

CANADA / JUDGMENT

R. v. Bouthillette

2024 BCSC 1205

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1205 R. v. Bouthillette

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bouthillette,

2024 BCSC 1205

Date: 20240705

Docket: 32929-A

Registry: Vancouver

Rex

v.

Pascal Jean Claude Bouthillette

Before: The Honourable Madam Justice Ker

Ruling on Voir Dire - Voluntariness of Accused's Statement

Counsel for the Crown:

J. Lawton

J. Zondervan

Counsel for the Defence:

R.A. McConchie

A. Crouse

Place and Date of Hearing:

Vancouver, B.C.

April 15-18, 22, 2024

Place and Date of Ruling given to Parties with Reasons to follow:

Vancouver, B.C.

May 16, 2024

Place and Date of Judgment:

Vancouver, B.C.

July 5, 2024

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Introduction

- [1] Pascal Jean Claude Bouthillette is charged with first degree murder of Usha Singh. The murder occurred in the context of a break and enter and robbery of Ms. Singh in her home in the early morning hours of January 31, 2021.
- [2] Mr. Bouthillette is alleged to have entered Ms. Singh's home along with another man, Sandy Parisian. The two men dressed as police officers to gain entry to the home shortly before 6 a.m.

- [3] Ms. Singh lived alone in her home. She was 78 years old and was in frail health. A neighbour kept watch over her, in part through video surveillance cameras installed at the front door of her home and in the living room where a day bed was set up.
- [4] On January 26, 2021, it is alleged that Mr. Bouthillette broke into Ms. Singh's home in the mid-afternoon, when Ms. Singh was out of the residence. The neighbour saw suspicious activity on the surveillance camera but by the time members of the Vancouver Police Department ("VPD") attended, the intruder had departed, taking with him a bedside table drawer that contained wallets and money.
- [5] A significant feature in the videos from the January 26 and 31, 2021 attendances at Ms. Singh's home is the fact that the intruder, alleged to be Mr. Bouthillette, wore distinctive red running shoes on both occasions.
- [6] A pair of red running shoes similar to those depicted in the two videos was located in the trailer where Mr. Bouthillette was residing when he was arrested on February 2, 2021.
- [7] On January 31, 2021 at approximately 11:15 a.m., members of the VPD attended Ms. Singh's residence. The residence appeared to have been ransacked. Police found Ms. Singh lying on the floor of her bathroom with injuries to her head and a zap strap around her wrist. Ms. Singh was transported to Vancouver General Hospital for treatment. She died at 4:39 p.m. on February 2, 2021.
- [8] Police surveillance officers identified the accused, Mr. Bouthillette, and another male named Sandy Parisian as suspects.
- [9] As part of its case, the Crown seeks to tender a statement made by Mr. Bouthillette to Detective Constable ("DC") Kristopher Adams on the evening of February 2, 2021, following his detention shortly after at 5:50 p.m. and ensuing arrest that day. A voir dire was held over five days to determine whether the Crown had proven beyond a reasonable doubt that Mr. Bouthillette made his statement voluntarily, as that concept is defined in the jurisprudence.
- [10] *R. v. Oickle*, 2000 SCC 38 is the leading case setting out the test for determining the voluntariness of statements made to persons in authority. *Oickle* was affirmed in *R. v. Spencer*, 2007 SCC 11 and reviewed in *R. v. Hosack*, 2022 BCCA 226. The governing legal principles for assessing whether the Crown has established beyond a reasonable doubt the voluntariness of a statement made by an accused to a person in authority are not at issue in this case. I will address these principles later in the reasons.
- [11] On May 16, 2024, I issued a memorandum to counsel advising that I had determined that the Crown had not established beyond a reasonable doubt that Mr. Bouthillette's statement was made voluntarily and that it would be inadmissible at this trial. I indicated that reasons would follow. These are my reasons.

- [12] I will first outline the background to this case. I will then set out the positions of the parties, the evidence adduced in the voir dire, and my findings of fact from the evidence. I will then review the governing legal principles and conduct the analysis required in this case.

Background

- [13] As noted above, Mr. Bouthillette and his former co-accused, Sandy Parisian, quickly became suspects in this case as a result of their identification by police surveillance officers, through review of stills extracted from the videotape surveillance footage obtained from Ms. Singh's home.
- [14] Both Mr. Bouthillette and Mr. Parisian were arrested on February 2, 2021 at approximately the same time, albeit in different locations.
- [15] Members of the VPD involved in the arrest and interview of both suspects attended a briefing about the investigation on the morning of February 2, 2021.
- [16] By the time of the briefing, the investigators believed Mr. Bouthillette and Mr. Parisian were the individuals responsible for the invasion of Ms. Singh's home and members were assigned various roles, including who would: draft the information to obtain for search warrants for the residences of the suspects; be involved in the arrest of the suspects; be tasked with reading the formal arrest script to the accused; and interview the accused.
- [17] At approximately 5:50 p.m. on February 2, 2021, members of the VPD, including members of the Emergency Response Team ("ERT"), attended to the vicinity of a silver trailer where the accused was believed to be residing, near Strathcona Park. The intention was to arrest Mr. Bouthillette and execute a search warrant to search his trailer.
- [18] Approximately an hour before this attendance, Ms. Singh succumbed to her injuries and was pronounced dead. As a result, the charges Mr. Bouthillette was about to be arrested on changed from aggravated assault to murder.
- [19] Shortly after the VPD and ERT members arrived on scene, Mr. Bouthillette was arrested by an ERT officer. His arms were handcuffed behind his back. He was eventually transported to the VPD jail on at 238 East Cordova Street ("VPD Jail"), arriving at approximately 6:44 p.m., where he was processed, meaning he was photographed and his clothes were seized. The handcuffs were removed during the photographing of his hands. Mr. Bouthillette was also eventually provided with a change of clothes. He was finally given the opportunity to consult with his counsel from 7:23 p.m. to 7:26 p.m.

- [20] At 7:50 p.m., Mr. Bouthillette was transported to VPD headquarters at 3585 Graveley Street ("VPD Headquarters") by means of a police wagon. His arms were again handcuffed behind his back for this transport. Mr. Bouthillette arrived at VPD Headquarters at 8:05 p.m. By 8:08 p.m., he was placed in the interview room. He was left secured in the interview room with his arms still handcuffed behind his back until DC Adams entered the interview room approximately eight minutes later. The handcuffs were finally removed at 8:18 p.m.
- [21] Between 8:18 p.m. on February 2, 2021 and 12:21 a.m. on February 3, 2021, Mr. Bouthillette was subjected to a police interrogation by DC Adams. The entirety of this interview was audio and video recorded. By the time DC Adams concluded the interview, Mr. Bouthillette had been in the interview room (save for bathroom breaks and a smoke break) for approximately four hours and 13 minutes.
- [22] During the voir dire, the Court watched or listened to all recordings of the interactions between Mr. Bouthillette and the arresting and investigating officers. The transcripts of all the interactions that were recorded were also in evidence, to assist in determining what had been discussed.
- [23] Three police witnesses testified on this voir dire:
- a) Cst. Thomas Dobranowski of the VPD's ERT squad, who secured and detained Mr. Bouthillette outside of the silver trailer he was residing in.
 - b) Now Sgt. Troy Griffiths, the officer who formally arrested Mr. Bouthillette at the scene. He was involved in overseeing Mr. Bouthillette's transport both to the VPD Jail and to VPD Headquarters. Sgt. Griffiths also participated in part of the processing of Mr. Bouthillette at the VPD Jail and in providing him with access to counsel.
 - c) DC Kristopher Adams, a member of the VPD's forensic interview team who conducted the interview of Mr. Bouthillette and obtained an inculpatory statement from him.
- [24] Mr. Bouthillette elected to call no evidence on the voir dire.

Positions of the Parties

A) The Crown

- [25] The Crown acknowledges that it bears the burden of proving beyond a reasonable doubt that Mr. Bouthillette's statement to DC Adams was made voluntarily.
- [26] The Crown contends that in the totality of the circumstances, Mr. Bouthillette of his own volition decided to unburden himself to DC Adams. The Crown submits that although it is unclear what precisely motivated him to do so, the evidence suggests his confession was borne out of heartfelt regret, remorse, and self-pity, prompted by reflection and Mr. Bouthillette's own moral condemnation of his actions.

- [27] The Crown contends that the statement was not obtained as a result of any threats, promises, inducements, oppression, or police trickery. Moreover, Mr. Bouthillette was apprised of his right to remain silent and asserted that right throughout the interview. The Crown argues there is ample evidence that Mr. Bouthillette was aware of his jeopardy throughout. They contend that DC Adams's moral inducements and persistent open-ended and empathetic questioning at a crucial time in the interview persuaded Mr. Bouthillette to explore the reasons for his actions, and then to confront and describe what they were.
- [28] The Crown argues that this is clearly not a case in which one of the discrete factors set out in Oickle operated to potentially render the statement involuntary. The Crown further asserts that in considering the broad concept of oppression, the "constellation of factors" advanced by Mr. Bouthillette did not accumulate in a way that caused Mr. Bouthillette's will to be overborne. The Crown contends that such a conclusion is simply not supported by the evidence, and does not raise a reasonable doubt that his choice to talk about the allegations was not the product of his own free will.
- [29] It is the Crown's position that ultimately, Mr. Bouthillette, when confronted with what he had done, was overcome with guilt and remorse. While aware his lawyer had told him not to speak, he decided he did not want to lie; he wanted to tell the truth and allow himself to be judged by God.

B) The Defence

- [30] The defence contends that the Crown has failed to meet its burden of proving beyond a reasonable doubt the voluntariness of Mr. Bouthillette's statement to DC Adams.
- [31] The defence argues that when the totality of the circumstances is considered, the evidence raises a reasonable doubt that the cumulative effect of oppressive circumstances and police interference with Mr. Bouthillette's right to counsel and right to silence wore Mr. Bouthillette down until he lost the ability to exercise his free will to choose whether to speak.
- [32] The defence contends that the following oppressive circumstances undermined Mr. Bouthillette's free will:
- a) Mr. Bouthillette was tired and sleep deprived;
 - b) Mr. Bouthillette had taken heroin shortly before his arrest--he indicated in the interview that he would start to go into withdrawal, and did in fact do so;
 - c) Mr. Bouthillette experienced prolonged physical discomfort both in respect of the circumstances of his arrest and his own health;
 - d) the VPD disregarded Mr. Bouthillette's right to counsel; and

- e) DC Adams persistent questioning in the face of Mr. Bouthillette's repeated assertions of his desire to exercise his right to remain silent.
- [33] The defence asserts that when these factors are considered cumulatively, they contributed to the crumbling of Mr. Bouthillette's ability to withstand DC Adams's questioning and exercise his free will regarding whether to speak to the police.
- [34] Defence counsel also contends that DC Adams's "denigration" of his lawyer's advice undermined Mr. Bouthillette's ability to make a meaningful choice about whether to speak to the officer.
- [35] Finally, the defence argues that the cumulative effect of the oppressive circumstances and the deceptive police tactics overbore Mr. Bouthillette's free will.
- [36] Accordingly, the defence contends the Court ought to have a reasonable doubt as to the voluntariness of Mr. Bouthillette's statement to DC Adams and therefore should exclude the statement from the evidence.

Evidence on the Voir Dire

A) The Arrest on February 2, 2021, 5:50 p.m. to 6:18 p.m.

- [37] At approximately 5:50 p.m., members of the VPD and ERT squad set up on the silver trailer that Mr. Bouthillette was residing in for the purpose of arresting Mr. Bouthillette and executing a search warrant for the trailer. The silver trailer was parked in an industrial/warehouse area on the south side of the 200 block of Southern Street in Vancouver, BC.
- [38] Photographs from the scene of the arrest establish that the ground was wet and it had been raining. It may well have still been raining when Mr. Bouthillette was arrested, in light of his comments to Sgt. Griffiths at the scene.
- [39] Shortly after arriving at the scene, Cst. Dobranowski, dressed in full tactical uniform and armed with an ARWEN device, began to yell verbal commands for Mr. Bouthillette to come out of the trailer. Three unknown people and then Mr. Bouthillette exited the rear of the trailer.
- [40] Mr. Bouthillette complied with Cst. Dobranowski's commands and offered no resistance. He laid down on the wet ground on his stomach and placed his hands behind his back. Cst. Dobranowski then placed Mr. Bouthillette in handcuffs with his hands cuffed behind his back.
- [41] Mr. Bouthillette was dressed only in a short sleeved t-shirt and pants. He was not wearing shoes or socks.

- [42] Mr. Bouthillette was subjected to a cursory safety pat down search that involved Cst. Dobranowski checking Mr. Bouthillette's pockets and the waistband area of his pants. In order to check the front pockets area, Cst. Dobranowski rolled the prone Mr. Bouthillette from one hip to the other.
- [43] Once Cst. Dobranowski completed his search of Mr. Bouthillette, the officer got Mr. Bouthillette to his feet and took him to Sgt. Griffiths and DC Shawn Shipper, who immediately took custody of Mr. Bouthillette.
- [44] At 5:58 p.m., Sgt. Griffiths formally arrested Mr. Bouthillette for the murder of Usha Singh. Sgt. Griffiths read from a prepared arrest script, marked Exhibit 2 on this voir dire. Mr. Bouthillette was advised of his s. 10(b) Charter right to counsel and immediately said he wished to exercise that right and contact his own lawyer, who he named. He was not given any indication as to when he would be permitted to exercise his right to counsel. In fact, he was not given the opportunity to do so for approximately another hour and 25 minutes.
- [45] Sgt. Griffiths and DC Shipper's interactions with Mr. Bouthillette were audio recorded. The recording, Exhibit 3A, was played in the voir dire and a transcript, Exhibit 3B, was provided as well. The recorded interaction is 16 minutes and 13 seconds long and the transcript is seven pages in length. No inculpatory statements are provided, but the context is critical.
- [46] At the commencement of the arrest, Sgt. Griffiths can be heard to say:
- G We'll try and grab you some here in a sec, 'kay?
- B Thank you.
- Sgt. Griffiths agreed in his evidence that he believed this was a reference to Mr. Bouthillette's inquiry about getting some shoes.
- [47] The recording commences at approximately 5:58 p.m. and contains the standard comments of advising Mr. Bouthillette of the charges he was being arrested on, his s. 10(b) right to counsel, the standard police caution, and then inquiries about Covid-19. At the three minute and 29 second mark of the recording, Mr. Bouthillette provides his lawyer's name and had moments before indicated he wished to call his lawyer.
- [48] At the three minute and 49 second mark of the recording, Mr. Bouthillette said this:
- B My foot are really cold, sir, uh, I'd like to get out of the rain please.
- G Yes, we will get you something to throw on here in one second.

S There's a police wagon coming, so

G Yeah, we have a wagon coming. All right, the rest is for, uh, at the jail, okay? Do you have a pair of shoes that's easily accessible in there?

B Uh, I don't know where they are. Ask my girlfriend.

[49] Mr. Bouthillette indicated to the officer that his shoes were red and black. He then reiterated that he needed a pair of shoes, presumably because his bare feet were cold having been standing in the rain on the pavement for almost ten minutes since he exited the trailer at Cst. Dobranowski's direction. Mr. Bouthillette stated at the four minute and 32 second mark:

B Uh, uh, yeah, I just want some shoes, yeah. I don't know where.

G You just want some shoes?

B Yeah.

[50] Sgt. Griffiths then left Mr. Bouthillette with DC Shipper while he went to look for shoes for the accused. Sgt. Griffiths was out of the recording, ostensibly looking for shoes, between the four minute and 39 second mark of the recording and the seven minute and 18 second mark. Sgt. Griffiths returned and advised Mr. Bouthillette that he could not get a pair of shoes because the trailer was going to be searched pursuant to the search warrant.

[51] While Sgt. Griffiths was looking for shoes, Mr. Bouthillette asked DC Shipper at the six minute and three second mark of the recording if the police wagon was going to arrive soon and was told that it would be. I find that the only logical reason for asking about this is the fact that Mr. Bouthillette was cold and wanted some relief from that circumstance. Unfortunately, he had to wait approximately another ten minutes for the wagon to arrive and be placed inside it.

[52] At the seven minute and 38 second mark of the recording, Mr. Bouthillette again asked if the wagon was far but received no response.

[53] Ten minutes into the recording, at 6:08 p.m., DC Shipper noted the obvious--they were still waiting for the wagon to transport the accused. Although not captured in the transcript, it was readily discernible when the audio recording was played that at the 12 minute and 41 second mark of the audio recording, Mr. Bouthillette politely told Sgt. Griffiths "I'm freezing, sir". Sgt. Griffiths replied "Are ya? Okay, I'll find out an ETA." However, no ETA on the wagon was provided. Mr. Bouthillette continued to have to wait another three and a half minutes before he was placed in the police wagon at approximately 6:18 p.m.

[54] I find the following with respect to the dealings with Mr. Bouthillette at the scene of his detention:

- a) the officers were not aggressive in their dealings with Mr. Bouthillette;
- b) Mr. Bouthillette was polite, compliant, and cooperative throughout;
- c) Mr. Bouthillette was wearing only a t-shirt and a pair of pants when he exited his trailer;
- d) Mr. Bouthillette was barefoot;
- e) Mr. Bouthillette had to lay down on the wet ground to be arrested;

- f) Mr. Bouthillette's hands were cuffed behind his back;
 - g) Mr. Bouthillette was not provided with a blanket, a jacket, or any sort of covering to protect him from the elements for the entire duration of his detention at the scene, a matter of approximately 24 minutes;
 - h) it was a winter evening in February;
 - i) it was raining;
 - j) Mr. Bouthillette's comments to the officers on at least five occasions make it clear that Mr. Bouthillette was cold and needed to be sheltered from the elements; and
 - k) Mr. Bouthillette was not offered any sort of refuge from exposure to the elements, e.g., he was not placed in a police vehicle while the arresting officers waited for the arrival of the police wagon, covered with an emergency blanket or a jacket, or moved to a location out of the rain.
- [55] It would have been obvious that Mr. Bouthillette was very cold given his lack of appropriate clothing for the circumstances, coupled with his assertions that he was cold and asking when the wagon would be there.
- [56] In these circumstances, I cannot find anything other than that the officers exhibited a casual indifference to the circumstances that Mr. Bouthillette was experiencing. Mr. Bouthillette may have been arrested for a particularly horrific offence, but he was cooperative throughout. He posed no security threat. He was entitled to be treated with dignity and humanity. How he was treated by the VPD at the time of his detention and arrest set the tone and informed the rest of Mr. Bouthillette's interaction with the police over the next six hours.
- B) Mr. Bouthillette's Processing at VPD Jail from 6:18 p.m. to 7:23 p.m.
- [57] Mr. Bouthillette was placed in a secure compartment in the police wagon at approximately 6:18 p.m. His hands remained cuffed behind his back. He was transported to the VPD Jail. The transport was not recorded.
- [58] Sgt. Griffiths and DC Shipper arrived at the VPD Jail at approximately 6:35 p.m. They removed Mr. Bouthillette from the police wagon nine minutes later, at approximately 6:44 p.m., and re-commenced recording their interactions. The recording, marked Exhibit 4A on the voir dire, was played, and a transcript, Exhibit 4B, was provided to assist in following the recording of the processing of Mr. Bouthillette.
- [59] This recording is 35 minutes in length and the transcript is 21 pages long. The recording ends with DC Shipper stopping the recording to permit Mr. Bouthillette to consult with counsel. Mr. Bouthillette spoke to his lawyer in private between 7:23 p.m. and 7:26 p.m.

- [60] When Mr. Bouthillette was removed from the police wagon, his hands remained cuffed behind his back. He was still barefoot and in his rain-soaked clothes. He was not provided with an opportunity to consult with counsel immediately upon his arrival at the jail, notwithstanding his indication upon arrest that he wished to exercise his right to counsel.
- [61] Instead, he was whisked to a small holding cell, where two female Forensic Identification Unit ("FIU") officers, Cst. Sharon Hunter and Cst. Anja Bergler, proceeded to take pictures of Mr. Bouthillette and then examine and swab his hands once the handcuffs were removed. Finally, Mr. Bouthillette's clothing was seized and he was provided with clothes and shoes. The overall atmosphere of this interaction was respectful, polite, and not aggressive. Mr. Bouthillette was polite and cooperative throughout. No incriminating statements were made, and there were no attempts to elicit such evidence. Rather, the officers processing Mr. Bouthillette were recording his condition, inquiring about injuries to his hands and related matters.
- [62] Photographs of Mr. Bouthillette's condition are found at Tab 2 of Exhibit 1. The front of his t-shirt was obviously wet, as depicted in photographs 2 and 5. Given the darkness of his pants and the quality of the photographs, it is not possible to discern if Mr. Bouthillette's pants were also soaked. However, given the fact that he had to lay face down on the pavement for the first part of his arrest, it is entirely likely that the front of his pants were also wet.
- [63] Photographs 1 through 10 of Exhibit 1 at Tab 2 depict Mr. Bouthillette with his hands still cuffed behind his back as he was being processed at the VPD Jail.
- [64] At approximately six minutes and 18 seconds into the audio recording of this processing, the handcuffs were finally removed. By this time, the accused's hands had been cuffed behind his back since his arrest, for approximately 58 minutes.
- [65] The remaining photographs (11 to 33) depict Mr. Bouthillette in various states of dress but still in his own wet clothing, up to photograph 30.
- [66] At the 14 minute and 52 second mark of the audio recording, Mr. Bouthillette appears to ask Cst. Bergler about his lawyers and is told he can talk to the investigators about that.
- [67] At 19 minutes and 36 seconds into the processing, Mr. Bouthillette was advised by Sgt. Griffiths that they were going to seize his clothes one article at a time and a male guard advised that he had clean clothes for the accused.
- [68] Between the 21 minute and 55 second mark to 24 minute 33 second mark of the audio recording, Sgt. Griffiths, DC Shipper, and a male guard start to have Mr. Bouthillette remove his wet clothes and get into clean clothing. The officers examined his body for marks during this process and then had the FIU officers photograph scrapes once Mr. Bouthillette was dressed.

- [69] From the transcript of the audio recording, Mr. Bouthillette was finally provided a warm sweatshirt at the 23 minute and 26 second mark of his processing, but was still without shoes at approximately the 24 minute and 40 second mark of the recording.
- [70] Sgt. Griffiths, DC Shipper, and the unidentified male jail guard continued to examine Mr. Bouthillette's body for marks, commenting on the red blotches in various locations of his body. Mr. Bouthillette advised he had sensitive skin and that the cold contributed to the rash he had, as did the handling of him upon his arrest.
- [71] Shortly after the 34 minute mark of the audio recording, Mr. Bouthillette asked Cst. Bergler and Sgt. Griffiths if he could put on his shirt and was advised that he could.
- [72] Finally, approximately 35 minutes after the recording commenced, Mr. Bouthillette was advised by DC Shipper that he would now be given access to counsel.
- [73] Mr. Bouthillette's three-minute private conversation with his lawyer commenced at 7:23 p.m.
- [74] From this processing period I find the following facts:
- a) By the time the handcuffs were removed from Mr. Bouthillette, he had had his hands cuffed behind his back for approximately 58 minutes.
 - b) Mr. Bouthillette seemingly posed no security threat to the officers - he was polite and compliant throughout;
 - c) By the time Mr. Bouthillette was provided with clean, dry clothes, he had been barefoot and in his wet t-shirt and pants for approximately 75 minutes, from the time of his initial detention.
 - d) Mr. Bouthillette was not given immediate access to counsel upon his arrival at the VPD Jail nor was he advised when he would be given access to his counsel until it was finally facilitated.
 - e) By the time Mr. Bouthillette was finally allowed to speak with his lawyer, approximately one hour and 25 minutes had elapsed since the time he advised Sgt. Griffiths he wished to exercise his right to counsel. Additionally, he had been at the jail for approximately 39 minutes before he was permitted to speak with his lawyer.

C) Mr. Bouthillette's Transport to VPD Headquarters at Graveley St

- [75] Mr. Bouthillette finished speaking with his lawyer at 7:26 p.m. and was returned to a holding cell for approximately 22 minutes. Shortly before 7:50 p.m., Mr. Bouthillette was removed from the holding cell and re-handcuffed with his hands behind his back and escorted to the police wagon. Thus, Mr. Bouthillette was in handcuffs again as of approximately 7:48 p.m.

- [76] At 7:50 p.m., Mr. Bouthillette left the VPD Jail in a police wagon and arrived at VPD Headquarters at 8:05 p.m.
- [77] The period of time between 7:26 p.m. and 8:05 p.m. was not audio recorded. Nothing untoward happened during this period apart from the inexplicable and concerning handcuffing of Mr. Bouthillette's arms behind his back at approximately 7:48 p.m. Sgt. Griffiths conceded that transporting a prisoner with their hands cuffed in front of them is more comfortable. The totality of the dealing with Mr. Bouthillette up to this point establishes he was compliant, cooperative, and polite. There is nothing in the evidence that provides any sort of security justification for re-handcuffing Mr. Bouthillette's arms behind his back. I can only conclude that the decision to re-handcuff Mr. Bouthillette with his arms behind his back was to add to the discomfort and stress of the situation that he found himself in. I find that Mr. Bouthillette was unnecessarily subjected to a further 20 minutes of discomfort, transported as he was with his hands cuffed behind his back.
- D) DC Adams's interview of Mr. Bouthillette on February 2, 2021 at 8:08 p.m. to February 3, 2021 at 12:21 a.m.
- [78] When Sgt. Griffiths and DC Shipper reunited with Mr. Bouthillette at VPD Headquarters, the recording device was turned back on. The rest of the police interactions with Mr. Bouthillette from the time he arrived at the VPD Headquarters and was removed from the police wagon until his interview with DC Adams concluded were either audio or audio and video recorded.
- [79] The overall recorded time of the interview with DC Adams was four hours and 33 minutes, although the actual interview time was approximately three hours and 15 minutes.
- [80] The audio and video recording of the interview, marked Exhibit 6A, was played in the voir dire. The 111-page transcript, marked Exhibit 6B, was provided to assist in following the interaction.
- [81] Mr. Bouthillette arrived at VPD Headquarters at 8:05 p.m. and by 8:08 p.m. he was secured in an interview room by Sgt. Griffiths and DC Shipper. He was placed in a chair. His hands remained cuffed behind his back. As the officers were leaving the interview room, the following exchange occurred:
- ?M1 Okay, Pascal?
- B You're not gonna take my handcuffs off?
- ?M1 Yeah. We're gonna get 'em off. We've just gotta have the detective come in here.
- S Just a second (unintelligible).
- ?M1 Yeah.

- [82] Mr. Bouthillette was told the handcuffs would be removed in "a second". Notwithstanding being advised of this, Mr. Bouthillette had to wait a further ten minutes to actually have the handcuffs removed by DC Adams.
- [83] Sgt. Griffiths testified he would have removed the handcuffs from Mr. Bouthillette once he was placed in the interview room, had the interviewer told him to do so. However, DC Adams instructed the arresting officers not to remove the handcuffs. DC Adams explained in his evidence that as part of his plan for rapport building with Mr. Bouthillette, he directed that the handcuffs remain on Mr. Bouthillette. DC Adams candidly explained that he wanted to look like "the good guy" and be the person who looked like he was there to help Mr. Bouthillette. He wanted Mr. Bouthillette to both like him and speak to him. Accordingly, Mr. Bouthillette had been subjected to the physical discomfort and attendant psychological stress of having his arms handcuffed behind his back for a further ten minutes to accommodate DC Adams's rapport-building ploy.
- [84] In total, Mr. Bouthillette had his hands cuffed behind his back for approximately 88 minutes from the time of his arrest. At least 30 minutes of this appears to have been completely unnecessary. I conclude that the prolonged period of handcuffing Mr. Bouthillette's arms behind his back was a tactic employed by the investigators to bring further physical and psychological stress to bear on the accused, in addition to the general stress of being arrested for murder.
- [85] After Mr. Bouthillette was left by Sgt. Griffiths in the interview room for approximately eight minutes, DC Adams entered the room at approximately 8:17 p.m. and the following exchange occurred:

Det. Adams enters room

A Hey, Pascal. You've still got handcuffs on?

B Yeah.

A Oh, fuck. Told us, I told, okay, I told them to take 'em off you. Gimme two seconds. I don't have a key on me, okay?

B Mm-hmm.

Det. Adams exits room

- [86] DC Adams exited the interview room to locate a key to undo the handcuffs. By 8:18 p.m., DC Adams returned to the interview room and removed the handcuffs, stating:

Det. Adams enters room (at 20:17:57 video time stamp)

A All right, buddy. Stand up. Turn around. I'll get those handcuffs off for you. I told them to take them off before you got in here, but obviously they didn't. T-, gimme two seconds. Okay. So we have This way around, sorry. When I take this off, bring your hand round to the front for me, okay?

B Mm-hmm.

A Thank you. And then the other one is underneath, of course. Okay. Is that out yet? No. One more twist. Oh, this one's d-, a bit fidgety. There we go. 'Kay, bring that hand out for me, okay? And sit down. Okay. So do you want a drink or anything, or anything to eat before we get goin' here?

B Uh, please.

- [87] At the start of the interview, Mr. Bouthillette was offered food and drink, which he readily accepted. His consumption of the McDonald's meal when it arrived at 8:36 p.m. is consistent with his being hungry. As DC Adams continued to ask general questions about Mr. Bouthillette's background and Mr. Bouthillette answered, he also consumed his McDonald's meal in approximately six minutes, concluding at 8:42 p.m.
- [88] Before Mr. Bouthillette received his meal, while DC Adams was out of the interview room, at 8:19 p.m. Mr. Bouthillette placed his arms on the table in front of him, with his head on his arms, and remained in this position until the officer returned to the room.
- [89] At 8:20 p.m., as DC Adams started explaining what was going to take place, Mr. Bouthillette asserted for the first time that he did not want to talk without his lawyer. DC Adams confirmed this and then directed the conversation to ensuring that Mr. Bouthillette had had a chance to talk to his lawyer and various other standard police warnings and cautions.
- [90] DC Adams then asked Mr. Bouthillette if he had Covid or was experiencing any symptoms of Covid. Mr. Bouthillette advised the officer that he had been having diarrhea and had been throwing up recently, but that he did not know what was causing this. Seemingly unphased by this information, at about 8:24 p.m., DC Adams moved on through his checklist and asked Mr. Bouthillette when he had last consumed drugs or alcohol. DC Adams learned that Mr. Bouthillette had consumed a quarter gram of heroin about two to three hours earlier. Although this was a normal amount for Mr. Bouthillette and not causing him immediate problems, DC Adams was also advised by Mr. Bouthillette that he would soon start to feel sick, in pain, and uncomfortable when he started to withdraw.
- [91] Also, at this time, as DC Adams seemingly moved through his checklist of potential issues affecting an accused, Mr. Bouthillette advised him that he had not slept in two days and that he was feeling tired.

- [92] DC Adams ended the health check portion of the interview questioning by telling Mr. Bouthillette that there was a bathroom across the hall and that they could take a break at any time. DC Adams was not responsive to any of Mr. Bouthillette's mentioned health issues, rather he kept moving forward with his interview.
- [93] As DC Adams concluded the initial formalities, Mr. Bouthillette reiterated for a second time that he was not going to talk.
- [94] DC Adams's way of dealing with Mr. Bouthillette's assertions that he wished to exercise his right to silence, in that he did not want to talk, was to simply ignore Mr. Bouthillette's requests and continue talking, endeavoring to build rapport through asking more general questions designed to elicit background information and put Mr. Bouthillette at ease.
- [95] Between pp. 5 and 60 of the transcript, Mr. Bouthillette asserted his right to silence approximately 18 times. By the time Mr. Bouthillette finally gave in to DC Adams's repeated questions and entreaties to tell him what happened, approximately one hour and 45 minutes had elapsed. Significantly, on one occasion when Mr. Bouthillette was asserting his desire not to talk, the following exchange occurred:

B (Sniffs) I am really tired. Uh, my nose, that I'm startin' to be sick. I don't wanna answer.

A Well, do you want me to get you a tissue? Would that help?

B Yeah.

A Okay.

B (Sniffs)

A I can get you a tissue.

B I wanna go back in a cell and go in the jail.

A Why do you wanna go to the jail?

B Because that's obviously where you guys are gonna bring me after.

A I mean, I can't answer that question, because that's not my decision.

B Hm.

A Think some of it's to do with what we have a conversation about.

B Well, I don't wanna have a conversation. My lawyer told me not to say anything and I'm not going to say anything.

A M'kay. But do you think that's gonna help you?

B I don't know. (Unintelligible) if she said, if that's what she told me to do, yeah.

A Do you think, I, I mean of all the, all the interviews I've done, I've never heard of a lawyer sayin' anything else apart from that.

B Mm.

A Do you thi-, do you personally think that's the best thing?

B Yeah.

A You do?

B Yeah.

A 'Kay. But if you're sayin' that you didn't do anything

[96] These comments by DC Adams and Mr. Bouthillette's responses cannot be considered in isolation. Indeed, prior to this exchange at p. 30, DC Adams had already received the following important pieces of information about Mr. Bouthillette's physical condition and concerns:

- a) DC Adams directed that Mr. Bouthillette remained secured with his arms handcuffed behind his back until he could go in and release Mr. Bouthillette, a matter of approximately eight to ten minutes after Mr. Bouthillette was placed in the interview room;
- b) Mr. Bouthillette had repeatedly asserted he did not wish to answer questions;
- c) Mr. Bouthillette advised DC Adams that he had:
 - i. consumed one quarter gram of heroin two to three hours before the interview started;
 - ii. he would begin to get sick, meaning he would start to experience withdrawal;
 - iii. he had not slept in two days and, although normal for him, he was tired;
 - iv. he did not want to talk because he was tired and could not concentrate;
- d) Mr. Bouthillette was obviously hungry, as he managed to consume his McDonald's meal in approximately six minutes; and
- e) in the passage quoted above, Mr. Bouthillette advised the officer again that he was really tired and he was starting to get sick, meaning he was starting to withdraw.

[97] Unphased by Mr. Bouthillette's assertions, DC Adams continued to ask questions and to try to build a rapport with Mr. Bouthillette, engaging him in general conversation to disarm him and get Mr. Bouthillette to talk.

[98] For the most part, Mr. Bouthillette appeared disengaged, increasingly fatigued, withdrawn, and flat. To be fair, DC Adams was polite, kind, empathetic, and not aggressive with Mr. Bouthillette, but he was unrelenting in continuing to question Mr. Bouthillette, trying to get him to engage. Mr. Bouthillette on a number of occasions advised DC Adams that he was tired, and when he made a mistake about the colour of his jacket explained it was because he was really tired.

[99] From time to time in the first 50 pages of the transcript, Mr. Bouthillette either put his head on the desk or his head on his arms on the desk.

[100] Mr. Bouthillette's increasing fatigue was apparent to DC Adams when he offered to get Mr. Bouthillette some coffee:

B I don't know. (Chuckles) She buys it with her money.

A Don't ask any questions?

B Yeah.

A Are you still awake?

B Oh, yeah, still awake, always.

A W-, do you want some coffee?

B Yeah.

A How do you have it?

B Uh, triple triple please.

A Triple triple?

B Yeah.

A Holy shit. I was, don't even know if I've got that much cream.

B (Chuckles)

A All right. I'll get you some, okay?

B Yeah.

A 'Cause I, I don't want you fallin' asleep on me. Which you might just do anyway.

B Mm-hmm.

[101] At this point, it was 9:12 p.m. Mr. Bouthillette had been in the interview room for more than an hour. His speech was becoming less clear and Mr. Bouthillette had placed his head down on his arms on the desk.

- [102] DC Adams left the interview room at 9:13 p.m. for approximately ten minutes. For this entire period of time, Mr. Bouthillette remained with his head on his arms on the desk.
- [103] Having reviewed the video again, it is fundamentally apparent that Mr. Bouthillette fell asleep during this period of time. Indeed, at 9:20 p.m., he made a small little groan and then his arms slid forward in a lurching motion indicative of being asleep. And at 9:23 p.m., as DC Adams returned with a triple-triple coffee, Mr. Bouthillette sat up and wiped his face in a motion consistent with wiping drool that had collected while sleeping. I find as a fact that Mr. Bouthillette was indeed very tired, so much so that he fell asleep in the interview room during this ten-minute period.
- [104] After DC Adams provided the coffee to Mr. Bouthillette, he left the video room and Mr. Bouthillette again put his head down on his arms on the desk in front of him. The time was 9:23 p.m. DC Adams returned a minute later and Mr. Bouthillette sat part way up, leaning on his arms on the desk, sipping the coffee.
- [105] DC Adams immediately launched into asking Mr. Bouthillette why he had shaved his beard from the other day. Mr. Bouthillette again said he did not wish to speak.
- [106] It was at this point that the interview turned darker. Mr. Bouthillette appeared to become fatalistic about dying in jail and resigned to his circumstances. He appeared to struggle with maintaining his resolve to not talk to the officer. He became emotional, reminisced further about his abusive upbringing, and then he started to cry.
- [107] Between 9:24 p.m. and 9:44 p.m. (pp. 54-64 of the transcript), it is clear from the video and audio of the interview that Mr. Bouthillette struggled to control himself from talking, but was experiencing a gradual emotional disintegration and crumbling of his resolve as the officer continued to probe Mr. Bouthillette with questions--about his life, why he thought he should remain in jail, why he had no right to a life, and how his life had been very rough since birth.
- [108] Between DC Adams's questioning about Mr. Bouthillette shaving his beard and Mr. Bouthillette's "If I did the crime" comment, Mr. Bouthillette reiterated at least four more times that he did not or could not talk. Each assertion was made in an increasingly dejected and subdued fashion and with Mr. Bouthillette becoming more emotional.
- [109] In the face of this crumbling by Mr. Bouthillette, DC Adams continued to persist in asking Mr. Bouthillette what happened.
- [110] The last glimmer of resolve in Mr. Bouthillette's unfolding emotional disintegration can be seen at p. 60 when he refused to be a rat.
- [111] Interestingly, the following exchange then occurred:

A Okay. Do you feel like tellin' me what you did?

B I lost it.

A You lost control?

B Me, that said I w-, I would never n-, ever do that.

A You said you would never do that?

B No.

A So what happened?

B I don't know. I'm just a fuckin' idiot.

A Pardon?

B I'm just a fuckin' idiot.

A Why are you callin' yourself an idiot? What happened?

B That's what it is.

A M'kay.

B Fuck. If I did the crime, uh, I'll, I'll do the time, that's all.

A So I think, and, uh, tell me if, I think you said you did the crime, so you have to do the time, is that what you said?

B Yeah.

A 'Kay. What, what crime? What did you do? Help me understand what happened in that house, Pascal.

Short pause

B All my life I asked for help.

[112] Although DC Adams interpreted Mr. Bouthillette's comment as "you did the crime", that in fact is not what Mr. Bouthillette said. Rather, he said "If I did the crime" (emphasis added).

[113] By 9:42 p.m. on the video, Mr. Bouthillette appears to give up--he is crying, emotional, and increasingly dejected. DC Adams's gentle but continued probing led Mr. Bouthillette to a place where he could no longer resist answering the officer's questions and his resolve to remain silent was broken.

[114] DC Adams's strategic, empathetic listening and deft questioning all contributed to Mr. Bouthillette's gradual dissolution of his resolve not to talk and his eventual crumbling in the interview at p. 62 of the transcript. I wish to be clear that it was not DC Adams's persistent questioning alone that brought about Mr. Bouthillette no longer exercising his right to main silent. Rather, it was the entire set of circumstances, from the outset of his arrest, that inform the assessment of whether Mr. Bouthillette made a choice to freely speak to DC Adams or whether his will was overborne such that he felt he had no choice but to speak because resistance to the questioning was futile.

Governing Legal Principles

- [115] The legal principles governing the admissibility of an accused's statement to a person in authority are not in issue on this voir dire. Counsel agree that Oickle is the seminal case that outlines the governing test for determining the voluntariness of an accused's statement to a person in authority. Oickle was affirmed by the SCC in Spencer. Counsel referred to several other cases that applied the principle derived from Oickle, which I have considered, including: R. v. B.J., 2020 BCSC 2251; R. v. Yu, 2007 BCSC 1584; R. v. Desjarlais et al, 2006 BCSC 45; R. v. Holt, 2022 BCSC 1278; R. v. A.D., 2017 BCSC 2065; R. v. Azonwanna, 2020 ONSC 5416; R. v. Boffa, 2018 BCSC 765; R. v. McGregor, 2020 ONSC 4802; R. v. Singh, 2007 SCC 48; R. v. Lucier and Hanner, 2008 BCPC 319; R. v. Abdollahi, 2015 BCPC 125; R. v. Tessier, 2022 SCC 35; R. v. Davidson, 2017 BCSC 2497. And, the principles from R. v. Burlingham, [1995] 2 S.C.R. 206, 1995 CanLII 88 were relied upon by the defence in challenging the propriety of DC Adams' comments that appeared to denigrate or undermine counsel's advice.
- [116] Oickle and its jurisprudential progeny make it clear that hard and fast rules cannot be employed and applied rotely to the wide variety of situations in which police officers obtain statements from suspects. Rather, the governing principles must be applied contextually, sensitive to the circumstances surrounding the particular accused's statement in issue.
- [117] Trial decisions on voluntariness provide examples of various circumstances that can arise but the facts of each case invariably are different.
- [118] In Holt, I reviewed the governing legal principles, writing:
- [78] Pursuant to the modern common law confessions rule where state authorities obtain a statement (confession) from an accused person, the Crown bears the burden of proving beyond a reasonable doubt that the statement was made voluntarily for it to be admissible as evidence against an accused at trial. This is also true where the Crown proposes to hold the statement and use it in the cross-examination of an accused at trial, should they elect to testify.
- [79] The common law confessions rule is intended to address concerns about the reliability and truthfulness of confessions. It is also intended to promote and protect the integrity of the administration of criminal justice. The confessions rule involves striking a balance between the individual's right to silence and fair treatment by authorities, with the state's need to investigate and solve crimes: A.D. at para. 9, citing R. v. Tan, 2014 BCCA 9 at para. 99; Salehi at para. 40.
- [80] The ultimate issue is whether there is a reasonable doubt that an accused's decision to speak to the authorities was the product of their free will: Singh at para. 53.
- [81] In Salehi, Justice Devlin succinctly summarized the animating principles that inform the analytical framework of the contemporary confessions rule, writing:

- [41] Under the contemporary confessions rule, a statement will not be found to be voluntary if it was obtained through unacceptable threats or promises; in oppressive circumstances; or if the accused lacked an operating mind in providing the statements: *Oickle* at paras. 47-71. These factors are to be considered together contextually with reference to the specific facts of the case and the particularities of the individual accused. Police trickery that would shock the community will also render a statement inadmissible, although this engages a distinct inquiry that is primarily concerned with maintaining the integrity of the criminal justice system.
- [42] Threats or promises will render a statement inadmissible if they raise a reasonable doubt about whether the detainee's will was overborne. Explicit threats of violence or torture are impermissible, as is Holting out the prospect of leniency from the courts: *Oickle* at paras. 48-49. Lesser inducements, such as offers of psychiatric assistance, may render a statement inadmissible depending on the entirety of the circumstances: *Oickle* at para. 50. On the other hand, moral or spiritual inducements are generally permissible because what is offered is not in the authorities' control: *Oickle* at para. 56. A central consideration in the context of threats or promises is whether there has been a quid pro quo offer from the authorities: *Oickle* at para. 57.
- [43] Oppression refers to the atmosphere and conditions surrounding the making of a statement. The question is whether the conditions in which the statement was made were so distasteful as to produce a stress-compliant confession, or such that they overbore the will of the detainee in the sense that the individual believed it was futile to resist questioning, or came to doubt their own memory in the face of relentless accusations: *Oickle* at para. 58. Although inexhaustive, the factors that can create an atmosphere of oppression include depriving the detainee of food, clothing, water, sleep, or medical attention; excessively aggressive, intimidating questioning for a prolonged period and denying access to counsel: *Oickle* at para. 60.
- [44] Further, an accused's statement must be the product of an operating mind in order to be admissible. This requires that a detainee knows what they are saying, and that they are saying it to police officers who can use it to their detriment: *Oickle* at para. 63. However, it is not necessary for the court to consider whether the detainee is capable of making a wise choice or a choice that is in their best interests.

(See also *A.D.* at paras. 11-37.)

- [82] I adopt the review of the principles by both Justice Devlin in *Salehi* and Justice Donegan in *A.D.*
- [83] More recently, in *R. v. Hosack*, 2022 BCCA 226, Justice Dickson, writing for the Court, reiterated the legal framework in the following manner:

- [19] The scope of the common law confessions rule is well-established. The governing authority is *R. v. Oickle*, [2000] 2 S.C.R. 3. In *Oickle*, Justice Iacobucci described voluntariness as "the touchstone of the confessions rule" and a "shorthand for a complex of values": at paras. 69-70. Accordingly, only those confessions proven voluntary beyond a reasonable doubt will be admissible: at para. 68. Justice Iacobucci also affirmed that hard and fast rules cannot account for the wide range of circumstances that may vitiate voluntariness. Therefore, he stated, judges must be "sensitive to the particularities of the individual suspect", conduct a contextual analysis and consider all relevant factors when determining the admissibility of a confession made to police: *Oickle* at paras. 42, 47, 71.
- [20] As Justice Iacobucci explained, in assessing voluntariness a judge must consider whether threats or inducements were used by police in an interrogation, whether conditions were oppressive, whether the accused had an operating mind and whether the police engaged in trickery. The threats or inducements doctrine asks whether the police offered a quid pro quo to obtain a confession and, like the oppression doctrine, is primarily concerned with its reliability. Conditions of an interrogation are oppressive where they are so distasteful that they overbear the suspect's will. The operating mind doctrine requires that the suspect is aware of what is being said and that it is being said to police who can use it to their detriment, and is primarily concerned with fairness and the rights of the accused. These three doctrines are to be considered together. Considerations of police trickery involve a distinct inquiry aimed at maintaining the integrity of the criminal justice system and ask whether the police conduct in question would shock the community, although police deception is also relevant to voluntariness at large: *Oickle* at paras. 57, 58, 63, 65-70.
- [21] In conducting a contextual analysis, the judge should strive to understand the entirety of the surrounding circumstances and ask whether, considered together, they give rise to a reasonable doubt as to voluntariness, taking into account all aspects of the confessions rule: *Oickle* at paras. 71, 91.
- [19] As *Oickle* at para. 71 makes clear, a determination of whether the Crown has proven voluntariness is essentially a factual one that must be made having regard to all of the relevant circumstances. In making the determination, the court must be "sensitive to the particularities of the individual suspect": *Oickle* at para. 42.
- [120] Baked into the modern conception of the confessions rule or perhaps informing it are other standards, including the right to silence and the right to counsel. Justice Copeland in *Azonwanna*, when still on the trial court in Ontario, explained it this way:
- [118] Subsequent to *Oickle*, in *Singh*, the Supreme Court held that in the context of a police custodial interview, the s. 7 right to silence is functionally equivalent to common law voluntariness: *R. v. Singh*, [2007] 3 S.C.R. 405, 2007 SCC 48 at paras. 21-25. In coming to this conclusion, the court recognized that the modern expansive common law voluntariness rule enunciated in *Oickle* includes the right of a detained person to make a "meaningful choice" whether or not to speak to state authorities. The focus is on the effect of the

circumstances and police conduct on the detainee's ability to exercise their free will to choose whether to not to speak to police. The test is an objective one; however, the characteristics of the individual are relevant in applying the objective test: Singh at paras. 35-37.

- [119] Case law also recognizes the interrelationship between common law voluntariness, the right to silence, and the right to counsel. In addition to the holding in Singh that in the context of a custodial interview, the right to silence is functionally equivalent to the common law voluntariness, the Supreme Court recognized in Oickle (at para. 60) that denial of access to counsel is a factor that can impact on voluntariness of statements as a type of oppression. This is not surprising, since a central purpose of the s. 10(b) right is to allow a detainee to obtain legal advice so that they can make an informed choice about how to exercise their rights, and chief among those rights is the right to choose whether or not to cooperate with police: R. v. Sinclair, [2010] 2 S.C.R. 310, 2010 SCC 35, at paras. 24-26; R. v. Taylor, [2014] 2 S.C.R. 495, 2014 SCC 50, at para. 21
- [121] And so, in Singh the SCC reiterated that the modern view of the confessions rule discussed in Oickle includes the right of the detainee / accused to make a meaningful choice about whether to speak to the police. A contextual approach is applied to the largely fact-sensitive assessment that must be made.
- [122] With these principles informing the assessment that must be conducted in mind, I turn to the contextual analysis of the relevant factors, considered in the totality of the circumstances, to determine whether the Crown has established beyond a reasonable doubt that Mr. Bouthillette's February 2, 2021 statement to DC Adams was made voluntarily.

Analysis

- [123] As I did in Holt, following Justice Donegan's approach in A.D. at paras. 39-40, I begin with what this case is not about. This is not a case where police offered Mr. Bouthillette any impermissible inducements, threatened or intimidated him in any way, or used any dirty tricks to obtain a statement. No reasonable doubt exists on these issues.
- [124] This is also not a case where the accused lacked an operating mind, as the concept is understood in the case law: Oickle at para. 63; Holt at para. 81, citing R. v. Salehi, 2019 BCSC 197 at para. 44.
- [125] Rather, what this case is about is the broad concept of oppression and whether the particular constellation of factors at play in this case, and their cumulative effect, caused Mr. Bouthillette's will to be overborne such that there is a reasonable doubt that his choice to discuss the allegations was the product of his own free will.

- [126] The concept of oppression encapsulates the circumstances and conditions that surround and inform the making of a statement. The question in this case focuses on the conditions in which the statement was made: were they such that collectively they overbore the will of Mr. Bouthillette in the sense that he may have believed it was futile to resist DC Adams's persistent questioning: Oickle at paras. 58-60.
- [127] In the case at bar, there are a number of factors that contributed to the totality of the circumstances creating an oppressive atmosphere. The constellation of factors in this case started with Mr. Bouthillette's arrest and continued to accrue and compound as time elapsed. They include:
- a) Mr. Bouthillette was improperly dressed for the conditions of a cold, rainy February night, wearing only a t-shirt and pants and being barefoot.
 - b) Mr. Bouthillette's repeated statements that he was cold and his request to get out of the rain were seemingly ignored or not viewed to be important. He was left to stand barefoot in the rain for approximately 24 minutes, wearing only a wet t-shirt and wet pants.
 - c) Mr. Bouthillette remained barefoot and in his wet clothes until the processing of him at the VPD Jail was completed and his clothes were seized, approximately 75 minutes after his initial detention.
 - d) Mr. Bouthillette's physical discomfort would only have been exacerbated by the prolonged time his hands were cuffed behind his back from arrest to when the handcuffs were removed during the initial processing--a matter of at least 58 minutes.
 - e) Mr. Bouthillette's request to exercise his right to counsel was not facilitated immediately and was further delayed through the FIU processing and clothing seizure. When he asked about calling his lawyer, he was rebuffed by the FIU officers.
 - f) Mr. Bouthillette was re-handcuffed at approximately 7:48 p.m., again with his hands behind his back--an uncomfortable and seemingly unnecessary form of restraint in the circumstances. He remained restrained in that fashion until 8:18 p.m., when DC Adams finally released him from the handcuffs.
 - g) The arresting officers rebuffed Mr. Bouthillette's query about not having the handcuffs removed when secured in the interview room, which only further compounded the oppressive conditions that were continuing to aggregate. This state of affairs was further exacerbated by leaving Mr. Bouthillette secured in such an uncomfortable fashion a further ten minutes, until he was finally released from the handcuff restraint at 8:18 p.m. by DC Adams.
 - h) Mr. Bouthillette was obviously fatigued from the time he was placed in the interview room and left to wait for DC Adams to arrive. Over the course of waiting for DC Adams's arrival, Mr. Bouthillette can be seen to slowly slump or wilt in the chair he is seated in, with his head dropping forward to his chest and his shoulders drooping. At approximately the 23-minute

and 26-minute time stamps mark Mr. Bouthillette's body appeared to twitch and it seems that he had dozed off. During the interview, Mr. Bouthillette told DC Adams a number of times that he was tired. And, when left alone again at 9:13 pm while DC Adams left to obtain coffee, Mr. Bouthillette fell asleep.

[128] The evident fatigue of Mr. Bouthillette is particularly concerning in light of the following additional facts:

- a) Mr. Bouthillette's assertion that he had not slept in two days;
- b) Mr. Bouthillette's admission to consuming one quarter gram of heroin shortly before his arrest;
- c) Mr. Bouthillette's warning that he would start to experience withdrawal and when he stated he was getting sick;
- d) Mr. Bouthillette's repeated requests to go back to a cell;
- e) Mr. Bouthillette's statement that he was so tired he was having difficulty concentrating; and
- f) Mr. Bouthillette's obvious and increasing fatigue, as depicted in the video of his interview.

[129] What makes these points about Mr. Bouthillette's fatigue more poignant are three other salient facts:

- a) DC Adams largely ignored Mr. Bouthillette's repeated assertions of being tired and continued to question Mr. Bouthillette to get him to talk;
- b) the manifest display of tiredness when Mr. Bouthillette fell sleep in the interview room and his grogginess upon being awoken; and
- c) the fact that there was no urgency to conducting the interview in such circumstances, as Mr. Bouthillette had only been in police custody approximately three hours when the interview commenced. Despite all of this, Mr. Bouthillette was never offered the option of rest and respite. DC Adams simply pressed on with his rapport building questioning.

[130] In addition to the foregoing enumerated factors that I find cumulatively constituted oppressive conditions in this case is the inappropriate comments that DC Adams made to Mr. Bouthillette about his lawyer's advice to remain silent. DC Adams's initial comments--that he presumed Mr. Bouthillette's lawyer told him not to talk and that that was fair--do not on their own cross the line into denigration or undermining Mr. Bouthillette's right to silence. However, there is another component further on in the interview that, in my view, was improper. At p. 30 of the transcript, just after Mr. Bouthillette advised DC Adams that he:

- a) was starting to feel ill;
- b) did not want to talk;

- c) wanted to go back to a cell;
- d) did not want to have a conversation;
- e) his lawyer told him not to say anything; and
- f) he was not going to say anything,

DC Adams openly questioned the wisdom of Mr. Bouthillette following his lawyer's advice when he said:

A M'kay. But do you think that's gonna help you?

B I don't know. (Unintelligible) if she said, if that's what she told me to do, yeah.

A Do you think, I, I mean of all the, all the interviews I've done, I've never heard of a lawyer sayin' anything else apart from that.

B Mm.

A Do you thi-, do you personally think that's the best thing?

B Yeah.

A You do?

B Yeah.

A 'Kay. But if you're sayin' that you didn't do anything

B Mm-hmm.

A um, other people outside are sayin' they think it's you, how can we go back to them and say it's not you, if you're not gonna talk to me?

[131] As Oickle at para. 33 makes clear, the modern confessions rule has two objectives: protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes. It is intended to not only address concerns about the reliability and truthfulness of confessions but to also promote and protect the integrity of the administration of justice. The confessions rule involves striking a balance between the individual's right to silence and fair treatment by authorities, with the state's need to investigate and solve crimes. While police are not required to stop an interview when an accused asserts they wish to follow their lawyer's advice and remain silent, they must be mindful of how they continue to pursue their questioning. They cannot question or undermine the advice that an accused has received nor should they make comments that might cause an accused to question their lawyer's advice.

[132] While DC Adams may not have intended to undermine Mr. Bouthillette's relationship with his lawyer when he asked if Mr. Bouthillette thought the advice to not talk was the best thing for him, DC Adams's intentions are largely irrelevant. It is the effect of the comments on the detainee, considered in the totality of the circumstances, that matters. In my view,

police officers would be well advised to simply refrain from commenting on the advice provided to a detainee by their lawyer because, depending on the circumstances, it could well undermine the detainee's confidence in their counsel or cause them to question the validity of the advice they have received: Burlingham at paras. 14-17; Davidson at paras. 123-126; McGregor at paras. 192-194.

- [133] In this case, DC Adams's question to Mr. Bouthillette about whether he thought following the advice to not talk was the best thing for him was coupled with the officer's suggestion that if Mr. Bouthillette was not involved in the offence, the officer and others needed to hear that side of the story. In context, this was an implicit invitation to Mr. Bouthillette that if he was not guilty he should speak. On their own, the comments are concerning. And when considered with the unique constellation of factors operating on Mr. Bouthillette at the time of this interview, they clearly contributed to undermining his ability to withstand DC Adams's persistent questioning and to stand on his right to silence: Davidson at para. 126.
- [134] Although the police may interview detainees, may interrogate them, and use persistent rapport-building questioning in an attempt to have a suspect break their silence, the police cannot abuse that right by ignoring the will of the detainee and the overall circumstances of their detention. The overall aura surrounding Mr. Bouthillette's interview, coupled as it was with his fatigue, his consumption of drugs and his treatment before the interview, is that resistance was futile.
- [135] In my view, when the entirety of the surrounding circumstances are considered together, they give rise to a reasonable doubt as to the voluntariness of Mr. Bouthillette's statement to DC Adams. The entire constellation of factors included Mr. Bouthillette being:
- a) sleep deprived and obviously fatigued;
 - b) having used heroin shortly before his arrest and likely starting to experience the initial symptoms of withdrawal during the interview;
 - c) the prolonged physical discomfort of being unnecessarily exposed to the elements without any sort of protection from the cold and rain when arrested, exacerbated by the lengthy period of time his arms were handcuffed behind his back;
 - d) the casual indifference of the arresting officers in facilitating immediate access to counsel - access which only occurred more than an hour and 25 minutes after his arrest;
 - e) DC Adams's continued persistent questioning in the face of Mr. Bouthillette's repeated assertions of his desire to exercise his right to remain silent; and
 - f) DC Adams undermining Mr. Bouthillette's ability to make a meaningful choice about whether to speak or not by effectively challenging the advice Mr. Bouthillette had received. This occurred when the officer asked if Mr. Bouthillette personally thought that was the best thing. The implication was clear: an innocent person would speak.

[136] While these factors considered individually may not raise a reasonable doubt on their own, it is the entire set of circumstances considered cumulatively that raises concerns.

[137] After reviewing the audio and video taped recordings of Mr. Bouthillette's arrest, processing, and interview, and considering the totality of the circumstances leading up to and surrounding the statement, I have concluded that the overall oppressive atmosphere and conditions surrounding the making of the statement, coupled with the undermining of counsel's advice to Mr. Bouthillette, resulted in his will being overborne and his right to choose to remain silent or speak to the police being rendered meaningless. As a result, I have a reasonable doubt about the voluntariness of the statement.

[138] Having found that the Crown has not established the voluntariness of Mr. Bouthillette's statement, it is not admissible in evidence at his trial.

"Ker J."

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