth and wanted B.J. to tell him the truth. He suggested to B.J. that he was not telling him the truth. This type of moral inducement is not, per se, inappropriate. Heatley at para. 14. With regard to the assertion that the reference to media interest was a threat, I find that it is not appropriately characterized in that manner. Sergeant Lee advised B.J. that the police do not make public statements, but if the Crown approved charges, it would be publicly known. He asked B.J. how that would affect him in relation to his martial arts students. That was an attempt by Sergeant Lee to get B.J. to talk about how public knowledge of the charges would affect him, but was not a threat that if he did not talk, it would become public.

- [56] In this case, there was no suggestion, explicit or implicit, that B.J. would not be charged if he provided a statement. There was no promise of leniency if he agreed to make a statement, and there was no promise to provide a particular type of assistance if he agreed to make a statement. The promise was to take what he had to say into account in the investigation. That is self-evident from the nature of making a statement, and does not amount to an improper inducement, as described in *Oickle and Heatley*.
- [57] Despite the lack of a *quid pro quo*, Sergeant Lee's attempts to persuade B.J. to talk to him so he had his version of the events when making a recommendation to the Crown on charges could render the statement involuntary, if in combination or alone they affected B.J. to the point of overbearing his will. B.J. points to the exchange with Sergeant Lee during which B.J. said to Sergeant Lee that he knows that if Sergeant Lee does not believe him, he is "done". In the context of the exchanges, by "done", B.J. means that the police recommendations to the Crown will be to charge him. In my view, that is not evidence that B.J.'s will had been overborne. Given Sergeant Lee's previous explanation of the charge approval process, B.J.'s statement was a rational description of a situation, but it does not suggest that he was speaking to Sergeant Lee against his will or that he was speaking to Sergeant Lee because his will was overwhelmed by the hopelessness of the situation.
- [58] It is important in assessing voluntariness to constantly refer back to the touchstone inquiry of whether the detainee's will was overborne such that there is a reasonable doubt as to the voluntariness of the statement. This is because relatively minor inducements that are not improper tactics can, in combination with oppressive circumstances, work to overwhelm the will of the detainee: *Oickle* at para. 71. While I conclude that the issues that B.J. characterizes as inducements were not improper and do not amount to a reasonable doubt that his will was not overborne, I will revisit the issue of whether his will was overborne, taking into account all of the arguments about inducement, trickery, and oppression.

Oppression

- [59] The Crown argues that the arrest and interview demonstrate that B.J. was treated with respect, not made physically uncomfortable, escorted to the washroom promptly when asked, offered food and drink (and provided both on request), and not berated or submitted to aggressive and intimidating questioning. The Crown points to a time in the interview during which Sergeant Lee played a video of B.J.'s son's statement to the police, at which time B.J. became very emotional, turned away from the video, and wrapped his arms around himself. Within a minute or two, he appeared calm and participated in a non-emotional way as he had for the balance of the arrest and interview. The Crown submits that this evidence shows that B.J. was not oppressed to the point that his will was overborne, but rather was able to quickly recover from an emotional reaction to a portion of what he was confronted with.

- [60] B.J. argues that by withholding the information that B.J. was asking for about the facts on which his arrest was based and by not giving him an option to get these facts, other than by submitting to an interview, the police created an oppressive atmosphere that caused B.J. to give a statement against his will.
- [61] In *Oickle*, the court explained that oppressive circumstances can operate to produce a false confession or to overbear the subject's will (at para. 58). This can occur because the circumstances of the detainment are inhumane or uncomfortable or because of aggressive and intimidating questioning or false evidence that convinces the accused that protestations are futile.
- [62] There is no evidence that the physical circumstances of the arrest, detention, and interview were oppressive to B.J. The real issue is whether he was oppressed because he did not know the factual basis for his arrest.
- [63] In my view, this tactic did not psychologically oppress B.J. to the point of overcoming his will. He clearly stated that he understood his right to be silent, but he submitted to the interview to find out the reasons for his arrest and to clear it up. While I am of the view that the police should have given him the information he was seeking, as I will explain in the discussion of s. 10(a), the evidence does not show that this tactic acted to oppress B.J. Instead, the evidence shows that B.J. felt confronted with a choice: talk to Sergeant Lee in order to obtain the information and stop talking at any time, or do not talk and do not obtain the information. He chose to talk. He clearly voiced that he would talk but might stop talking. He did not stop talking once he had the information about who the complainant was and over what timeframe. He never asked for the interview to stop or convey in any way that he was psychologically uncomfortable, except for when shown a video clip of his son's police statement. The evidence as a whole does not support a conclusion that the momentary emotional distress was a reaction to oppressive tactics or circumstances that overcame his will.

Operating Mind

- [64] The accused must have a degree of awareness that he is making a statement to persons in authority who can use it to his detriment for the statement to be voluntary: *Oickle* at para. 63. This requirement is substantive and not formalistic. The police do not necessarily satisfy it by asking the accused whether he or she understands that what he or she says may be used against him or her. It is part of the positive nature of the voluntary confessions rule: *Oickle* at para. 64, citing *Horvath v. The Queen*, [1979] 2 S.C.R. 376 at 424-25.

- [65] In this case, the Crown points to the overall meticulous process the police used to ensure that B.J. understood his rights. They also point to the nature of the answers he gave and the questions he asked as displaying the requisite awareness. B.J. argues that although he said he understood that he had the right to silence and that if he made a statement, it might be used against him, he then asked a question displaying that he did not really understand what a statement was.
- [66] In my view, at the time they began discussing the subject matter of the crimes for which B.J. was arrested, Sergeant Lee explained to him that everything he said was part of a statement and B.J. agreed to give a statement while reserving his right to stop if he decided he did not want to speak anymore. He clearly understood that everything he said to Sergeant Lee was part of a statement.

Trickery

- [67] B.J. argues that the following events and tactics amount to trickery:
- a) Shortly after the arrest, B.J. asked one of the arresting officers about when the matters he was being arrested for had been "filed" and the arresting officer, Cst. Silzer, told him that the file came to the police in November of 2017, instead of telling him that the charges pertained to events that took place over several years and many years previously. B.J. submits that answer was misleading in replying to what B.J. was clearly asking and amounted to trickery.
 - b) The interview technique was to incrementally divulge information to him, which was a trick to compel him to talk in order to learn what the charges were about.
 - c) When Sergeant Lee finally gave B.J. information about the dates the assaults were alleged to have occurred, he gave wrong information by telling B.J. that R.J. said the assaults started when she was four or five. R.J. told the police that the assaults started when she was nine or ten.
- [68] Police trickery is a distinct inquiry from the other Oickle factors. This factor has the specific objective of "maintaining the integrity of the criminal justice system": Oickle at para. 65. The inquiry is focused on the conduct of the police and considers whether police actions during the interview would "shock the community": Oickle at para. 66. The majority's comment in Oickle that this factor should not "unduly limit the police discretion" (at para. 66), should be considered in tandem with the Supreme Court's recognition that the police have a duty to investigate alleged crimes and police interviews are an important part of the investigative process: Singh at paras. 28, 45, and R. v. Sinclair, 2010 SCC 35 at para. 63.
- [69] In Oickle at para. 66, citing Rothman v. The Queen, [1981] 1 S.C.R. 640, the Court explained that "tricks or other forms of deceit" that would likely shock the community included things such as a police officer pretending to be a chaplain or a legal aid lawyer or injecting truth serum into a diabetic under the pretense that it was insulin.

- [70] In my view, Constable Silzer should not have told B.J. that the matter came to the police in the fall of 2017, when B.J. was asking questions about the factual basis for his arrest. Although it was correct, it was misleading. While I find it contributed to the breach of s. 10(a), I do not consider it to be a matter of trickery. Constable Silzer was trying to avoid talking to B.J. until he had an opportunity to speak to counsel. For some reason, he answered that question. That issue did not come up again when B.J. agreed to speak to Sergeant Lee. On reviewing all of the evidence, the misleading answer did not trick him into saying anything. I also conclude that the mistake would not shock the community.
- [71] I reach the same conclusion about the incorrect information that Sergeant Lee told B.J. about R.J.'s age when the alleged sexual abuse started.
- [72] With regard to the tactic of gradually revealing evidence to try to get B.J. to speak and, in particular, to identify the complainant or the historical nature of the abuse in an incriminating manner, I do not accept that this is inappropriate trickery. It is a recognized tactic that has not been called into question as trickery vitiating voluntariness in any of the cases brought to my attention. In *Sinclair*, the Supreme Court of Canada pointed out that no case law impugned such conduct as contrary to s. 10(b) of the Charter. As I will explain below, it is my view that this is relevant to the s. 10(a) analysis, not because of the morality of the tactic, but as a matter of fact about whether the accused has enough information to submit to arrest or access his s. 10(b) right to counsel.

Was B.J.'s Will Overborne?

- [73] I have not found inducement, an oppressive interview environment, a lack of operating mind, or police trickery. Nevertheless, I must consider whether all of the circumstances together acted to overtake B.J.'s will and raise a reasonable doubt about the voluntariness of his statement. I conclude that the issues I have reviewed above do not, in combination, raise a reasonable doubt about the voluntariness of his statement.
- [74] The police tactic that causes me concern is the failure to provide B.J. with the information he was requesting about the factual basis for his arrest. B.J. said that he felt on numerous occasions after his arrest that he had to speak to either the arresting officers or Sergeant Lee to understand what was going on, including at the end when Sergeant Lee asked him why he had spoken to him. Despite my conclusion that this is not police trickery, I must still consider whether his belief that he needed to give a statement to understand the factual basis for his arrest overtook his will.
- [75] It is clear from the transcript and the video record of the interview that B.J. understood he did not have to speak to Sergeant Lee when he chose to speak to him. B.J. said that he would speak to his lawyer later as he was asking for more information and saying out loud that he thought he needed to speak to Sergeant Lee to understand what was going on. Whether he had enough information when he made the statement for it to be admissible and whether he should have concluded he had to speak to the police to obtain the information he was looking for are different issues than whether his will was overborne. His beliefs in that

regard are not in evidence and there is no evidence that his will was overborne.

[76] I conclude that the Crown has proved beyond a reasonable doubt that B.J.'s statement was voluntary.

Section 10(a)

[77] Section 10(a) of the Charter provides that persons who are arrested or detained have the right to be informed promptly of the reasons for their arrest or detention. The burden is on the accused to prove a breach of s. 10(a) on the balance of probabilities. If a breach is established, evidence obtained in connection with the breach is not necessarily excluded. The court must then determine whether the breach is such that the administration of justice will fall into disrepute pursuant to s. 24(2).

[78] B.J. takes issues with the following aspects of his arrest and detention:

- a) on arrest, the police did not tell B.J. the name of the complainant or the timeframe of historical sexual crimes for which he was being arrested;
- b) from the time of the arrest until the beginning of the interview, B.J. repeatedly asked questions to get information about the subject matter of the charges. He was told that he would have the chance to discuss the matter during the police interview. Sergeant Lee did not provide him with any information or any other options, other than to submit to an interview to understand the basic facts underlying his arrest; and
- c) it was not until halfway through the interview that he learned that his daughter, R.J., was the complainant.

[79] The Crown submits that the case law provides that upon arrest, the police are required to convey to the person the jeopardy or seriousness of the situation. The Crown asserts that the Supreme Court of Canada has established that this may be accomplished by advising the person being arrested of the title and section number of the Criminal Code offence(s) for which he is being arrested: *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Evans*, [1991] 1 S.C.R. 869 at 888; and *R. v. Smith*, [1991] 1 S.C.R. 714. The Crown says that there is no binding authority to the contrary and that to require more will go against the grain of these foundational cases.

[80] I do not agree that those cases stand for the proposition that providing the name of the offence and the provision of the Criminal Code satisfies s. 10(a) in every case. It is correct that the accused must be given sufficient information to understand the seriousness of the situation, which also referred to as the jeopardy that the accused person is facing. However, the focus of an alleged breach of s. 10(a) is "the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used" which involves asking "whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10(b)": *Evans* at 888.

[81] In *Evans*, Justice McLachlin (as she then was) discussed the rationale for s. 10(a) at 886-87:

The right to be promptly advised of the reason for one's detention embodied in s. 10(a) of the Charter is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it *R. v. Kelly* (1985), 44 C.R. (3d) 17, 7 O.A.C. 46, 17 C.C.C. (3d) 419, 12 C.R.R. 354 (C.A.), [C.C.C.] at p. 424. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(b) of the Charter. As Wilson J. stated for the Court in *R. v. Black*, [1989] 2 S.C.R. 138, 70 C.R. (3d) 97, 98 N.R. 281, 93 N.S.R. (2d) 35, 242 A.P.R. 35, 50 C.C.C. (3d) 1, 47 C.R.R. 171 [S.C.R.] at pp. 152-153 [S.C.R., p. 108 C.R.], "[a]n individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy." In interpreting s. 10(a) in a purposive manner, regard must be had to the double rationale underlying the right.

[82] In *Evans*, the s. 10(a) requirement was challenged on the basis that the accused was told he was arrested for trafficking narcotics, but toward the end of the first police interview, the focus shifted, and the police began questioning the accused as the principal suspect in two murders and the accused confessed to both (at 880-81). Justice McLachlin concluded that s. 10(a) had not been breached because the officer had indicated that the focus of the questioning had changed and the accused was now being questioned about the murders. From the transcript of the police interview excerpted in the Supreme Court's reasons, it is clear that the accused had information about who the murder victim was and when the murder was alleged to have taken place. The accused "was given the facts relevant to determining whether he should continue to submit to the detention" (at 888).

[83] Justice McLachlin went on to conclude that there was, however, a breach of s. 10(b). The breach of s. 10(b) came before the police questioning turned to the murders, because it was clear the accused did not understand his rights, since he said explicitly he did not understand them (at 891). The court held that the police must take steps to ensure that the person being detained understands the right to counsel where there is an indication that the person does not.

[84] On a s. 10(a) analysis, the inquiry must be conducted with reference to the circumstances surrounding the arrest and specific attributes of the accused. Although the test is framed somewhat objectively (what the accused was told "viewed reasonably") this inquiry assesses the "accused's subjective understanding of the information conveyed": *R. v. Weiland*, 2019 ONSC 3194 at para. 41, citing *R. v. Mueller*, 2018 ONSC 2734 at paras. 19-20.

[85] There are typically two contexts when issues arise as to whether the accused knows the extent of their jeopardy. The first is where the accused knows the police are investigating a specific incident but is unaware of the seriousness of the crime. Those circumstances were at play in *Black* and *Smith*. In both of those cases, the accused took the position that he did not know the victim had died. The second context is where the accused knows the type of crime being investigated, but does not know the details of the incident at issue. This was the case in *R. v. Sawatsky*, 150 D.L.R. (4th) 750 (Ont. C.A.), where the investigation developed to

include a second incident of arson. This case involves the second type of contextual circumstance: i.e., B.J. knew the types of crime being investigated, but did not know the details of the incidents that were said to amount to those crimes.

[86] In *Smith*, the Court explained the concerns underlying s. 10(a) at 726-27:

We take the view that the accused's understanding of his situation is relevant to whether he has made a valid and informed waiver. This approach is mandated by s. 10(a) of the Charter, which gives the detainee the right to be promptly advised of the reasons for his or her detention. It is exemplified by three related concepts: (1) the "tainting" of a warning as to the right to counsel by lack of information; (2) the idea that one is entitled to know "the extent of one's jeopardy"; and (3) the concept of "awareness of the consequences" developed in the context of waiver.

[87] The Court referred to *Black* for the proposition that the accused must possess "knowledge of the extent of his jeopardy" and what is required is that the accused understand generally the jeopardy in which he or she finds himself (at 727-28). The Court explained at 729:

The accused need not be aware of the precise charge faced. Nor need the accused be made aware of all the factual details of the case. What is required is that he or she be possessed of sufficient information to allow making an informed and appropriate decision as to whether to speak to a lawyer or not. The emphasis should be on the reality of the total situation as it impacts on the understanding of the accused, rather than on technical detail of what the accused may or may not have been told.

[88] In *Smith*, the accused shot his victim and on arrest was told he was arrested in connection with a shooting incident. He asserted that he did not know his victim was dead and that he was not arrested for murder until after he waived his right to speak to counsel. The court held that he did know he was arrested for a most serious matter and that given the circumstances of the shooting and his arrest, he should have known that his victim died.

[89] I conclude that the law does not establish a hard and fast rule that providing a person on arrest with the description of the offence and the section of the Criminal Code is adequate to satisfy the s. 10(a) right to know the reasons for arrest in all circumstances. In some circumstances, more will be required. The analysis is contextual, focusing on whether the arrested person had enough information to submit to arrest and to exercise his or her right to counsel. The factors that courts have considered to assess whether an accused's s. 10(a) rights were breached include the following:

- a) whether it can be inferred from the accused's conduct that he or she understood the seriousness of the offence (*Smith* at 729-30);
- b) whether the conduct of the police during the arrest conveyed the seriousness of the offence (*Smith* at 730);

- c) whether the police informed the accused's chosen lawyer or duty counsel of the specific charges (Black at 144; R. v. W.L., 2016 ONSC 5141 at para. 53; Weiland at para. 46; R. v. Tang, 2015 BCSC 1643 at para. 94);
 - d) whether there was an indication by the accused that they did not understand the charges (Evans at 886-87; R. v. MacLean, 2013 ABQB 60 at para. 41; R. v. Martin, 2018 ONSC 1677 at para. 126);
 - e) whether the accused was provided sufficient information with respect to each incident if the accused was arrested in connection with multiple incidents, even if they are under the same Code provision (R. v. Borden, [1994] 3 S.C.R. 145 at 165-66; Sawatsky at paras. 29, 32; R. v. Y. (N.) (2008), 89 W.C.B. (2d)83 (Ont. S.C.) at paras. 50-58);
 - f) whether the accused was familiar with the criminal justice system (R. v. Eakin, [2000] O.J. No. 1670 (C.A.), at paras. 10-11; R. v. S.E.V., 2009 ABCA 108 at para. 8; R. v. S.A.L., 2018 BCSC 2072 at para. 23);
 - g) whether the accused's level of intelligence or sophistication (Eakin at para. 11; S.A.L. at para. 23);
 - h) whether the accused expressed an independent awareness of the incident, victim, or timeframe, or whether there is evidence from which the court can infer the accused knew the details of the incident (S.E.V. at para. 24; MacLean at paras. 5, 36-38);
 - i) whether the accused was provided with information sufficient to identify the victim, timeframe, or location of the offence, or whether the accused was forced to speculate about the offence (MacLean at para. 44, 46); and
 - j) the amount of time that passed between the alleged offence and the arrest (R. v. Goodkey, 2015 BCCA 64 at para. 118; MacLean at paras. 36-38).
- [90] This is not a checklist. The proper approach is a qualitative assessment of whether the accused reasonably had enough information to understand the seriousness of the reasons for his arrest. A focus in many cases is described in MacLean at para. 58:
- [58] the closer in time and proximity of location to the allegations, the less detail that may be required to be provided by the investigating officer to satisfy s. 10(a).
- [91] B.J. was told he was being arrested on offences that a normal person would understand are serious. This was also conveyed in the manner in which the police arrested him. They contacted him early in the morning, arranged to meet him immediately, and immediately on meeting him placed him in handcuffs.
- [92] The fact that the crime is objectively serious, like sexual assault, does not mean that by advising B.J. that he was under arrest for sexual assault he had enough information. B.J. was under arrest for multiple incidents of sexual assault against his daughter, who was a child at the time that the assaults were alleged to take place i.e., a seven year period ending 11 years

prior to the arrest. There is a qualitative difference in the seriousness of a single incident of sexual assault and the alleged offences for which B.J. was arrested. While he was not told that it was a single incident, he was not told it was multiple incidents. It is not reasonable to assume that a person who is told that he is being arrested for sexual assault will assume that he is arrested for multiple incidents of sexual assault against his daughter, who was a minor at the time.

- [93] With regard to B.J.'s capacity to understand why he was arrested, the audiotape of the arrest and the videotape of the interactions between him and the police demonstrate that B.J. was a well functioning adult at the time of the arrest. He did not demonstrate a lack of intelligence or sophistication, nor did he demonstrate an abundance of either. Nevertheless, he did demonstrate a lack of understanding of the minimal information he had been given. He did not know what "invitation to sexual touching" meant or how one would commit that crime. Sergeant Lee explained to him without telling him who he was alleged to have invited to sexual touching. He stated that he assumed that because he was arrested for anal intercourse and incest the complainant or complainants had to be his sons, but he also wondered out loud if it could have been a misunderstanding about how he handled one of his martial arts students.
- [94] Most obvious to the police about B.J.'s lack of understanding about the reasons for his arrest is that from the very moment of his arrest, B.J. was asking for more information about why he was arrested. He said he understood when he was told the offences he was arrested for (although as explained above, he later displayed that he did not), but he also asked for the factual basis on multiple occasions. He was not given this information until well into the interview. It clearly was the police's intention to withhold that information to see if B.J. would say something that connected what he knew about why he was arrested. In Sinclair at para. 25, the Supreme Court held that such a tactic did not automatically trigger the right to a second consultation with a lawyer, which is relevant to a s. 10(b) analysis. In stating that, the Court was addressing whether the tactic of withholding information can result in changing the jeopardy that the accused is facing. However, this discussion was predicated on the assumption that the accused had the information in the first place to understand the extent of his or her jeopardy. It does not follow that when the police only provide the description of the charge and the section number of the Criminal Code, the accused has necessarily been given the reasons for his arrest in a manner and content that satisfies s. 10(a).
- [95] In Evans, the Supreme Court imposed an obligation on the police to facilitate the accused's understanding of the s. 10(b) right to counsel where the accused demonstrates that he or she does not understand it. In my view, this obligation applies to s. 10(a) where the accused demonstrates that he or she does not understand the reasons for the arrest.
- [96] B.J. was asked whether he understood what he had been told about the reason for his arrest. He said he understood what he had been told (although, as I have said more than once, the questions he asked Sergeant Lee demonstrated this not to be the case), but he did not

understand why he was arrested for these things and asked for the factual basis for his arrest. Details of the incident can be necessary to "immediately undertake" a defence: Evans at 875, per Sopinka J (concurring in the result); MacLean at paras. 15, 55, 59; R. v. Price, 2017 BCSC 739 at para. 98, citing MacLean; and R. v. Brodie, 2017 BCSC 1784 at para. 104, citing Evans.

- [97] Instead of substantively answering B.J.'s questions, Constable Silzer assured B.J. that he would receive the answers he was looking for after he had his right to counsel.
- [98] Sergeant Lee, by his murmured affirming communications, his body language, and his failure to advise otherwise, confirmed B.J.'s statement that he believed he had to submit to an interview in order to be given the information he was seeking about the factual basis for his arrest.
- [99] The circumstances, notably the time and place of arrest were not significantly connected to the events in question such that the court can infer that B.J. had more information than provided to him on arrest. Given the length of time between the alleged incidents and the accused's arrest, the level of detail required to satisfy s. 10(a) in this case is more than in a case where the time and place of the alleged crime are connected to the circumstances of the arrest: MacLean at para. 58; Martin at para. 122; see also Goodkey at para. 118.
- [100] This is not a situation like Smith, where the court concluded that because the accused had shot his victim and was arrested the next day for a shooting incident, he understood the general seriousness of what he was charged with. B.J. was arrested 11 years after the historical sexual abuse was alleged to have ended and no one involved in the historical sexual abuse was in the vicinity. B.J. said nothing prior to his interview that indicated that he was aware that his arrest was for historical sexual abuse of R.J. As indicated above, his vocal wonderings and his requests for information should have caused the police to be concerned that he needed more information.
- [101] As discussed above, for a reason that is not apparent, while refusing to answer the questions about the nature of the allegations, Constable Silzer advised B.J. that the file had come to the police in November 2017. This information, while correct, was conveyed to B.J. while B.J.'s questions were all directed at understanding what facts led to his arrest. The response might have conveyed to B.J. that he was arrested for something that happened recently, instead of historical sexual assault. It certainly did not convey to B.J. that the arrest pertained to historical incidents.
- [102] The audio recording demonstrates that the lawyer with whom B.J. spoke was not advised of the reasons for the arrest in any manner before B.J. spoke with her.
- [103] In the circumstances of this case, where the police knew the name of the complainant and the timeframe of the alleged historical assault and where B.J. was clearly confused, the police had an obligation to facilitate his understanding by providing the information he was requesting and telling him that the reason for his arrest was that his daughter R.J. alleged

that he had committed offences against her on many occasions while she was between the ages of nine and 16. That information was necessary for B.J. to decide whether to submit to the arrest and to be able to exercise his s. 10(b) right to counsel meaningfully.

- [104] Given the circumstances of his arrest and B.J.'s repeated requests for more information, I conclude that he did not have the information he was entitled to in order to be able to submit to the arrest and to exercise his right to counsel. B.J. has met his burden to prove on a balance of probabilities that his s. 10(a) right was breached.

Section 10(b)

- [105] Section 10(b) provides that persons who are arrested or detained have the right to retain and instruct counsel without delay and to be informed of that right.

- [106] In this case, the question is whether the s. 10(a) issues made it possible for B.J. to "instruct counsel" as required by s. 10(b). Police must "refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity" to retain and instruct counsel if desired: *R. v. Bartle*, [1994] 3 S.C.R. 173 at 192; *Evans* at 890.

- [107] In *Sinclair* at para. 25, Chief Justice McLachlin and Justice Charron, writing for the majority, quoted and emphasized the following from *R. v. Hebert*, [1990] 2 S.C.R. 151 at 176-77:

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. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities. To assist in that choice, the suspect is given the right to counsel.

- [108] The majority went on to delineate the scope of s. 10(b) at para. 38:

The scope of s. 10(b) of the Charter must be defined by reference to its language; the right to silence; the common law confessions rule; and the public interest in effective law enforcement in the Canadian context.

- [109] In *Black*, the Court said that the ambit of s. 10(b) should be understood in reference to s. 10(a) because a person can only exercise his s. 10(b) rights in a meaningful way if he or she knows the extent of his or her jeopardy (at 152-53).

- [110] In this case, the matters that cause me to conclude that B.J.'s s. 10(a) rights were breached happened before and after he had the opportunity to speak to counsel. He learned of the name of the complainant and the timeframe of the alleged incidents after he had the opportunity to speak with counsel. His confusion over what he was arrested for was demonstrated before and after he spoke to counsel.

[111] In similar circumstances, the court in MacLean concluded that the information the accused had did not permit him to exercise his right to counsel in a meaningful way. I reach the same conclusion.

[112] I conclude that B.J. has established on the balance of probabilities that his s. 10(b) rights were breached.

Conclusion

[113] I have concluded that B.J.'s statement was made voluntarily but the police breached his s. 10(a) and s. 10(b) Charter rights in taking the statement without giving him sufficient information to submit to arrest and meaningfully exercise his right to counsel.

[114] I will hear submissions on s. 24(2) of the Charter.

"Matthews J."

[1] The dates on the indictment are January 1, 1999 to December 31, 2005 on counts 1 and 4 (sexual assault and incest) and January 1, 1999 to March 2, 2003 on counts 2 and 3 (sexual interference and invitation to sexual touching). When I delivered these reasons orally, the end date was incorrectly stated with respect to counts 2 and 3.

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