*Case Name:*

# R. v. MacLean

**Between**
**Her Majesty the Queen, Crown, and**
**Matthew Richard MacLean, Accused**

[2013] A.J. No. 94

2013 ABQB 60

Docket: 111312260Q1

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

**V.O. Ouellette J.**

Heard: November 19-23, 2012.
Judgment: January 23, 2013.

(101 paras.)

*Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- Right to be informed of the specific offence -- Right to retain and instruct counsel without delay -- Waiver of -- Remedies of denial of right -- Specific remedies -- Exclusion of evidence -- Statements made by accused during police interviewer not admissible due to breaches of ss. 10(a) and 10(b) of Charter -- Accused charged with sexual assault and sexual interference -- Accused only given minimal information about the alleged offences -- Accused not given adequate information to allow him to make reasonable decision to submit to questioning or to exercise his right to counsel -- Officer failed to comply with s. 10(b) informational duty and implementational duty of providing accused with opportunity to contact counsel and by failing to refrain from questioning accused until he had a reasonable opportunity to contact counsel.*

Voir dire to determine the admissibility of voluntary statements made by the accused during a police interview. The accused was charged with sexual assault and sexual interference. The 15-year old complainant had worked with accused for four days over three months before the charges were laid. Upon his arrest, the accused was advised he was under arrest for sexual assault and sexual interference. The accused was not provided with any information as to the actual nature of the allegations until 35 minutes into the interview, and even then, was provided minimal information. He was not informed as to when the allegations were alleged to have taken place, where the allegations were to have taken place, or who the complainant was. It was not until nearly an hour into the interview that he was advised as to the

complainant's name. It was at that point that he indicated he should call a lawyer. Twice during the interview that accused indicated he wanted to contact counsel. He was not given access to a telephone and the officer continued to question him. The accused was also not advised of the toll free legal aid number and of the availability of a legal aid lawyer. The accused argued that his rights under ss. 10(a) and 10(b) of the Charter were breached.

HELD: The statements were not admissible. The accused's rights under ss. 10(a) and 10(b) of the Charter were breached. The accused was not given adequate information to allow him to make a reasonable decision to submit to questioning or to exercise his right to counsel. Merely providing the nature of the allegation, without providing any time frame, or where the alleged offenses had occurred, would not allow an individual to exercise their s. 10(b) rights in any meaningful way because they would not have any idea of what jeopardy they might be facing. Although an accused person, upon arrest or detention, need not be informed of the specific details of the charges or allegations made against him, an accused was not required to speculate about the nature of the matter for which he was being investigated. The officer's failure to advise the accused of the most basic nature of the allegations under investigation violated his s. 10(a) rights. There was nothing to indicate that he would reasonably have known or understood the incident or the matter for which he was under arrest until he was finally advised of the complainant's name and that she was a co-worker under the age of 16 in Edmonton during the summer of 2011. The violation of s. 10(a) directly affected the accused's s. 10(b) right. The officer initially breached his s. 10(b) right when she failed to comply with her informational duty and the implementational duty of providing a detainee with a reasonable opportunity to exercise his right to counsel once a desire to exercise that right was indicated. The implementational duty of refraining from eliciting evidence from the accused until he had a reasonable opportunity to contact counsel was also breached. As a result of the failure to inform the accused of at least the basics of why he was under arrest, his apparent waiver, based on insufficient information, was invalid. The seriousness of the right to counsel was significant. The deliberate nature of the officer's actions negated considerations of good faith. The Charter breaches could have been avoided with reasonable due diligence. The evidence obtained in breach of the accused's Charter rights was thus excluded.

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 10(a), s. 10(b), s. 24(2)

**Counsel:**

Shelley J. Bykewich, Alberta Justice, for the Crown.

Rory **Ziv,** for the Accused.

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**Memorandum of Decision**

V.O. OUELLETTE J.:--

**I. Introduction**

**1** Matthew MacLean ("MacLean") is charged with sexual assault and sexual interference. During the police investigation, he provided a voluntary statement.

**2** The Crown wishes to have the option to use the statement in cross-examination to impeach the credibility of MacLean, should he decide to testify.

**II. Issues**

A. Has s. 10(a) of the *Canadian Charter of Rights and Freedom* (*Charter*) been breached?
B. Has s. 10(b) of the *Charter* been breached?
C. If s. 10(a) or s. 10(b) or both have been breached, should the statement be ruled inadmissible pursuant to s. 24(2) of the *Charter*?

**III. Facts**

**3** MacLean is charged with committing a sexual assault and sexual interference against H.J. on or about July 27, 2011 in Edmonton, Alberta. H.J. was 15 years old in July 2011. After an encounter with MacLean in July, she contacted the police on August 6, 2011. On August 6, 2011, Constable Kelly Fradley ("Cst. Fradley"), the investigating officer, met with H.J. and conducted an interview. H.J. advised that she and MacLean had both been employed at the Capital Ex in July 2011 and that she did not know MacLean before her employment at the Capital Ex. It was later discovered that the employment of MacLean in Edmonton was for a duration of no more than four days.

**4** On November 1, 2011, Cst. Fradley was advised by the Calgary Police Service that MacLean had been arrested for bylaw infractions. The next day, she met with MacLean in a Calgary jail and told him he was under arrest for sexual assault and sexual interference. She advised him, reading from her notebook, as to *Charter* rights including s. 10(b). She then asked MacLean, "Do you understand?" and noted his response to be "Yes". She then asked him if he wanted to call a lawyer to which he indicated "I want to talk to you first, I didn't do nothing". Cst. Fradley indicated that she then read the waiver to which MacLean said "I want to talk to you first. I did not do anything wrong." She further indicated that she asked him again if he wanted to waive his right to call a lawyer, to which he responded "Yes".

**5** Cst. Fradley then had MacLean transferred to another police facility in Calgary to conduct a videotaped interview.

The interview commenced at 12:31 and was completed at 15:04. The following is a chronology of the events that occurred during the interview which are relevant to the issues of s. 10(a) and 10(b):

12:24 - MacLean is placed into the interview room.

12:31 - Cst. Fradley entered the interview room and told MacLean that she would introduce herself properly. She indicated that she was a Constable with the Edmonton Police Service and that she was investigating a file for a little while and that he was a suspect. MacLean asked if she was looking at different people or just himself, to which Cst. Fradley indicated that she would firstly go over his rights.

12:32 - Cst. Fradley asked MacLean what he understood sexual assault to mean. MacLean answered "I don't really know much about it. I don't know."

12:33 - There is discussion about MacLean's daughter.

12:35 - Cst. Fradley asked MacLean about his understanding about sexual assault and then proceeded to tell him what she believed sexual assault to be. She defined sexual assault as an assault of a sexual nature where there is a lack of consent. She then went on to define sexual interference as the same as sexual assault, meaning there is a lack of consent, and further that the person is under the age of 16.

12:37 - After more discussion about definitions, MacLean indicated that he knew his rights and that he was very clear what she was getting at.

12:37 - Cst. Fradley indicated that she had to go over some formalities and began to go over a pre-printed form (Appendix A). Cst. Fradley read the following from the form: "You may be/will be/are being charged with: sexual assault, sexual interference." She then read him the pre-printed portion of the form which is the following: "You have the right to retain and instruct a lawyer without delay. This means that before we proceed with our investigation, you may call any lawyer you wish or a lawyer from a free legal advice service immediately. If you want to call a lawyer from a free legal advice service, we will provide you with a telephone and you can call a toll free number for immediate legal advice. If you wish to contact any other lawyer, a telephone and telephone books will be provided to you. If you are charged with an offense, you may apply to Legal Aid for assistance. Do you understand?" MacLean replied "Yes". Cst. Fradley then read from the form "Do you want to call a free or any other lawyer?" and MacLean said "Yes".

12:38 - Immediately after MacLean answered "Yes", Cst. Fradley failed to read to him the following portion of the pre-printed form "All persons detained in police custody have the right to immediate legal advice regardless of their financial status. De-

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| | tained persons also have the right to choice of counsel. You may choose to use the appropriate free legal advice number, or the telephone books provided to contact a lawyer of your choice. The free legal advice number is (provide appropriate number): Adult all times 1-866-653-3424, Youth all times 422-8383". |
| 12:38 - | After McLean said yes, that he wanted to call a lawyer, Cst. Fradley asked him the following: "Do you want to call a lawyer right this second?" and MacLean responded that he wanted to hear from her. |
| 12:39 - | Cst. Fradley then went to the waiver portion of the pre-printed form and read the following: "You have the right to a reasonable opportunity to contact a lawyer. I am obliged not to take a statement from you or ask you to participate in any process that might provide evidence against you until you are certain about whether you want to exercise this right. Do you understand?" to which MacLean responded "Yes". Cst. Fradley then read the next sentence, "Do you want to waive your right to contact a lawyer?" and MacLean responded "What do you mean, waive my right?". Cst. Fradley stated: "Do you waive your right this minute?" Cst. Fradley then read the standard caution to which MacLean responded "What if I say I don't want to deal with this stuff?" to which Cst. Fradley replied that she was doing an investigation and they were going to sit and have a chat. |
| 12:40 - | The discussion was of the waiver to which the Cst. Fradley confirmed that MacLean did not want to call a lawyer "this second", but told him that if he wanted to, she would get him a phone. |
| 12:40 - | General conversation about MacLean's background - being from Nova Scotia, his 8 year old daughter, his employment, his problems with drug addiction and methadone, other names that he might be going by and his drug treatment program at the Hope Center. |
| 12:54 - | MacLean states "These allegations ... it's disturbing, I know nothing." |
| 12:57 - | Cst. Fradley, for the first time, indicates that she was provided with a complaint from a female that MacLean had sexual contact in the month of August and that she was 15 years old at the time. |
| 12:58 - to 13:07 | MacLean, in discussion with Cst. Fradley, talks about his employment in August being in Calgary and various other employments, and that part of it may have been in Edmonton for a few days. |
| 13:07 - to 13:20- | MacLean asked "Why all this turmoil? Why are you asking all these things?" The conversation then shifts to how he would get paid and a girl who would have worked in the duck booth at the Capital Ex. |
| 13:20 - | MacLean asks Cst. Fradley "I have to ask, so what is this all about?". Cst. Fradley responded that it was about H.J. (providing her first name only). This was the first mention of H.J. and the first time that Cst. Fradley told MacLean who the complainant was. |
| 13:21 - to | General conversation and questions by Cst. Fradley to MacLean regarding women |

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| 13:27 | and sexual encounters with women during his stint of work at the Capital Ex in Edmonton. |
| 13:28 - | MacLean stated, after discussing drinking with one of the females at the casino who he had "hooked up" with, "That's why I'm so baffled. I don't understand. Whatever this is, it's crazy. We were drinking at the casino..." and making reference to legal age and indicating that he had been ID'd. |
| 13:30 - | MacLean asked Cst. Fradley what this person was saying. Cst. Fradley went on to explain that it was not a situation where he has forced himself upon the complainant, but that she was 15 years and could not legally consent. Further, that the allegation was not that he had sexual intercourse with someone under the age of 16. |
| 13:32 - to 13:42 | More general conversation about the women who MacLean "hooked up" with in Edmonton. |
| 13:42 - | MacLean asked "what is this person saying?" and further asked that he be told about H.J., stating that he didn't know her, and asked Cst. Fradley if she had a picture of her to which she responded - no. |
| 13:43 - | Cst. Fradley explained that H.J. was a girl who worked in a booth next to him. |
| 13:44 - | MacLean stated that he couldn't explain something that he didn't understand. |
| 13:45 - | Cst. Fradley is about to leave the room and MacLean states "I think I should call a lawyer". Cst. Fradley tells him that she will be back and that they will get things "sorted out". Cst. Fradley returned to the room at 13:53 and immediately asked the accused "Do you want to speak with a lawyer right now?" to which MacLean responded "Yeah, I should because I don't know what's going on." Cst. Fradley asked MacLean if he had a specific lawyer in mind or if he needed access to phone books and the Legal Aid number. Cst. Fradley then stated "I just want to make sure I get the appropriate things together for you." MacLean responded "Yeah, something."Cst. Fradley indicated that she would go let them know, but before she left the interview room, MacLean asked "So what's going on here?" Cst. Fradley stopped and said "I'm open to keep chatting but you've indicated that you want to speak to a lawyer so it's my responsibility to make sure you do that if that's what you want to do." Cst. Fradley then added "Do you want to keep talking or do you want to talk to a lawyer now? I do have some other things I want to talk to you about." MacLean responded, "I'll listen to you, yeah." then Cst. Fradley left the room. |
| 13:55 - | Cst. Fradley returned to the interview room and stated "At any time, you tell me you want to speak to a lawyer, you let me know and I'll make those arrangements for you." MacLean responded "I understand". |
| 13:56 - to 15:04 | MacLean is further questioned by Cst. Fradley. |

**IV. Position of the Crown**

**6** It is the Crown's position that Cst. Fradley met the requirements of s. 10(a) because MacLean was told of the charges or jeopardy he was facing, i.e. sexual assault and sexual interference. Further, that s. 10(a) does not require a police officer to provide the complainant's name or where or when the alleged offence occurred.

**7** In regards to s. 10(b), the Crown argues that both the informational and implementational requirements were met. Further, that in any event, MacLean waived his s. 10(b) right.

**8** Lastly, even if s. 10(a) and s. 10(b) have been breached, that the proper s. 24(2) analysis would not warrant the exclusion of the statement. The Crown submits that the accused knew what was going on and knew his rights.

**V. Position of the Accused**

**9** MacLean argues that the facts of this case required Cst. Fradley to provide more details of the reasons for the arrest besides simply stating sexual assault and sexual interference. He argues that the reasons required at the very least that the name of the complainant be given. Further, that the reasons given by Cst. Fradley did not allow him to make an informed decision as to whether or not to call a lawyer.

**10** MacLean also submits that his s. 10(b) was violated. MacLean argues that Cst. Fradley had an obligation to stop questioning and provide him the opportunity to consult with a lawyer. Further, MacLean submits the Crown has not proven that he unequivocally waived his s. 10(b) rights.

**11** Lastly, MacLean argues that a breach of either s. 10(a) or s. 10(b), or both, should result in the statement being deemed inadmissible pursuant to s. 24(2) of the *Charter*.

**VI. The Law**

A. Section 10(a) of the *Charter*

**12** Section 10(a) states that "everyone has the right on arrest or detention to be informed promptly of the reason therefore".

**13** Individuals who are detained for investigative purposes must be advised in clear and simple language of the reasons for the detention (***R. v. Mann***, 2004 SCC 52 at para. 21). Advising an accused of their reasons for detention is more than a formal requirement. It is necessary because an individual can only meaningfully exercise their s. 10(b) right if he/she knows the extent of his/her jeopardy (***R. v. Black***, [1989] 2 S.C.R. 138 at para. 24). In assessing whether the s. 10(a) requirement has been met, it is the substance of what the accused can reasonably be supposed to have understood in the context of the circumstances and the case, rather than the formalism of the precise words used (***R. v. Evans***, [1991] 1 S.C.R. 869 at para. 35 and ***R. v. S.E.V.***, 2009 ABCA 108 at para. 22).

**14** To determine if the requirements of s. 10(a) are met, the question is whether the accused can reasonably be supposed to have understood the basis for the investigation (***Evans*** at para. 35 and ***S.E.V.*** at para. 23). If, on the facts and circumstances of the case an accused would reasonably understand the basis for his apprehension or for his arrest or detention and the extent of his jeopardy, then the requirements of s. 10(a) are met (***R. v. Latimer***, [1997] 1 S.C.R. 217 at para. 31).

**15** The purpose of communicating the information to the accused is to enable the person under arrest or detention to immediately undertake his/her defence, including a decision as to what response, if any, to make to the accusation (***Evans*** at para. 2). The information given to the accused must be sufficient to permit the accused to make a reasonable decision to either submit to detention or assert his right to counsel.

**16** A change in jeopardy may require that an individual being questioned be re-advised of their right to counsel and re-cautioned. The change in jeopardy must involve a fundamental and discrete change in the purpose of the

investigation such as a different and non-related offense, a significantly more serious offense or additional offenses (***Black*** at para. 25, ***Evans*** at para. 48). However, it is not a change in jeopardy for a detainee to learn more about the evidence against him during the interview (***S.E.V.*** at para. 27).

B. Section 10(b) of the *Charter*

**17** Section 10(b) states "Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of the right." As stated in ***R. v. Willier***, 2010 SCC 37 at para. 28: "Section 10(b) provides detainees with an opportunity to contact counsel in circumstances where they are deprived of liberty and in the control of the state, and thus vulnerable to the exercise of its power and in a position of legal jeopardy. The purpose of s. 10(b) is to provide detainees an opportunity to mitigate this legal disadvantage."

**18** In ***R. v. Prosper***, [1994] 3 S.C.R. 236 at para. 34 and ***R. v. Bartle***, [1994] 3 S.C.R. 173 at para. 17, the Supreme Court of Canada outlined the State's obligation under s. 10(b). The Court held that when someone is arrested or detained, the following duties are imposed on the State authorities:

1) To inform the detainee of his/her right to instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel;
2) If a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise that right (except in urgent and dangerous circumstances);
3) To refrain from eliciting evidence from the detainee until he/she has had that reasonable opportunity (again, except in urgent and dangerous circumstances).

**19** The first duty has been called an "informational duty" and the second and third duties are "implementational duties". The implementational aspect of the right implies a duty on State authorities to afford the detainee a reasonable opportunity to consult counsel. As soon as the right is asserted, the police must assist the detainee in exercising the right without delay (***R. v. Manninen***, [1987] 1 S.C.R. 1233 at para. 22).

**20** The second implementational aspect of s. 10(b) imposes the duty to stop questioning or attempting to elicit evidence from the detainee until he/she has had a reasonable opportunity to retain and instruct counsel (***R. v. Burlingham***, [1995] 2 S.C.R. 206 at para. 13). Once there has been an assertion of the right to counsel and in the absence of a clear waiver, questioning must cease until the detainee has consulted counsel (***Manninen*** at para. 23).

**21** The purpose of the right to counsel is to allow the detainee to be informed of his/her rights and obligations under the law and to obtain advice as to how to exercise those rights. Failure to comply with any of these duties frustrates the purpose of s. 10(b) and results in a breach of the detainee's rights.

**22** In ***R. v. Luong***, 2000 ABCA 301 at para. 12, Berger J.A. provides a step-by-step analysis meant to guide trial judges dealing with s. 10(b) issues. Steps 7 through 11 are particularly relevant:

7. A trial judge must first determine whether or not, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel; the Crown has the burden of establishing that the detainee who invoked the right to counsel was provided with a reasonable opportunity to exercise the right.
8. If the trial judge concludes that the first implementation duty was breached, an infringement is made out.
9. If the trial judge is persuaded that the first implementation duty has been satisfied, only then will the trial judge consider whether the detainee, who has invoked the right to counsel, has been reasonably diligent in exercising it; the detainee has the burden of establishing that he was reasonably diligent in the exercise of his rights. *R. v. Smith*, (1989), 50 C.C.C. (3d) 308 (S.C.C.) at 315-16 and 323.

10. If the detainee, who has invoked the right to counsel, is found not to have been reasonably diligent in exercising it, the implementation duties either do not arise in the first place or will be suspended. *R. v. Tremblay* (1987), 37 C.C.C. (3d) 565 (S.C.C.) at 568; *R. v. Ross* (1989), 46 C.C.C. (3d) 129 (S.C.C.) at 135; *R. v. Black* (1989), 50 C.C.C. (3d) 1 (S.C.C.) at 13; *R. v. Smith*, supra, at 314; *R. v. Bartle*, supra, at 301 and *R. v. Prosper* (1994), 92 C.C.C. (3d) 353 (S.C.C.) at 375-381 and 400-401. In such circumstances, no infringement is made out.
11. Once a detainee asserts his or her right to counsel and is duly diligent in exercising it, (having been afforded a reasonable opportunity to exercise it), if the detainee indicates that he or she has changed his or her mind and no longer wants legal advice, the Crown is required to prove a valid waiver of the right to counsel. In such a case, state authorities have an additional informational obligation to "tell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity" (sometimes referred to as a "Prosper warning"). *R. v. Prosper*, supra, at 378-79. Absent such a warning, an infringement is made out.

**23** In ***R. v. Sinclair***, 2010 SCC 35, the Supreme Court stated that "In most cases, the initial warning, coupled with a reasonable opportunity to consult counsel when the detainee invokes the right, satisfies s. 10(b)" (***Sinclair*** at para. 2). The right to counsel is "essentially a one time matter" except with a few recognized exceptions (***Sinclair*** at para. 64).

**24** The police must also provide an additional opportunity to contact counsel where developments in the investigation in question make this necessary to allow the accused to obtain legal advice on whether they should choose to cooperate with the investigation or not. A second consultation with a lawyer should be provided where a change in circumstances results from new procedures involving the detainee, a change in jeopardy facing the detainee, or a reason to believe that the first information provided was deficient (***Sinclair*** at para. 2).

**25** The necessary implication is that any consultation with counsel, after the initial consultation, is optional and at the discretion of the police, other than in three circumstances identified above (***R. v. Briscoe***, 2012 ABQB 111 at para. 113). Further, police investigators do not have an obligation to provide additional access to a lawyer after having promised that access if an initial consultation between the detainee and counsel has occurred (***Briscoe*** at paras. 114 and 119).

C. Section 24(2) of the *Charter*

**26** The exclusion of evidence is governed by section 24(2) of the *Charter*. Section 24(2) states:

> 24(2) Where ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

**27** S. 24(2) is generally concerned with "whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence": ***R. v. Grant***, 2009 SCC 32 at para. 68. The analysis starts from the position that there has already been a breach of the *Charter* and that this fact has already brought the administration of justice into disrepute: ***R. v. Simpenzwe***, 2009 ABQB 579 at para. 48. The goal of s. 24(2) is to ensure that admission of evidence obtained through breach of the rights of the accused does not further damage the repute of the justice system beyond any damage caused by the initial breach of the accused's rights: ***Grant*** at para. 69.

**28** A court must determine whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute under three lines of inquiry: (1) the seriousness of state conduct; (2) the seriousness of the impact of the *Charter* violation on the *Charter*-protected interests of the accused; and (3) society's

interest in an adjudication on the merits: ***Grant*** at para. 71.

**29** The first line of inquiry involves an evaluation of the seriousness of the state conduct. The more serious the conduct, "the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law": ***Grant*** at para. 72.

**30** The second line of inquiry involves the seriousness of the impact on the accused. The *Charter* violation may be a minor and technical breach or if may be an egregious and intrusive violation. A court must look to the interests engaged by the infringed right and examine the degree to which the violation impacts those interests: ***Grant*** at para. 77. The more serious the impact on the accused's *Charter* rights, the more the admission of the evidence is likely to bring the administration of justice into disrepute: ***R. v. Côté***, 2011 SCC 46 at para. 47.

**31** The third line of inquiry involves the Court determining whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the evidence: ***Grant*** at para. 79. A court must weigh the fact that evidence obtained in violation of the *Charter* may help the trier of fact find the truth against the other factors which may favour exclusion: ***Grant*** at para. 82. The reliability of the evidence and its importance to the prosecution's case are key factors. Admitting unreliable evidence does not serve the accused's fair trial interests nor the public's desire to uncover the truth. On the other hand, excluding reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair: ***Grant*** at para. 81. Admitting evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the whole of the Crown's case. However, excluding reliable evidence may more negatively affect the truth-seeking function of the criminal law process where it makes up the entirety of the prosecution's case: ***Côté*** at para. 47.

**32** After considering these three factors, a court must balance each line of inquiry in making a determination under s. 24(2). There is no "overarching rule" and none of these three factors trump any other factor: ***Grant*** at para. 86. Rather, "[t]he evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute": ***R. v. Harrison***, 2009 SCC 34 at para. 36. The balancing is not to measure the approval or disapproval in a particular case and is meant to consider the broader effect of judicially condoning serious *Charter* breaches by allowing the state to have evidence it should not have: ***R. v. M.A.R.***, 2011 ABCA 98 at para. 64.

**VII. Analysis**

A. Section 10(a)

**33** The question is whether MacLean was been given adequate information to allow him to make a reasonable decision to submit to questioning or to exercise his right to counsel. It is the substance of the information provided by the police and what an accused can be reasonably supposed to have understood that determines whether or not the requirements of the s. 10(a) right have been met.

**34** At the time of the arrest, Cst. Fradley met MacLean, who was already in custody for other minor matters relating to bylaw infractions, in a Calgary jail cell. The facts, as disclosed, are prior to that MacLean had been attending a drug rehabilitation program.

**35** The only information that she provided to him at that point in time was that he was under arrest for sexual assault and sexual interference. During this initial period of arrest prior to being taken an hour and a half later to another Calgary jail facility, MacLean was not informed as to when the allegations were alleged to have taken place, where the allegations were to have taken place, or who the complainant was. One has to ask what he could have reasonably understood to be the jeopardy he was facing on November 2, 2011. It could be argued that he could have reasonably understood that the allegations originated out of Edmonton, since the police officer arresting him was a member of the Edmonton Police Service.

**36** The question therefore is, at the time of the arrest at approximately 11:00 a.m. on November 2, 2011, was MacLean promptly informed of his reasons for arrest? As we now know, the allegations are alleged to have occurred some three months prior to his arrest in Edmonton, Alberta, with a complainant whom he would have known for no more than four days. In all of the circumstances and the context of this case, would it be sufficient to simply advise him that he was under arrest for sexual assault and sexual interference?

**37** The answer is no.

**38** I am of the view that merely providing the nature of the allegation, without providing any time frame, or where the alleged offenses have occurred, would not allow an individual to exercise their s. 10(b) rights in any meaningful way because they would not have any idea of what jeopardy they may be facing.

**39** Assuming that it is enough at the initial arrest to simply to provide the bare bones of the allegations, one must still look at whether or not the reasons for arrest provided at the videotaped interview would be considered prompt and whether they would be sufficient.

**40** Cst. Fradley did not commence the videotaped interview by advising MacLean that he may be, or was, or would be charged, with sexual assault or sexual interference. Cst. Fradley simply stated that she had to introduce herself properly as a Constable with the Edmonton Police Service and that she was investigating a file in which MacLean was a suspect. She then went into a conversation with MacLean regarding what he believed and what he understood to be the definition of sexual assault and sexual interference. She went on to provide her own definitions and explanations. In regard to her explanation of sexual interference, she incorrectly provided the definition as being the same as a sexual assault with the additional factor of the person being under the age of 16 years old, indicating that the issue of lack of consent was not only related to age but to actual consent. Finally, at 12:37, Cst. Fradley indicated that she had to go over some formalities, meaning providing MacLean with his *Charter* rights by using the pre-printed form (Appendix A).

**41** MacLean continued to state that he would probably call a lawyer once he knew what Cst. Fradley was talking about. Thus, it is clear from the videotaped interview that MacLean still did not know what was going on at the time Cst. Fradley went over the pre-printed form and asked whether or not he was going to waive his right to call a lawyer.

**42** At 12:57, approximately 35 minutes into the interview. Cst. Fradley indicated she was investigating a complaint of sexual contact by a complainant who was 15 at the time of the contact. This occurred after the s. 10(b) rights had already been read. Even at that point in time, Cst. Fradley did not mention who the complainant was and through her questioning, it could have been reasonably supposed by MacLean that the allegations were related to an event that occurred in August, not July. This is because Cst. Fradley was asking MacLean about his work in Edmonton in August.

**43** It was not until 13:20, nearly an hour into the interview, that Cst. Fradley, after persistent questioning by MacLean asking what "this [the interview] was all about", told MacLean that the complainant's first name was H.J. It was not until 13:43, approximately an hour and 20 minutes into the interview, that Cst. Fradley informed MacLean that the allegations of sexual assault and sexual interference being made by H.J. were allegations being made by someone who worked at Capital Ex with MacLean. It is at that point that MacLean stated that "I think I should call a lawyer".

**44** In summary, Cst. Fradley did not initially provide MacLean with the name of the complainant in relation to the charges, nor the alleged dates of the offenses, nor where they were alleged to have occurred. It could be presumed that during the course of the first 35 minutes of the videotaped interview that MacLean could have been reasonably expected to understand that whatever the allegations were, that they were likely to have occurred in Edmonton, Alberta. He would have likely understood based on the questions or suggestions of the investigating officer, that the allegations had occurred in August, 2011 (which we know is not correct).

**45** In this case, MacLean was not provided any information as to the actual nature of the allegations until 35 minutes into the interview, and even then, was provided minimal information. It was not until nearly an hour into the interview

that MacLean was advised as to the complainant's name. It was not until approximately an hour and 20 minutes into the interview that he was actually told why he was under arrest, that being that there was a complaint by a person named H.J. and that he had sexual contact with her when she was only 15 years of age. It is at that point that the videotaped interview shows that MacLean understood his jeopardy because he said "I think I should call a lawyer".

**46** It should be noted that an accused person, upon arrest or detention, need not be informed of the specific details of the charges or allegations made against him. However, an accused is also not required to speculate about the nature of the matter for which he is being investigated. Police have an obligation to tell a detainee sufficient detail so that the detainee can assess the scope of jeopardy. Without such information, a detainee is not in a position to make an informed decision about whether or not to consult counsel (***R. v. Small***, 1998 ABCA 85 at para. 30).

**47** I recognize that not all situations or cases require that, for example, the name of the victim or complainant be provided in order to comply with s. 10(a). The Alberta Court of Appeal in ***R. v. Jackson***, 2005 ABCA 430, held that the appellant "has not shown that he must be provided with the circumstances of the offense, including the identity of the deceased, in order to satisfy s. 10(a)" (para. 25). This was a result of the trial judge finding that the appellant's testimony was untruthful on many points and that the appellant had not met the onus of proving a *Charter* breach. The circumstances of the offense and the context in ***Jackson*** were such that the identity of the complainant or victim should have been known to the accused. That does not mean that ***Jackson*** stands for the proposition that police never have to identify a complainant in order to satisfy s. 10(a) of the *Charter*.

**48** A s. 10(a) breach may result if an accused can satisfy the Court that the failure of the police to provide the identity of the complainant affected the accused's ability to make a reasonable decision to either submit to detention or to assert his right to counsel. The key question is whether the accused would have understood the substance of the incident or matter for which he was being detained. All of the circumstances must be considered and an accused bears the onus of proving that the lack of information caused a breach.

**49** In ***R. v. Koivisto***, 2011 ONCJ 307, the Court ruled that the accused's rights were violated when the police officer conducting the interview failed to state who the complainant was and what the allegations entailed. The Court held that "Detainees are not to be guessing and speculating on what the allegations are and who the complainant is during the course of a police interrogation. The detainee cannot voluntarily decide to participate in an interview when he does not know what the subject matter of the interview is." (***Koivisto*** at para. 71).

**50** The rationale in ***Koivisto*** is persuasive as the failure to communicate a specific allegation and identity of a complainant to an accused may undermine his right to counsel and prevent an accused from making an informed and voluntary decision on whether to participate in the interview.

**51** In this case, the failure of Cst. Fradley to advise MacLean of the most basic nature of the allegations under investigation violated his s. 10(a) rights. The most basic nature of the allegations in this particular context would have to include a reference as to time, due to the length of the time between the alleged allegations and the time of arrest. Also, in the specific context of this case and having regard to the nominal connection to Edmonton by MacLean, he should have been informed that the allegations originated in Edmonton.

**52** Lastly, because of the very limited contact between the complainant and MacLean, her name should have been provided. The videotaped interview discloses that MacLean was "guessing and speculating" during the interrogation until he was finally informed of the subject matter and the complainant's identity. Prior to being informed of the complainant's identity, MacLean asked several questions as to what was going on, why he was there, what it was all about, and why he was being asked all of the questions. Approximately one hour and 15 minutes into the interview, MacLean asked to see a picture of the complainant to see who H.J. was.

**53** There is nothing to indicate that MacLean would reasonably have known or understood the incident or the matter for which he was under arrest until he was finally advised of the complainant's name and that she was a co-worker

under the age of 16 while employed at the Capital Ex in the booth next to him in Edmonton during the Summer of 2011.

**54** The circumstances of this case are distinguishable from those in ***S.E.V.***. In ***S.E.V.***, the accused's knew it was an allegation from the night before the interview involving allegations of his less than 14 year old sister-in-law (para. 24).

**55** In ***Evans***, both the majority and Sopinka J. relied on ***Christie v. Leachinsky***, [1947] AC 573, at pp. 587-588, that the right to be informed of the true grounds for arrest or detention require that the detainee be informed in sufficient detail that he/she "know in substance the reason why it is claimed that this restraint should be imposed". Sopinka J. went on to state that it would not be unreasonable to expect that the detail that is included when an arrest is made pursuant to a warrant, also be provided when an arrest occurs without a warrant. I take that to mean that the accused be provided sufficient detail to know the substance of the reason for the arrest. Sopinka, J. (para. 2) went on to state the following:

> The purpose of communicating this information to the accused in either case is *inter alia*, to enable the person under arrest or detention to immediately undertake his/her defence, including a decision as to what response, if any, to make to the accusation. It seems axiomatic, therefore, that this information should be conveyed prior to questioning and obtaining a response from the person under arrest or detention. These basic and important values are included in s. 10(a) of the *Charter*.

**56** I am of the view that the meaning of "reasons therefore" as contained in s. 10(a) require that a detainee be provided at least the basic information in order to make a determination as to whether he/she should contact counsel and also in order to permit meaningful advice be provided by counsel in the event that right is exercised.

**57** However, there are certain cases which, due to the circumstances and the context, obviously would not require police to provide the approximate date of the alleged allegation or the approximate location, city or town. One such example would be an allegation of impaired driving causing bodily harm where the police come upon the scene of an accident. Clearly in that situation, an accused need not be told more than he/she is under arrest for impaired driving causing bodily harm since it would be clearly known to the accused that the allegation he is facing is at the location of the accident and on that particular day.

**58** Therefore, the closer in time and proximity of location to the allegations, the less detail that may be required to be provided by the investigating officer to satisfy s. 10(a). This was the situation addressed in ***Jackson***.

**59** It is difficult to understand why a police officer would not provide at least the information which is contained in the formal charging document such as an information or indictment, that is, the date, location, allegation, and identity of the person making the allegation (if known). Providing this very basic, bare-boned information, surely would not hinder or curtail the investigating officer in seeking to obtain more information or a confession from an accused person. Without a detained person being informed, for example as to the alleged offense date, it would be impossible to provide meaningful responses to a police officer in the event of a potential alibi.

**60** Finally, the police are not to arbitrarily arrest or detain an individual unless they have formed the opinion that they have reasonable and probable grounds to believe that person committed an offense or is about to commit an offense. As a result, it is not unreasonable to conclude that in order to give effect to s. 10(a) of the *Charter*, that the person arrested be at least provided the basics of those reasonable and probable grounds for which he is under arrest. In this case, it is not until approximately an hour and 20 minutes into the interview that the investigating officer truly indicated, in the most basic sense, what the allegations against MacLean were by stating that he had a sexual encounter with H.J. in Edmonton while employed at Capital Ex and that complainant was only 15 years of age, therefore unable to consent.

**61** It is my view that this most basic information, in the circumstances of this case where MacLean is arrested more than three months after the alleged one time encounter in a different city, was required to be provided to him as the reasons for his arrest. Only then would MacLean not be guessing or speculating why he was under arrest, as is clear

from the videotaped interview

B. Section 10(b)

**62** In this case, the violation of s. 10(a) directly affected MacLean's s. 10(b) right. The failure of Cst. Fradley to communicate sufficient reasons for his arrest undermined and violated MacLean's right to counsel. MacLean could not obtain the legal advice necessary in the absence of this information.

**63** Cst. Fradley initially breached MacLean's s. 10(b) right when she failed to comply with her informational duty and the first implementational duty of providing a detainee with a reasonable opportunity to exercise his right to counsel once a desire to exercise that right is indicated. When the interview was in its initial stages, MacLean was not placed into a phone room and was not given a reasonable opportunity to contact counsel and exercise his s. 10(b) right. This should have occurred at 12:37, when he responded "yes", he wished to call a lawyer (see Appendix A). However, he was not given access to a telephone before the questioning began. After MacLean responded "yes", Cst. Fradley continued, failing to inform MacLean that he had a right to immediate legal advice regardless of his financial status and that there was a number for free legal advice. In failing to do so, Cst. Fradley breached her informational duty.

**64** Further, MacLean's s. 10(b) *Charter* right was violated again when Cst. Fradley did not provide him with a reasonable opportunity to contact counsel after his attempts to exercise that right. He clearly asserted his right to counsel at 13:45 of the videotaped interview when he stated "I think I should call a lawyer" and when he responded to Cst. Fradley's question of whether he wanted to speak to a lawyer at that moment with "yeah, I should because I don't know what's going on". At this point, Cst. Fradley had the obligation to again comply with the first implementational duty required by s. 10(b). She did not do so for the second time.

**65** The second implementational duty of refraining from eliciting evidence from MacLean until he had a reasonable opportunity to contact counsel was also breached. Instead of "holding off" and honouring and attempting to facilitate MacLean's request to speak with a lawyer, Cst. Fradley stated that she was open to "keep chatting" and that she still had some things she wanted to talk about. She continued the interview and continued to attempt to elicit information from MacLean. This was a clear breach of the implementational duty required by s. 10(b) and any statement made by MacLean after this breach was the fruit of that breach.

**66** This case is very similar to the case of ***Small***. In ***Small***, the accused said that "maybe he should" contact a lawyer. However, he was then immediately invited by the police officer to tell "his side of the story". The Alberta Court of Appeal held that this was a breach because the officer was obliged to pursue the issue further and to obtain a clear and unequivocal waiver or afford the accused a reasonable opportunity to exercise his right to counsel once it was asserted by the accused (***Small*** at para. 34). The Court found there was a plain breach of the accused's s. 10(b) right because the police not only failed to hold off from questioning the accused but also shifted promptly into questioning the accused after he asserted his right to counsel.

**67** In this case, Cst. Fradley failed to hold off from questioning once MacLean asserted his right to counsel and failed to provide him a reasonable opportunity to contact counsel. She also failed to obtain a clear and unequivocal waiver. These were clear violations of MacLean's s. 10(b) right to retain and instruct counsel without delay.

**68** With respect to the issue of waiver, it is clear that a detainee can expressly or implicitly waive his/her right to counsel. Where an accused denies that he/she has waived that right, the Crown has the burden of establishing that the accused has done so. The standard of establishing the waiver is high, as discussed in ***Bartle*** at para. 18.

**69** A detained person cannot be expected to make an informed choice to either retain counsel or waive the right unless he/she is given or is possessed of information about the matter under investigation, sufficient to identify the circumstances and alert the detainee to the scope to his/her jeopardy (***R. v. Smith***, [1991] 1 S.C.R. 714 at para. 27 and ***R. v. Brydges***, [1990] 1 S.C.R. 190 at para. 14). As stated by the Supreme Court of Canada in ***Smith*** at para. 28:

> "To establish a valid waiver of the right to counsel, the trial judge must be satisfied that in all the circumstances revealed by the evidence, the accused generally understood the sort of jeopardy he faced when he/she made the decision to dispense with counsel. The accused may not be aware of the precise charge faced. Nor may the accuse be made aware or all the factual details of the case. What is required is that he/she be possessed of sufficient information to allow making an informed and appropriate decision as to whether to speak to a lawyer or not."

**70** Any apparent waiver of an accused's s. 10(b) right that is based on insufficient information, as required by s. 10(a), is clearly invalid (***Small*** at para. 30). Finally, an initial waiver of the right to counsel can be withdrawn by a detainee asserting a second request to speak to counsel (***Small*** at para. 31).

**71** Was MacLean's written waiver of right to counsel a proper waiver of his s. 10(b) rights? As discussed above, MacLean was not advised of who the complainant was and what the allegations entailed. At the time of the waiver (Appendix A), he was only provided general information regarding what was meant by the charges of sexual assault and sexual interference.

**72** MacLean did not need to be made aware of all the factual details of the case. Cst. Fradley did not need to inform him of the particulars of the alleged offenses such as providing him with all the particulars of the alleged offenses. However, what was required was enough, or reasons sufficient, so that MacLean could be "possessed of sufficient knowledge". In this case, the identify of the complainant, the time and place are part of that sufficient knowledge. Without knowing this information, MacLean did not have enough information to determine why he was being arrested in connection with a sexual assault. Cst. Fradley had an obligation to tell MacLean sufficient detail so that he could assess the scope of his jeopardy and make an appropriate decision on whether he should call a lawyer or not.

**73** In ***Small***, the accused waived his s. 10(b) right immediately upon his arrival at the detachment, prior to being informed of any of the particulars of the offense. The accused was told that there had been a complaint of sexual assault and no more. After the accused waived his right to counsel, he was told that the complaint was in connection to an incident from the previous night with the complainant. The Alberta Court of Appeal held that the accused's "apparent waiver of s. 10(b) right after the initial *Charter* caution was invalid. He was not adequately informed of the reason for his detention before being asked to decide whether or not to consult a lawyer" (***Small*** at para. 30). I agree with the rationale applied by the Court of Appeal in ***Small***.

**74** As a result of the failure to inform MacLean of at least the basics of why he was under arrest, MacLean did not have an opportunity to make a fully informed decision as to whether he should exercise his s. 10(b) right or waive his right to counsel. Therefore, the apparent waiver, based on insufficient information, was invalid. MacLean, as a result, did not waive his s. 10(b) right and was not provided a reasonable opportunity to contact counsel.

**75** In the event that I am wrong and that the initial waiver by MacLean was valid, MacLean later withdrew that waiver in the interview when he indicated that he wanted to speak to a lawyer. Once informed of the right to counsel, a detainee is allowed to choose to listen to a police officer if they desire and to delay their consultation with a lawyer if they so choose (***Sinclair*** at para. 28).

**76** However, a detainee should not be completely denied the right to counsel if they provide an initial waiver. A waiver of the right to counsel should not last forever. An initial waiver of the right to counsel can be withdrawn by a detainee asserting a second request to speak counsel (***Small*** at para. 31). A clear desire by the detainee to exercise their right to counsel after an initial waiver of the right must be granted to ensure that the *Charter* protected right is respected.

**77** If as stated in ***Sinclair***, the right to counsel is normally a "one-time matter" with a single consultation with a lawyer and that further opportunities are not required unless there is a fundamental change in the circumstances, a detainee should have the right to determine when the one-time consultation will take place. The comments of Binnie J., in ***Sinclair*** are informative on this point (***Sinclair*** at para. 87):

> The role of counsel at this stage of the investigation is to help put the detainee in a position to navigate his or her legal problems with the informed capacity the detainee could muster alone if he or she possessed the requisite legal knowledge and experience. The choice whether or not to cooperate with the investigation is up to the detainee -- not the lawyer -- but it should be an informed choice. This does not give the lawyer access to places he or she has no right to be (such as the interrogation room in a police detachment), but it should certainly allow the detainee more than a preliminary piece of advice prior to any questioning, at which point the detained person may have a very flawed understanding of what the police are up to.

**78** It is clear that police may question and elicit evidence from a detainee if a detainee initially waives the right to counsel or does not express a desire to contact counsel. As stated in ***Sinclair*** at para. 27, "unless a detainee invokes the right and is reasonably diligent in exercising it, the implementational duties imposed on the police will not arise or will be suspended". However, once the accused asserts his/her right, the police must comply with the implementational duties subject to case of urgency and danger. The right of a detainee to withdraw a waiver must be respected.

**79** I am aware that the Supreme Court warned at para. 58 of ***Sinclair***:

> It must be remembered that the opportunity to consult again with counsel is accompanied by a duty on the police to hold off further questioning until that consultation has taken place or a reasonable opportunity for it to occur has been provided. This may well result in long delays in pursuing the interrogation. A person's Charter rights "must be exercised in a way that is reconcilable with the needs of society": *R. v. Smith*, [1989] 2 S.C.R. 368, at p. 385. The purpose of the right to counsel is not to permit suspects, particularly sophisticated and assertive ones, to delay "needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or [for whatever reasons, made] impossible to obtain": *Smith*, at p. 385.

**80** However, allowing a detainee to withdraw a waiver and to determine when to exercise their "one-time" right to counsel would not allow a suspect to delay an investigation and would still be reconcilable with the needs of society. As discussed, once the accused gives an initial waiver, the implementational duties of the police are suspended and the police are permitted to question and elicit evidence from the detainee. The obligation to 'hold off' does not arise at this time. Further, the implementational duties may still be suspended after an accused asserts their right to counsel if circumstances of urgency or danger warrant it. Allowing an accused to withdraw an initial waiver of their right to counsel does not result in the creation of the situation cautioned by the Supreme Court in ***Sinclair*** and still only allows an accused one consultation with a lawyer, absent a fundamental change in circumstances.

**81** In this case, MacLean withdrew his initial waiver when he stated: "I think I should call a lawyer" and when he responded "Yeah, I should" to Cst. Fradley's question of "Do you want to speak to a lawyer?" This was a clear indication that MacLean had a desire to contact counsel at this time and that he had withdrawn his previous waiver (if one had occurred). At this point in time, Cst. Fradley had an obligation to comply with her implementational duties. She did not do so and violated MacLean's s. 10(b) right.

C. Section 24(2)

1. Seriousness of State Conduct

**82** The seriousness of the violation of MacLean's right to counsel was significant. Cst. Fradley failed to comply with both her "informational and implementational duties" and, in doing so, actively prevented MacLean from having the opportunity to contact counsel. Cst. Fradley knew or ought to have known that she needed to adequately inform MacLean of the reason's for his detention, inform MacLean of the availability of free legal advice and to allow him to contact counsel when MacLean asserted his right. MacLean's request for counsel instantly engaged the

implementational component of Cst. Fradley's duties under s.10(b): ***R. v. Berger***, 2012 ABCA 189 at paras. 19 - 20. Therefore, she acted either in ignorance of, or with wilful disregard for, established *Charter* standards. The deliberate nature of Cst. Fradley's actions negate considerations of good faith: ***Grant*** at para. 75.

**83** Cst. Fradley could have started to question MacLean after he was informed of the reasons for his detention, after he was informed of the Legal Aid number, and after he had spoken to counsel. As Cst. Fradley failed to properly follow the implementational component of her duties or provide sufficient information, she unnecessarily breached MacLean's *Charter* rights. In this case, the *Charter* breach could have been avoided with reasonable due diligence. Since it was not avoided, Cst. Fradley's conduct was a serious breach. Much like the case of ***Harrison***, it appears that Cst. Fradley was "blinded" by her pursuit of obtaining evidence against MacLean, and that she subsequently departed from *Charter* standards to a major degree in order to obtain that evidence: ***Harrison*** at para. 24.

**84** The denial of the right to counsel was serious and appears to have been motivated by a desire to question MacLean before he talked with a lawyer or was informed as to what he was being questioned for. It was not merely a technical breach. Cst. Fradley's actions resulted in a serious breach and a court must disassociate itself from such conduct. To admit the evidence would be to condone a situation in which a police officer can question a suspect while forcing the suspect to guess as to what the questioning is about and to actively thwart a suspect's attempt to contact a lawyer.

**85** As the Alberta Court of Appeal held in ***R. v. Ngai***, 2010 ABCA 10 at para. 34, the decision on admission should not send "a message to the public that the courts effectively condone state deviation from the rule of law by failing to disassociate themselves from the fruit of that unlawful conduct." As a result, this line of inquiry weighs in favor of the exclusion of the evidence.

2. Seriousness of the Impact on the Interests of the Accused

**86** As discussed above, the violation of MacLean's ss. 10(a) and 10(b) rights was not minimal. This is not a case where an accused was provided incomplete information but was still able to contact a lawyer prior to evidence being gathered. MacLean was completely denied access to legal counsel and legal advice at a time when he requested it. The failure to advise MacLean of his right to counsel undermined his right to make a meaningful and informed decision whether to speak, his right to silence, and his protection against self-incrimination: ***Grant*** at para. 95.

**87** As a result of this violation, MacLean continued to participate in the interview without the benefit of legal advice. Had he been provided with an opportunity to consult counsel, the outcome may have been different. It is no excuse for a *Charter* violation that MacLean's options were limited at the time of the interview. As our Court of Appeal stated in ***Berger*** at para. 24, "[t]he lawyer could have provided other critical advice, including the importance of remaining silent, strategies for interrogation and practical advice about securing release from custody".

**88** The s. 10(b) right is concerned and connected with an individual's right against self-incrimination: ***Sinclair*** at paras. 24, 26 and 29. A detainee facing legal jeopardy is in immediate need of legal advice and s. 10(b) guarantees that a detainee is informed of his or her rights and obligations under the law, as well as guaranteeing a way to obtain advice as to how to exercise those rights. The impact of the breach, therefore, struck at the core of MacLean's right to silence and the protection against self-incrimination.

**89** The departure from *Charter* standards was major in degree. Cst. Fradley knew or should have known her conduct was not *Charter*-compliant: ***Harrison*** at para. 22. Therefore, this line of inquiry weighs in favor of exclusion.

3. Society's Interest

**90** The offences at issue in this case are serious and society has a high interest in the adjudication of the case on its merits. A case should be tried fairly on its merits and this should include a consideration of the reliability of the evidence.

**91** *Prima facie* the statements made by an accused are reliable. However, statements made and taken in contravention of the *Charter* are suspect on the grounds of reliability: ***Grant*** at para. 97. As stated by the Supreme Court, "detained by the police and without a lawyer, a suspect may make statements that are based more on a misconceived idea of how to get out of his or her predicament than on the truth. This danger, where present, undercuts the argument that the illegally obtained statement is necessary for a trial of the merits": ***Grant*** at para. 97. It has also been stated that "a statement is not like, for example drugs, which are, by their nature, reliable. The reliability of a statement cannot be fully examined until placed within the context of the trial": ***Briscoe*** at para. 129.

**92** In this case, MacLean was detained by police and not given a chance to contact his lawyer. The concern raised about whether his statements were the truth or based on an idea of how to get out of the interview is a live issue. There is a lack of reliability to the evidence. Further, the statements made in the interview do not comprise all of the Crown's case and the exclusion of the evidence will not "gut" the prosecution.

**93** This line of inquiry weighs in favor of the exclusion of the evidence.

4. Balancing of Factors

**94** In the final stage of the s. 24(2) analysis, a court must determine, after weighing all of the factors, in all of the circumstances would admission of the evidence bring the administration of justice into disrepute?

**95** I note that the Supreme Court of Canada has stated that the admission of *Charter*-infringing statements tends to bring the administration of justice into disrepute and that these type of statements are generally excluded: ***Grant*** at paras. 90-92. The right to counsel is a serious interest that must be protected. It, and the right to the protection against self-incrimination, are interests that are fundamental to the criminal process. It is reasonable to assume that all members of society would want, and would believe they have a right, to speak to a lawyer when they become involved in the criminal justice system. The criminal justice system is complicated and often unfamiliar and it is the right to counsel that guarantees individuals are able to exercise their legal rights when participating in the criminal process.

**96** Nonetheless, the exclusion is not automatic and all three of the factors must still be balanced and weighed. As discussed above, all three factors favor the exclusion of the evidence. Given that the breaches were serious and that they significantly undermined MacLean's right to counsel, the only reasonable conclusion is that the evidence should be excluded: ***Berger*** at para. 26. The unreliability of the evidence and society's interest in an adjudication on the case of the merits also supports this conclusion.

**97** As stated by the Alberta Court of Appeal, "[s]ections 10(a) and 10(b) seek to ensure a detainee is aware of his jeopardy, his right to silence, what it means and his right to choose, as explained by an independent counsel": ***M.A.R.*** at para. 61. MacLean was denied the opportunity to be informed of his jeopardy and was denied his right to choose as explained by counsel.

**98** Therefore, the evidence obtained in breach of MacLean's *Charter* rights is excluded under s. 24(2).

**VIII. Conclusion**

**99** For all the reasons stated above, it was not sufficient for the police officer, in this case, to simply provide the reasons for arrest and detention in the boiler plate fashion of the words "sexual assault and sexual interference". The particular circumstances of this case dictate that MacLean should have been provided reasons that he could understand in order to not be guessing and subsequently, to be able to provide meaningful instructions to counsel. As a result, his s. 10(a) *Charter* right was breached.

**100** In addition to the breach of his s. 10(a) right, MacLean's s. 10(b) right was also breached. For all of the reasons stated above, the uncontested evidence disclosed that on at least two occasions, MacLean expressed a desire to exercise his s. 10(b) right, but unfortunately, Cst. Fradley ignored these requests and continued with her questioning. Cst.

Fradley also continued the questioning without obtaining a proper waiver.

**101** Having found both s. 10(a) and (b) *Charter* rights having been breached, I am satisfied that the statement obtained is ruled inadmissible, pursuant to s. 24(2) for all of the reasons outlined above. Should MacLean decide to testify, the Crown will not be permitted to use the statement in cross-examination.

V.O. OUELLETTE J.

* * * * *

Appendix A

exhibit VD2



Date: 11Nov02 File # 11-102144

Time: 1225hrs

MACLEAN, Subject: MCLEAN, Matthew / Richard

Interviewer: Cst. FRADLEY

Location: Calgary

**You may be / will be / are being charged with:** Sexual Assault, Sexual Interference

You have the right to retain and instruct a lawyer without delay. This means that before we proceed with our investigation, you may call any lawyer you wish or a lawyer from a free legal advice service immediately. If you want to call a lawyer from a free legal advice service, we will provide you with a telephone and you can call a toll-free number for immediate legal advice. If you wish to contact any other lawyer, a telephone and telephone books will be provided to you. If you are charged with an offence, you may apply to Legal Aid for assistance.

Do you understand? yes

Do you want to call a free lawyer or any other lawyer? yes

*All persons detained in police custody have the right to immediate legal advice regardless of their financial status. Detained persons also have the right to choice of counsel. You may choose to use the appropriate free legal advice number, or the telephone books provided to contact a lawyer of your choice. The free legal advice number is (provide appropriate number):*

**Adults:** All times - **1-866-653-3424**

**Youth:** All times - **422-8383**

## Waiver:

You have the right to a reasonable opportunity to contact a lawyer. I am obliged not to take a statement from you or ask you to participate in any process that might provide evidence against you until you are certain about whether you want to exercise this right.

Do you understand? yes

Do you want to waive your right to contact a lawyer? [redacted] yes

## Standard Caution:

You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence. Do you understand? [redacted] yes

## Secondary Caution:

Regardless of anything that anybody has said to you or you have said to any other person in authority, you are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence. Do you understand?

Comments:

Signed: [redacted]

Reg 2663 Cst. FRADLEY.

cp/ci/e/qlcct/qllmr