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CANADA / JUDGMENT

## R. v. Boffa

2018 BCSC 765

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COURT

Supreme Court of British Columbia

DECIDED

23 April 2018

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2018 BCSC 765 R. v. Boffa

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Boffa,

2018 BCSC 765

Date: 20180423

Docket: 101820

Registry: Kamloops

Regina

v.

Wyatt Lee Boffa

Restriction on publication: Pursuant to s. 539 of the C.C.C.

Before: The Honourable Madam Justice Gerow

Oral Ruling on Voir Dire re Voluntariness of Statement

Counsel for the Crown:

C. Balison

Counsel for the Accused:

G. Verdurmen

Place and Date of Trial:

Kamloops, B.C.

February 19-23, 2018

February 26-27, 2018

March 1, 2018

Place and Date of Judgment:

Kamloops, B.C.

April 23, 2018

- [1] Wyatt Lee Boffa is charged with one count of manslaughter. The charge arises from the death of James Painter on September 10, 2014.
- [2] An investigation into Mr. Painter's death was undertaken and Mr. Boffa and another individual, Kodi Tower, were arrested on May 13, 2016. Following his arrest, Mr. Boffa made a statement to the police. In his statement to the police, Mr. Boffa admits to assaulting Mr. Painter. The Crown seeks to have Mr. Boffa's statement to the police admitted into evidence.
- [3] Mr. Boffa has brought an application to have the statement excluded on the basis that his Charter rights were violated.
- [4] A voir dire was conducted to determine if the statement should be admitted into evidence. The issues on the voir dire are:
  - 1. Has the Crown proven beyond a reasonable doubt that Mr. Boffa made the statement voluntarily?
  - 2. Has Mr. Boffa proven on the balance of probabilities that there was a breach of his rights under s. 10(b) of the Charter?
  - 3. If there was a breach of Mr. Boffa's Charter rights, should the evidence be excluded under s. 24(2) of the Charter?
- [5] There was a blended voir dire dealing with the issues. The onus of proving the voluntariness of the statement beyond a reasonable doubt is on the Crown. The onus of proving a breach of his Charter rights on the balance of probabilities is on Mr. Boffa.
- [6] As I have indicated in my memorandum to counsel, I have determined that Mr. Boffa's statement is not admissible. For the following reasons, I have concluded that the Crown has failed to prove beyond a reasonable doubt that Mr. Boffa made the statement voluntarily.
- [7] I turn then to the issue of voluntariness.
- [8] The leading authority on voluntariness is *R. v. Oickle*, 2000 SCC 38. The Court in *Oickle* confirmed that the burden is on the Crown to prove voluntariness beyond a reasonable doubt. If there is a reasonable doubt about whether the statement is voluntary, it will be excluded.

- [9] In *Oickle*, the Court noted the twin role of protecting the rights of the accused and society's need to investigate and solve crimes. A statement by an accused to a person in authority must be proven voluntary in the sense it was not obtained by threats or promises, an oppressive atmosphere, or any tricks or other tactics that can raise a reasonable doubt about whether the confession is voluntary.
- [10] In *Oickle*, the Court discussed the types of threats and promises that raise a reasonable doubt as to the voluntariness of a confession, and those that do not. One of the factors to consider is if there is a *quid pro quo*. For example, a promise to obtain a reduced charge or sentence, or to procure lenient treatment is a strong inducement and will warrant exclusion in all but exceptional circumstances. As noted at para. 56, moral or spiritual inducements will generally not result in a statement being involuntary because the inducements offered are not within the control of the interrogator. If the police convince an accused he will feel better if he confesses, the police have not offered anything.
- [11] The Court in *Oickle* acknowledged that the police often have to use some type of inducement to obtain a confession. However, where the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne, they are improper.
- [12] On the issue of oppression, the court made the following comments at para. 60:
- Without trying to indicate all the factors that can create an atmosphere of oppression, such factors include depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time.
- [13] The Court outlined other relevant factors to consider in determining whether a confession was voluntary, including the police use of non-existent evidence and whether the accused had an operating mind. The police use of trickery to obtain a confession is related to voluntariness, but is a distinct inquiry with the objective of maintaining the integrity of the justice system.
- [14] The Court, at para. 65, adopted the following comments by Lamer J. in *Rothman v. The Queen*, [1981] 1 S.C.R. 640 at 591 as a summary of the correct approach:
- [A] statement before being left to the trier of fact for consideration of its probative value should be the object of a *voir dire* in order to determine, not whether the statement is or is not reliable, but whether the authorities have done or said anything that could have induced the accused to make a statement which was or might be untrue. It is of the utmost importance to keep in mind that the inquiry is not concerned with reliability but with the authorities' conduct as regards reliability.

- [15] In *Oickle* at para. 66, the Court reiterated Lamer J.'s statement that the police's discretion should not be unduly limited, and that the police have to at times resort to tricks or other forms of deceit. It is when their conduct would shock the community that it must be sanctioned.
- [16] In *R. v. Singh*, 2007 SCC 48, the court discussed the intersection between the scope of the right to silence under s. 7 of the Charter and the common law confessions rule as restated in *Oickle*. The discussion in *Singh* is focused on the tension between the rights of the accused and society's interest in the investigation and resolution of crimes. The Court noted that although the right to silence is entrenched in the Charter, the right is a common law right and pre-dates the Charter. The common law right reflects the general principle that no one is obligated to provide information to the police or respond to questioning, unless obliged to do so by law. The Court goes on to note that the right to remain silent does not mean that a person has a right not to be spoken to by the police, and the common law recognizes the importance of police interrogation.
- [17] The Court reiterated that the modern view of the confessions rule discussed in *Oickle*, includes the right of the detained person to make a meaningful choice about whether to speak to the police, and that a contextual approach must be taken in applying the rule. The Court noted that the modern approach to the confessions rule extends to protect a broader conception of voluntariness "that focuses on the protection of the accused's rights and fairness in the criminal process."
- [18] As noted, the voluntariness rule recognizes the importance of police interrogation and the right to silence is not a right to be free from questioning by the police. However, police persistence in continuing to interview an accused who has repeatedly asserted his right to remain silent, may be a strong indicator that an eventual admission is not the product of free choice: *R. v. Dhaliwal*, 2016 BCSC 1966 at para. 213, *Singh* at para. 47.
- [19] As noted in *R. v. Camille*, 2018 BCSC 301, at para. 82, "In some circumstances, the evidence will support a finding that continued questioning by the police in the face of the accused's repeated assertions of the right to silence denied the accused a meaningful choice of whether to speak or remain silent." See also *R. v. Fitzgerald*, 2009 BCSC 1599 at para. 28.
- [20] I will first set out the parties' positions.
- [21] The Crown submits it has proven beyond a reasonable doubt that Mr. Boffa's statement to the police was voluntarily and it should be admitted into evidence. All dealings between Mr. Boffa and the police were audio and/or videotaped. The Crown submits there is no evidence to suggest that the police were anything but fair and courteous in their dealings with Mr. Boffa. They were never aggressive with Mr. Boffa and there were frequent breaks in the interviews.
- [22] The Crown submits there were no threats or promises to Mr. Boffa. At no point in the interview, did Mr. Boffa appear confused or tired.

- [23] As well, the Crown says Mr. Boffa's circumstances must be taken into account. He clearly recognized that he had a choice to make. He was aware of his right to silence and he chose to speak. The Crown asserts that Mr. Boffa made a choice to speak in the context of having referred to the advice he received to remain silent. The Crown says it is clear that he was aware that the information he provided could be used to his detriment.
- [24] The Crown submits that looking at the whole of the circumstances, it cannot be reasonably said that Mr. Boffa's will was overborne by any improper conduct of the police. Accordingly, the Crown submits that the statements are admissible.
- [25] The defence submits that the questioning of Mr. Boffa over 3 days was relentless and eventually overbore his will. All through the interviews, he consistently advised he did not wish to give a statement. His assertions were sometimes acknowledged but were not respected and by the third day of the interview, Mr. Boffa was worn down in an atmosphere of oppression. The defence says that in the circumstances the Crown has failed to prove the statement was voluntary.
- [26] I turn to an application of the law to the facts. Sgt. Stephane Lacroix arrested Mr. Boffa in Grindrod, B.C., on Friday afternoon, May 13, 2016, for the murder of Mr. Painter. From the time of the arrest on May 13, 2016 until May 15, 2016, the vast majority of Mr. Boffa's interactions with the police were audio and/or video-taped.
- [27] I will refer to a number of passages from the transcripts of the audio taped and videotaped interactions between Mr. Boffa and the police officers over the three days during which the interviews took place. The passages referred to are examples and not exhaustive of all of the relevant portions of the interviews. In coming to a determination of whether the Crown has proven Mr. Boffa's statement was voluntary, I have reviewed and taken into consideration the entire circumstances surrounding the statement, including the audio taped and video taped interactions, and the demeanour of Mr. Boffa and the police officers, over the three days.
- [28] At the time of his arrest, Mr. Boffa was 26 years old and of aboriginal descent. It was obvious that he was not an educated or sophisticated individual. The arresting officer, Sgt. Lacroix, had to explain that his right to counsel meant a right to speak to a lawyer because Mr. Boffa did not know that counsel meant lawyer.
- [29] When he was arrested, Mr. Boffa was advised of his right to silence and that anything he did say could be used as evidence. He was also advised of his right to counsel. On arrival in Kelowna, and prior to being interviewed, Mr. Boffa was provided with access to counsel.
- [30] The police were courteous towards Mr. Boffa. Mr. Boffa was allowed breaks to use the washroom and smoke. He was given food and drinks throughout the interviews.

- [31] There is no evidence of any threats made to Mr. Boffa. However, when he being placed into a cell, and prior to accessing counsel, he observed an altercation between the police and his cellmate, an undercover police officer. The undercover officer was belligerent and is heard asking for a phone call. His demands escalated, and the police entered his cell and demanded he "go to the ground". Yelling continued and the undercover officer screamed that he was in pain. He was then tasered.
- [32] The undercover officer continued to complain that he just wanted a phone call and a blanket, and that he had asked for a phone call 35 times. The police officer told the undercover officer to calm down and then put Mr. Boffa in the cell with him.
- [33] Sgt. Lacroix testified that the interaction as Mr. Boffa was being taken to his cell was a scenario and the pain expressed by the undercover officer was an act. Sgt. Lacroix testified Mr. Boffa could hear the undercover officer asking for a phone call and becoming upset, and the police response which was to use physical force including tasing the individual.
- [34] After his access to counsel, Mr. Boffa was taken to an interview room and interviewed by Cst. Annika Faa. The defence concedes that Cst. Faa was not aggressive and was attempting to build rapport with Mr. Boffa during the first interview on Friday night. Cst. Faa agreed that on five occasions when Mr. Boffa indicated he did not want to talk or give a statement, she responded with what she called "motherhood statements", confirming his right to silence and that it was his choice of whether he wanted to speak to her.
- [35] Approximately half an hour into the interview, the following exchange takes place:
- Mr. Boffa: Well I am done now.
- Cst. Faa: You're done now? What do you mean?
- Mr. Boffa; Well it doesn't sound like I'm going (indiscernible)
- Cst. Faa: Well what do you mean by that?
- Mr. Boffa: Oh - pretty sure I know how the system works. (indiscernible) like I'm going to fucking jail.
- Cst. Faa: What do you mean you know what the system, or how the system works? Like -
- Mr. Boffa: Well I think gonna sitting there all weekend talking out to somebody like you, until I go to court and then I go to jail.
- Cst. Faa: Mmm.
- Mr. Boffa: isn't that how it works?
- Cst. Faa: Sometimes: (indiscernible) some - that's sometimes how it work for people.

- [36] Cst. Faa told Mr. Boffa that it was an opportunity to tell his story. The defence assert the obvious inference from this exchange is that Mr. Boffa was fatalistic in that he expected little from the legal system and assumed he was going to jail. The defence suggests that this fatalism is rooted in Mr. Boffa's experience as an aboriginal person.
- [37] When he was asked about Mr. Painter, Mr. Boffa stated he was tired and confused. Despite Mr. Boffa stating he was tired and confused at that point, and saying he was not making a statement, the interview continued for another two hours until approximately 11:35 p.m.
- [38] I agree with the defence that after the first hour, the interview was no longer about the investigation but rather small talk keeping Mr. Boffa up and wearing him down. Cst. Faa disagreed with the suggestion that Mr. Boffa was tired or confused. However, Mr. Boffa appears tired in the video of the first interview.
- [39] On Saturday, Cst. Faa interviewed Mr. Boffa for an hour and a half before his hearing with the judicial justice of the peace, and then for five hours from 4:30 p.m. until 9:30 p.m. During the interview starting at 4:30 p.m., Sgt. Greg Yanicki came into the interview room to explain what the difference between murder and manslaughter was to Mr. Boffa. The issue arose because Mr. Boffa had originally been arrested for murder but Cst. Faa informed him he was also charged with manslaughter. Mr. Boffa told Cst. Faa that he did not know the difference between the two offences. Sgt. Yanicki explained to Mr. Boffa that the Crown had laid a charge against him for manslaughter which is a type of homicide. After explaining the difference between the two, Sgt. Yanicki reiterates that Mr. Boffa has control over whether he will speak to the police or not.
- [40] The following exchange then takes place:
- Sgt. Yanicki: That's right. Alright, is there a legal benefit to you to talk to the police?
- Mr. Boffa: I really don't know, don't know.
- Sgt. Yanicki: No, right. You had a chance to talk to a lawyer, he's had a, he's explained to you your rights, you clearly understand that you don't need to talk to us, right. I think that's fair to say. You get you don't need to talk to the police. Right. And so I'm just, I'm not, there's no trick here, I just came in to say, nothing has changed in terms of your legal situation right now.
- Mr. Boffa: Alright, so can I go back to my cell then?
- Sgt. Yanicki: No, there's a reason for that. Because when you're in custody, (inaudible) where you sit.
- Mr. Boffa: Can I just sit here and listen?
- Sgt. Yanicki: It's always your right, right. You don't have to say anything, but you don't choose where you go. We're not gonna be uh, we're not gonna be rude or us, mean to you, we're not trying to make this uncomfortable.

[41] Sgt. Yanicki talked about the clothes they had gotten for Mr. Boffa which were too small and obviously uncomfortable. After which Sgt. Yanicki stated:

No worries. Um, while you're in our custody, you're, I mean we're going to treat you like our guest, right. We don't want you to be uncomfortable. This doesn't need to be an unpleasant process. Your rights never change, you don't need to say anything to us, anything you say can be used in Court. Talking to us legally is not, I don't want you to think for a second that talking to us legally, is gonna make your legal situation better. What Annika is gonna talk about is, is some of the reasons why we still think it's important to give people a chance.

[42] Sgt. Yanicki then told Mr. Boffa there are moral reasons why he might want to tell his story, or to explain things that the police might believe that he thinks they have wrong. Sgt. Yanicki explained that Cst. Faa had a job to do and he had asked her to speak to Mr. Boffa about the death of Mr. Painter to give him a fair chance. Sgt. Yanicki then reiterated that it was Mr. Boffa's choice whether to speak to the police or not and no one was going to force him to speak, and there were no advantages to him speaking to the police. Sgt. Yanicki told Mr. Boffa there may be reasons he wants to speak to the police, and Cst. Faa is going to tell him about that.

[43] Cst. Faa continued with the interview and talked to Mr. Boffa without any response. At one point Mr. Boffa stated: "I'm just going to sit here and listen to you." Cst. Faa: "Sure." Mr. Boffa: "Till I leave." Cst. Faa continued to speak for half an hour. At that point Mr. Boffa requested that he be taken back to his cell, and Cst. Faa said no. Mr. Boffa confirmed he was not making a statement at this time. Cst. Faa continued to speak to Mr. Boffa. After just over an hour into the third interview, Mr. Boffa was given a break.

[44] After the break Cst. Faa resumed the interview, and Cpl. Kilborn joined the interview and presented evidence to Mr. Boffa. Cst. Faa and Cpl. Kilborn discussed the evidence, and Mr. Boffa participated very little. When he was asked a question he twice stated he wasn't answering anything and once added that he wasn't making a statement. At the end of the evidence presentation, Cpl. Kilborn asked Mr. Boffa whether he had any questions and Mr. Boffa stated three times that he was not making a statement. After Cpl. Kilborn left, Cst. Faa continued to question Mr. Boffa. Mr. Boffa again stated he was not answering anything. Cst. Faa then prepared a chart on the wall, and asked Mr. Boffa some further questions, at which point, Mr. Boffa again stated that he was not making a statement.

[45] The third interview was approximately five hours long from 4:30 p.m. to 9:30 p.m. when Mr. Boffa was taken back to his cell. Just prior to the interview commencing, Mr. Boffa asked Sgt. Lacroix if he would be able to speak to his lawyer on Sunday. Sgt. Lacroix indicated he would have to ask the investigators. When Mr. Boffa had a break approximately one hour later the interview, Mr. Boffa asked Sgt. Lacroix whether there had been any luck on his lawyer and Sgt. Lacroix replied:

Sgt. Lacroix: For tomorrow you said?

Mr. Boffa: Yeah.

Sgt. Lacroix: Yeah. Well, I, we'll arrange that for sure.

[46] Mr. Boffa was brought in for another interview on Sunday morning at approximately 10:20 a.m. When Sgt. Lacroix came to get Mr. Boffa for the interview, Mr. Boffa asked whether it was lawyer time. Sgt. Lacroix reassured him he would arrange it. On the way to the interview, Sgt. Lacroix asked Mr. Boffa about whether he had any sleep as the cells were a "gong show" on Saturday night. When asked whether he had slept at all last night, Mr. Boffa replied not really, but that he had gotten some sleep that morning.

[47] After Mr. Boffa was taken to the interview room, Sgt. Lacroix started talking to him about the death of Mr. Painter, and the following conversation took place with Sgt. Lacroix:

Mr. Boffa: I want to talk to my lawyer before I do anything

Sgt. Lacroix: and I told you that I would put you in touch with him this morning for sure. Yeah.

Mr. Boffa: So can we it or what? I want to right now. I don't want us sitting her spinning wheels.

Sgt. Lacroix: And your wheels are spinning aren't they?

Mr. Boffa: Oh yeah.

[48] Sgt. Lacroix then asked Mr. Boffa what he is thinking about, and Mr. Boffa again asked him if it was possible to talk to my lawyer? Sgt. Lacroix replied "Okay. We'll see where we're at with that. Okay?"

[49] Sgt. Lacroix left the room and returned approximately 15 minutes later. At that point Sgt. Lacroix again promised to get Mr. Boffa his phone call to his lawyer, but told him it would be later, and that he already had advice from his lawyer and he had a right to decide whether to tell his story.

[50] Sgt. Lacroix started asking Mr. Boffa about his involvement in Mr. Painter's death, and Mr. Boffa stated he wanted to talk to his lawyer two more times. Sgt. Lacroix carried on asking him questions, and Mr. Boffa asked what time it was. After telling him that it was 11:30 a.m., Sgt. Lacroix asked him why the time mattered, and Mr. Boffa replied "when do you think I'll be able to talk to my lawyer". Sgt. Lacroix told him "I promised, I promised you that's gonna happen. It will happen." Mr. Boffa then told Sgt. Lacroix he was not making a statement.

[51] Sgt. Lacroix asked Mr. Boffa about the evidence presentation he saw the day before, and said he knew that if something is not right, Mr. Boffa would say so. The following exchange then takes place:

Mr. Boffa: Yeah. In my statement I will.

Sgt. Lacroix. Well, your statement is now.

Mr. Boffa: I wanna talk to my lawyer first. I've seen, oh my God. Just tired.

Sgt. Lacroix: you what?

Mr. Boffa: just tired.

[52] Sgt Lacroix replied that he knew Mr. Boffa was tired, and told Mr. Boffa that he thought the reason Mr. Boffa beat Mr. Painter was because he had abused his mother and was surprised to find out that Mr. Boffa did not know about the abuse. At that point the following exchange takes place:

Mr. Boffa: No. Oh, outrageous. Can I please talk to my lawyer?

Sgt. Lacroix: cause things didn't go at and that's what bugs me it it didn't, it's not what happened there an, I uh, it's it's uh, and you know what to do. But yeah.

Mr. Boffa: you be able to tell me what happens if I don't make a statement I can go to court?

Sgt. Lacroix: Well, you're gonna go to court no matter what.

Mr. Boffa: I know but if I don't have a statement when we go to court

Sgt. Lacroix: What do you mean, if you don't have a statement? Like if you don't talk to me?

Mr. Boffa: Yeah.

Sgt. Lacroix: you don't have to talk to me.

**Mr. Boffa: No, I'm just saying**

Sgt. Lacroix: you actually don't have to talk to me. Whatever the, the I, I and I know its clear in your head that you don't have to provi.. you don't have to say anything to me. Uh, there's no, absolutely no um, uh, and, I'm sure its clear in your head that it's there's no advantage to talk, for you to talk to me.

**Mr. Boffa: No, I'm listening**

Sgt. Lacroix: Kay but it's entirely your decision so when you ask me if, if I don't give a statement that, that you're wondering if it changed things on, uh, when you go to court

Mr. Boffa: no, I don't have my statement when we go to court and I'm just gone, right? And it's

Sgt. Lacroix: no, no.

Mr. Boffa: how does that work?

Sgt. Lacroix: I don't. I don't wanna do you wrong Wyatt. You're too much of a nice guy for that. Okay? Whether you decide to speak to me or speak to Annika or speak to anyone today, has absolutely

- [53] At that point the interview is interrupted by Sgt. Davidson entering the room. Sgt. Davidson introduced himself to Mr. Boffa and told him he had been interviewing Mr. Tower. Sgt. Davidson explained that he was part of the interviewing team, along with Cst. Faa, and that the interviewing team was independent of investigative team, or as he described it fresh and neutral.
- [54] Sgt. Davidson did not address the question asked by Mr. Boffa, i.e. do I have to make a statement before I go to court. What Sgt. Davidson told Mr. Boffa is that talking to the police won't help him legally. Sgt. Davidson then asked Mr. Boffa if he wants to be remembered by his son ten years from now as the twenty-six year old who thumped on an old man or does he want to tell what happened and say he was sorry so the people close to him will know. By that statement, Sgt. Davidson clearly implied that this was the only opportunity for Mr. Boffa to tell his side of the story or make a statement. Sgt. Davidson continued to question Mr. Boffa, and Mr. Boffa asserted his right to silence on two occasions.
- [55] Sgt. Davidson arranged a smoke break for Mr. Boffa and just before he went for the break the following exchange took place:

Sgt. Davidson: Uhm, I know you keep mentioning, I know you mentioned to Steph and you mentioned (indiscernible) look. I, I just wanna talk to my lawyer again, right. I, I, I wanted to put that to bed for you here. You are absolutely gonna get an opportunity to talk to your lawyer.

**Mr. Boffa: Yeah**

Sgt. Davidson: Okay. Right now, though, we're going through our process of our investigation so it, it will happen. It's just not gonna happen right now. Okay. Does that make sense?

Mr. Boffa: Yeah.

Sgt. Davidson: Right. But I'm not saying that to be, like a dick. What I'm saying is we're absolutely gonna do that for ya. Hundred percent. It's just not gonna happen right so really you don't, we know you wanna make the call. We're absolutely gonna give you that call. You don't have to keep tellin' us you wanna make that call. Cause we know you do, Okay? Does that make sense?

Mr. Boffa: Yeah.

- [56] After Mr. Boffa was brought back from his break, Sgt. Davidson continued to question him. When Sgt. Davidson asked Mr. Boffa about whether he and Mr. Tower had equal responsibility for what happened, or how would he split the pie, Mr. Boffa again stated he didn't want to talk and he wanted to speak to his lawyer. Sgt. Davidson ignored the request and changed the subject to ask how Mr. Boffa injured his finger.

- [57] Eventually Sgt. Davidson asked him about Mr. Painter's death and Mr. Boffa continued to assert his right to silence stating: "I'm not making a statement right now. I wanna speak to my lawyer before I say anything." Sgt. Davidson ignored the request and continued to press Mr. Boffa. Mr. Boffa again said he was not going to make a statement. Again Sgt. Davidson ignored him and continued to ask questions. Sgt. Davidson constantly made references to talking to Mr. Tower, and passed on that Mr. Tower wanted him to tell the truth.
- [58] After his assertions to remain silent and requests to speak to a lawyer are again ignored and Sgt. Davidson continued to question him, Mr. Boffa finally stated: "Settle down. This is what happened" and confessed that he kicked or stomped Mr. Painter in the head. Sgt. Davidson asked Mr. Boffa if he still wants to speak to his lawyer to which Mr. Boffa replied "there's no point now".
- [59] As set out in the case law, a confession that is made in circumstances that raise a reasonable doubt as to voluntariness will not be admissible. In determining whether the Crown has proven beyond a reasonable doubt that the statement is voluntary, the analysis is contextual. All of the circumstances surrounding the confession must be considered. As noted in Oickle, the concept of voluntariness focuses on the accused's rights and fairness in the criminal process.
- [60] In this case, Mr. Boffa was arrested on Friday and subjected to interviews by the police over three days. All of his assertions of his right to remain silent were either paid lip service to or completely ignored.
- [61] It is clear from the exchange with Sgt. Lacroix on Sunday morning that Mr. Boffa was confused about whether he had to provide a statement before going to court. In my view, that is not surprising given the persistent and relentless questioning by the police despite the fact he had continuously asserted his right to silence, coupled with Sgt. Lacroix's earlier comment that the time for his statement was now. At that point, Mr. Boffa had been interviewed for over nine hours. On the occasions when Mr. Boffa requested to be taken back to his cell, his requests were denied and the police made it clear to him that they had control over how long and how many times they were going to interview him.
- [62] It is also apparent from the videotape that by Sunday morning Mr. Boffa is tired. The evidence is that the conditions in the jail cells was not conducive to sleep as the cellblock was very busy on the weekend, and as Sgt. Lacroix testified, the cells were crowded with intoxicated individuals. Mr. Boffa told Sgt. Lacroix he had not slept Saturday night but had managed to get some sleep on Sunday morning prior to being interviewed. As noted earlier, Mr. Boffa told Sgt. Lacroix he was tired, which Sgt. Lacroix acknowledged. The police interviews themselves were lengthy, totalling approximately 14 hours.

- [63] The police officers never directly addressed Mr. Boffa's question about whether he had to provide a statement before going to court. As Sgt. Lacroix was attempting to answer the question, Sgt. Davidson interrupted the interview. Rather than answering the question, Sgt. Davidson stated that talking to the police would not help him legally, but then implied that this was the only opportunity that Mr. Boffa had to make a statement. As noted earlier, Sgt. Lacroix had also told Mr. Boffa that the time for the statement was now.
- [64] Despite being promised access to a lawyer on Sunday morning by Sgt. Lacroix, Sgt. Davidson told Mr. Boffa not to ask to speak to a lawyer anymore and he was not going to have access that morning. By the point Sgt. Davidson told him to stop requesting to speak his lawyer, Mr. Boffa was being interrogated for the third day, and had very little sleep.
- [65] After Sgt. Davidson told him not to ask to speak to his lawyer again, Mr. Boffa's assertions of his right to remain silent, refusals to answer questions and requests to speak to his lawyer became less frequent and less assertive. In my view, that is not surprising given the police reaction Mr. Boffa had witnessed earlier when the undercover officer had continuously asked for a phone call.
- [66] I agree with the defence that the violent scenario Mr. Boffa witnessed prior to the commencement of the interview created an atmosphere of oppression and fear. It is reasonable to infer that it was designed to dissuade Mr. Boffa from asking for phone calls and to induce compliance.
- [67] Although the Crown asserts that it is obvious from the transcript that Mr. Boffa was advised that he did not have to speak to the police, Mr. Boffa's assertions of his right to silence were either ignored or played lip service to, and the questioning continued. Over the first three sessions Mr. Boffa asserted his right to silence over 21 times. As stated earlier, it was obvious Mr. Boffa was confused about whether this was his only opportunity to give his statement when he was talking to Sgt. Lacroix. His requests to speak to his lawyer, even when it was obvious he was confused, were ignored.
- [68] Instead the questioning continued without any apparent end in sight. When Mr. Boffa attempted to assert his right to silence on the third day, Sgt. Davidson at first acknowledged it, and then changed the subject briefly before carrying on with the questioning. Later he totally ignored Mr. Boffa's attempts to assert his right to silence and continued to press him for information.
- [69] In my view, when the circumstances of the confession are looked at in their totality, the police went beyond the acceptable bounds of their legitimate right to pursue their investigation in the manner they pressed Mr. Boffa to provide information. While none of the factors such as the violent scenario in the cell block; the length of the interviews; the lack of sleep; the information about what Mr. Tower said; and the various police statement's that he needed to tell his side of the story, and that this was the time to give his statement may alone raise a reasonable doubt as to the voluntariness of the confession, the entire circumstances have to be taken into account.

- [70] By Sunday there appeared to be no end to the interview, despite Mr. Boffa's repeated assertions of his right to remain silent. It is apparent he was tired and confused about whether he had to give a statement prior to going to court. His question about whether he has to give his statement before going to court was never answered. Rather the police implied that this was the only opportunity to give his statement or evidence about what occurred.
- [71] Despite being promised by Sgt. Lacroix that he be given an opportunity to speak to a lawyer on Sunday morning, Sgt. Davidson made it clear he wouldn't be talking to one until the investigation was completed, and that he shouldn't ask to speak to one again. Mr. Boffa's assertions of his right to silence after that point were ignored by Sgt. Davidson. In my view, Sgt. Davidson's persistence was so determined and relentless that Mr. Boffa's right to choose was vanquished.
- [72] It is my opinion that a reasonable person in Mr. Boffa's circumstances would be entitled to conclude that his desire to remain silent and not answer the questions of the police was futile and would not be respected. He had earlier witnessed the police react with physical force when the undercover officer tried to insist on making a phone call.
- [73] After reviewing the video-taped recording of the statement, and considering the totality of the circumstances surrounding the statement, I have concluded that Mr. Boffa's right to remain silent or speak to the police was rendered meaningless. As a result, I have a reasonable doubt about the voluntariness of the statement.
- [74] Having found the Crown has not established the voluntariness of the statement, the statement will not be admitted at the trial.
- [75] Accordingly, I need not address Mr. Boffa's application that there was a breach of his rights under s. 10(a) and 10(b) of the Charter of Rights and Freedoms.

"The Honourable Madam Justice Gerow"

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