Citation: *R. v. R.S.S.*, 2020 YKTC 5

Date: 20200128
Docket: 19-00080
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

R.S.S.

Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Benjamin Eberhard — Counsel for the Crown
Gregory Johannson — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] RUDDY T.C.J. (Oral): R.S.S. is before me for trial facing four counts: making an arrangement by means of telecommunication to commit a sexual offence against a person under the age of 16; luring a person under the age of 16 by means of telecommunication for the purposes of engaging in sexual activity; distributing sexually explicit material to a person under the age of 16; and counselling a person under the age of 16 to touch herself for a sexual purpose.

[2] Trial has commenced by way of a *voir dire* in relation to a statement made by R.S.S. to a member of the RCMP, following R.S.S.'s arrest on April 18, 2019. The Crown seeks a ruling that the statement was voluntary and therefore admissible as

evidence at trial. Defence counsel asserts that R.S.S.'s statement should be excluded pursuant to s. 24(2) of the *Charter* based on a breach of R.S.S.'s s.10(b) right to counsel.

[3] The backdrop to both applications is the fact that R.S.S. is a recent immigrant, coming to Canada from his home country of India at the age of 17 in the summer of 2015. His first language is Hindi and he speaks English with a noticeable accent. At issue is the impact of language comprehension on the admissibility of R.S.S.'s statement.

[4] Crown bears the burden of proving voluntariness beyond a reasonable doubt. The Defence bears the burden of establishing the *Charter* breach on a balance of probabilities.

Voluntariness

[5] Turning first to the Crown's application, the doctrine of voluntariness is intended to guard against false confessions. While R.S.S. did not confess, *per se*, he nonetheless made statements, which, I gather, could be considered inculpatory in nature when considered together with the expected evidence at trial. In such circumstances, the law still requires that voluntariness be established beyond a reasonable doubt before a statement will be ruled admissible.

[6] The well-established law in relation to voluntariness is set out in the Supreme Court of Canada case of *R. v. Oickle*, 2000 SCC 38, which requires a contextual consideration of the statement in its entirety, taking into account four aspects:

1. Threats or promises: whether the statement resulted from fear of prejudice or hope of leniency;

2. Oppression: whether the conditions in which the statement was taken were so abhorrent as to raise a concern that a confession may be stress-induced;

3. Operating mind: requires recognition by the accused that anything said may be used in evidence; and

4. Police trickery: while police may resort to trickery to gain a confession, this aspect assesses whether the form of trickery employed would "shock the community" such that exclusion is necessary to maintain the integrity of the justice system.

[7] In considering the question of voluntariness in relation to R.S.S.'s statement, I have had the benefit of reviewing the audio recording of his arrest and processing, and the audio/video recording of the statement at issue, along with transcriptions of both. From these, I can conclude that there is no evidence that the police made any threats, promises or inducements to R.S.S. Nor is there any evidence the police relied on trickery that would meet the "shock the community" test.

[8] With respect to the operating mind aspect of the confessions rule, it is arguably at issue given the question of R.S.S.'s comprehension of English; however, I would note that in the *Oickle* decision the Supreme Court of Canada adopted its own ruling in *R. v. Whittle*, [1994] 2 S.C.R. 914, in concluding that "the operating mind requirement 'does not imply a higher degree of awareness than the knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment'". In the *Whittle* decision, the Court likened the operating mind test to that of fitness to stand trial, a standard requiring only limited cognitive capacity and no demonstrated analytical ability.

[9] In addition, the question of whether limited language comprehension can render a statement inadmissible on the operating mind test was addressed by the BC Supreme Court in *R. v. Arjun*, 2013 BCSC 2076, in which the Court referenced the Ontario Court of Appeal's decision in *R. v. Lapointe*, 1 O.A.C. 1, [1983] O.J. No. 183, aff'd [1987] 1 S.C.R. 1253, in concluding the following:

> *Lapointe* has been interpreted to mean that an accused's language comprehension when giving a statement is not a voluntariness issue, but goes to weight to be given to the statement. The only exception is where an accused's comprehension is so deficient that it was impossible for him or her to understand what the police said. (para 59)

[10] The evidence before me does not support a finding that R.S.S.'s comprehension of English was so deficient that he could not understand what the police said to him or that what he said could be used against him.

[11] Finally, I must consider the question of whether the evidence raises any concerns with respect to oppression. Normally, statements ruled inadmissible because of oppression include circumstances in which the police do not address an accused's physical well-being. In this case, the police clearly turned their minds to R.S.S.'s physical well-being in ensuring that he was fed, provided water, was appropriately clothed, and was given breaks as deemed necessary.

[12] The question of oppression on the circumstances of this case is in relation to the frequency that R.S.S. presented as visibly frustrated and uncomfortable. He repeated on numerous occasions that he did not want to say anything, complained of a headache, indicated that he was tired, asked to leave, and put his head down on the table for an extended period of time. Notwithstanding R.S.S. pleading to stop the

interview, Cst. Miller continued questioning R.S.S. The interview lasted four hours and 40 minutes in total inclusive of breaks.

[13] The question to be determined is whether continuing the interview in such circumstances can be said to be oppressive. I would note that Cst. Miller frequently offered R.S.S. breaks, water, and food in response to his complaints. In addition, Cst. Miller's interview style throughout was measured and appropriate. He was courteous and respectful, and did not raise his voice or ask questions in an aggressive or intimidating fashion.

[14] Furthermore, while there were times from mid interview to interview end in which R.S.S. presented in this fashion, there were also numerous times during this same period where R.S.S. presented as calm and willing to answer seemingly routine questions. I simply cannot conclude that the circumstances in which the statement was taken amount to oppression or that the information R.S.S. did offer was stress-induced.

[15] In the result, I am satisfied that R.S.S.'s statement was voluntary.

Charter Application

[16] Turning to R.S.S.'s *Charter* application, defence counsel alleges that due to linguistic barriers, R.S.S.'s right to counsel was not conveyed to him in a way that he could meaningfully understand and assert his constitutional rights. Crown argues that R.S.S. demonstrated a high level of comprehension such that he was afforded a meaningful application of his rights under s. 10(b) of the *Charter*.

[17] Counsel are in agreement with respect to the applicable law, though not on its application to the facts of this case. In *R. v. Ukumu*, 2019 ONSC 3731, Leach J. provides perhaps the most comprehensive overview of the law in this regard:

> 31 The law governing such issues is well-established and developed, at least insofar as alleged breaches of s.10(b) of the Charter based on linguistic difficulties are concerned.
>
> 32 General considerations and principles in that regard include the following:
>
> a. The right to counsel guaranteed by s.10(b) of the Charter encompasses a right to be informed of the right and its components in a comprehensible and meaningful way, and the right to exercise that right in a meaningful and comprehensible fashion. In particular, it is not sufficient for a police officer, upon the detention or arrest of a person, to merely recite the rights guaranteed by section 10 of the Charter. As s.10(b) of the Charter stipulates, the detainee or accused must be "informed". Individuals who are detained or arrested are in a vulnerable position, and the rights conferred by s.10(b) of the Charter are one of the central protections to allow such individuals the ability to understand their situation and make informed decisions in relation to that situation. A detainee or accused therefore must understand what is being said to him or her, and understand what the options are, in order that he or she may make a choice in the exercise or waiver of the rights guaranteed by the Charter. Similarly, meaningful exercise of the right to counsel requires an ability to fully understand the advice and instructions of counsel, in order to make a fully informed choice to follow or disregard such advice and instructions.
>
> b. The police are not required to go to extreme means in order to respect the rights of a detainee or accused under section 10 of the Charter. Generally, in relation to language comprehension, if there are no circumstances that subjectively or objectively suggest an issue regarding comprehension of English, it is fair to infer that an individual understands his or her legal rights as read to him or her in English, and will understand legal advice provided to him or her in English.

c. However, "special circumstances" may exist in relation to linguistic comprehension of legal rights. In particular, there may be objective indicia that an individual's knowledge of English may be limited for various reasons, such that he or she may not have sufficient comprehension of the matter. Where such "special circumstances" exist, police officers dealing with a detainee or accused are obliged to act reasonably in the circumstances; i.e., by taking further reasonable steps to ascertain and ensure that the individual actually understands his or her legal rights, and is able to exercise those rights in a meaningful way.

d. The determination of whether such "special circumstances" exist is a question of fact and law. In particular, even where a court accepts that a detainee or accused person understood his or her constitutional rights as explained in the English language, the factual findings may still raise "special circumstances" which require the police to take additional steps to ensure that the accused understands the content of the right to counsel, and makes a meaningful exercise of that right.

e. The test for special circumstances is an objective rather than subjective one. In particular, the subjective belief of police officers that an accused fully understood his or her legal rights, (even where a court accepts police testimony in that regard), or was "playing games" by pretending to understand less than he or she actually did, accordingly is not determinative of whether or not such "special circumstances" exist. Again, issues relating to linguistic comprehension of Charter rights involve a question of law, and accordingly are not decided by assessments of credibility alone. It is a reversible error of law to conclude that there are no special circumstances on the basis of a police officer's subjective belief about the ability of a detainee or accused to understand his or her legal rights.

f. Such "special circumstances" may exist where there is objective evidence that English is not the first language of a detainee or accused, and there is sufficient objective evidence of some lack of understanding of the right to counsel or other information provided to the detainee or accused by police at the time of the detention or arrest.

[18] The decision goes on to provide an extensive list of factors a court may consider in assessing whether "special circumstances" exist, though it is noted in paras. 33 and 34 of the decision that:

> 33 If there is a discernible trend in the many reported cases I have had the opportunity to review, it would seem to be that courts are inclined to lean heavily on the side of ensuring that the Charter rights of a detainee and/or accused are fully understood and protected accordingly.
>
> 34 In particular, while it seems clear that no one factor or consideration is determinative, most of the reported decisions addressing such linguistic comprehension issues have found that just two or three such indicators of possible comprehension difficulties, without further steps being taken by the police to ensure that Charter rights are fully understood and capable of being meaningfully exercised by a detainee and/or accused, will suffice to warrant a finding that the Charter rights of the individual have been breached.

[19] These comments recognize the critical importance of the right to counsel in ensuring vulnerable accused persons fully understand their legal jeopardy and can make informed decisions. (see *R. v. Bassi,* 2015 ONCJ 340)

[20] In assessing whether there are special circumstances in this case, I do not have the benefit of evidence from R.S.S. with respect to his level of comprehension. However, I would note that the primary issue before me is whether, at the time the police were dealing with R.S.S., there were objective indicators that R.S.S. was struggling with language that should have put the police on notice that additional steps were required to ensure R.S.S. fully understood and meaningfully applied his right to counsel.

[21] The evidence indicates that Cst. Locke and Cpl. Paris arrested R.S.S. at his workplace shortly after 11:00 a.m. on April 18, 2019. R.S.S. had been at work since

5:00 a.m. that morning. Upon arresting R.S.S., Cst. Locke recited an arrest script provided to her setting out the charges, the right to counsel and the police warning. R.S.S. did indicate a desire to speak to counsel when asked, but indicated that he did not know any. He ultimately spoke to Malcolm Campbell with Legal Aid between 11:40 a.m. and 11:53 a.m. He was fingerprinted and lodged in cells until Cst. Miller arrived at 2:08 p.m. to conduct the interview. Cst. Miller spent approximately 56 minutes of the interview covering R.S.S.'s right to counsel, police warning, and secondary caution. The interview lasted four hours and 40 minutes.

[22] Only Cst. Locke and Cst. Miller testified on the *voir dire*, but it was evident that all police officers who dealt with R.S.S., including the investing officer, Cst. Clements, were aware approximately one week in advance of the planned date and time of R.S.S.'s arrest. They were also aware that R.S.S. was a recent immigrant, having moved to Canada in the summer of 2015 from India, and that his first language was Hindi. Notwithstanding this knowledge, there is no evidence that the planning of R.S.S.'s arrest and interview included any discussions about addressing potential language concerns in the event R.S.S. had difficulties understanding and communicating in English.

[23] Both Cst. Locke and Cst. Miller testified, and I accept, that they strongly believed that R.S.S. understood what was being said to him, including his right to counsel, and where they were not sure if he understood, they took what they felt were appropriate steps to ensure comprehension. However, as noted, it is not the officer's subjective belief that is at issue. Both officers also testified that R.S.S. did not, at any time, state that he did not understand, that he wanted to speak to a Hindi-speaking lawyer, or that

he wanted an interpreter. Again, these factors are not determinative of the issue, as an accused person is not necessarily aware of what services may be available.

[24] In reviewing the recordings and transcripts, it is apparent to me that R.S.S. is functional in English. I would not say that R.S.S. is fluent in English as suggested by Cst. Miller, and I disagree with the Crown's contention that R.S.S.'s syntax was good and his language was not "broken". In my view, R.S.S. clearly spoke in broken English with obvious and persistent grammatical errors. For the most part, I find that R.S.S. was able to make himself understood, although his ability to do so clearly deteriorated at times when he appeared more stressed or frustrated.

[25] One example of this is found at line 1683 of the transcript of the interview during a time when R.S.S. is insisting that he wants to leave, go home, have a shower, and go to a lawyer to get his questions answered. When Cst. Miller asks him what questions he has, R.S.S.'s reply is almost unintelligible. He says:

> Please excuse me. Thank you, I have now-now, like, I am in such a situation that I can't even, um ask, like you know, about my thing that no, I want this, I have to, you know, request you for everything because it's I'm in a certain kind of situation.

[26] It is also apparent to me that R.S.S.'s answers over much of the interview appeared to be responsive to the questions being asked suggesting comprehension of what was being said. However, I am mindful of the fact that the majority of the subjects covered in the interview, other than the initial time spent on rights and cautions, were in relation to straightforward, day to day activities – where R.S.S. had lived, who he had lived with, where he had worked, what girlfriends he had had, and so on. These are not

complex topics requiring sophisticated understanding of the English language. The Crown makes particular note of R.S.S.'s ability to speak intelligently about computers and programs in English as indicative, perhaps, of an advanced language level; however, it must be noted that R.S.S. is in his early twenties, and part of a generation that has grown up with technology such that cell phones and apps are fundamental to their daily lives and concepts like "hacking" and "cookies" are part of their day to day vocabulary.

[27] It must be remembered that the question before me is not R.S.S.'s ability to comprehend and converse about everyday subjects, but whether the evidence indicates a concern about his ability to comprehend more complex and abstract concepts, in particular his legal rights. As noted in *Ukumu* at para. 32 (h):

> When determining whether such "special circumstances" exist, courts recognize that mastery of a language is not an "all or nothing" proposition, and that the situation of an individual detained or arrested by police, and attempting to understand his or her legal rights, is not an everyday situation. To the contrary, it frequently will be an unfamiliar situation. It also is a stressful situation in which the individual is inherently vulnerable, and may feel compelled to seem agreeable to authority figures. An individual who may be able to manage day to day in English, (e.g., after living and/or working in English-speaking areas of Canada for years), may nonetheless not be comfortable communicating in English, or sufficiently comprehend English, when dealing with the complexities of understanding or exercising his or her legal rights in a situation where he or she is detained and/or arrested, and the legal jeopardy he or she may be facing. Understanding of language in certain contexts is not the same thing as understanding rights.

[28] Crown argues that there was no indication that R.S.S.'s understanding of legal matters was any different from his understanding of everyday matters.

[29] I would agree there are some instances where R.S.S. demonstrates some grasp of legal concepts. He is able to indicate that a major crime would be "murder or something". He does appear to understand that he is not required to respond, refusing to answer questions he considers irrelevant. He is able to provide an understanding of what evidence is in the following excerpt starting at line 533 of the interview transcript:

> A: A proof, a proof.
>
> Q: Proof, kay, proof. How so? What-what do you mean by that proof, evidence proof, what –
>
> A: Proof is, like, okay, if I have, uh fall down this water over here, you saw me putting down the water in, so if somebody ask who put down the water, you would say me.
>
> Q: Alright
>
> A: And that's a proof.
>
> Q: Okay
>
> A: A camera is there, so if I-if I am putting down the water, and I'm saying no I didn't put down the water, but the-the you have the proof that I did it intentionally so it-
>
> Q: Okay
>
> A: …and that's a proof.

[30] However, R.S.S. is then completely at a loss to explain how evidence is used:

> Q: When I say, use as evidence, what does that mean to you?
>
> A: Evidence is used when there is a confusion or (inaudible) there is a, like, there is a dilemma about something that is, you know, if there is a, what to say, I don't have any words, uh.
>
> Q: Okay
>
> A: Um, if there is, you know, a, I'm sorry, I'm weak in English a little bit

[31] When asked about abstract concepts like honour and integrity he says:

> A: Honour for what?
>
> Q: Just, one's honour, one's integrity, do you know what I mean by integrity?
>
> A: Mm. My sister was a little bit older than me.

[32] The ensuing description of wrestling with his sister does not touch, even tangentially, on concepts of honour and integrity, indicating R.S.S. has clearly not grasped the question being asked.

[33] Throughout the lengthy section of the interview in which Cst. Miller is making efforts to satisfy himself that *Charter* rights have been addressed, R.S.S. frequently interrupts to ask questions about what proof the police have. Cst. Miller explains that he wants to address the *Charter* "stuff" before answering such questions. It is clear that R.S.S. has misunderstood Cst. Miller's clear explanation of what he is trying to do in delaying such questions until he has addressed the right to counsel and police warning. R.S.S., however, interprets what Cst. Miller says in a more literal way as meaning he cannot ask questions. When Cst. Miller later asks him what questions R.S.S. has, R.S.S. says, "I have before you said not to repeat so I'm not-I'm not going to ask it again."

[34] Each of these examples indicate that R.S.S.'s comprehension of English, particularly of more abstract concepts, was not as advanced as the officers may have believed based on his relative fluency to discuss day to day matters. R.S.S.'s reference to his English being weak, in particular, though in explanation of his inability to describe a particular concept nonetheless was a clear signal that there were limitations to his

ability to comprehend and express himself in English. At that time, he is not offered an interpreter, but instead is effectively told that interpretation is not possible when Cst. Miller says that there is no one available to have the conversation with R.S.S. in Hindi.

[35] In addition to these indicators, there are some specific concerns around both the information component and implementation of R.S.S.'s right to counsel that raise concerns about whether R.S.S. fully understood and meaningfully exercised his rights.

[36] Firstly, R.S.S.'s responses to both Cst. Locke and Cst. Miller when being asked if he understands his rights are consistently in the affirmative – "mmhmm, okay, yes". However, the evidence suggests that R.S.S. responded in the affirmative even where he did not fully understand. When Cst. Locke advises R.S.S. what he is charged with, she testified that she was not satisfied R.S.S. understood so she explained it to him again. Her effort to explain it to him again amounted to her simply repeating the same words, but R.S.S., when asked, does say "Yeah, I understand". However, it appears when Cst. Miller reviews what happened during the arrest that R.S.S. did not, in fact, understand what he had been charged with. When asked if he knew why he had been arrested, he says: "No, I just, uh, read roughly when, uh madam was showing something, uh the section something there was, uh 3 cases." Cst. Miller does take him through the charges again and R.S.S. thanks him for clearing things up for him, but his initial response indicates that he was not able to articulate the substance of what he had been charged with. In addition, R.S.S. asks a number of questions in the interview about when he was supposed to have met the complainant, suggesting he did not clearly understand the nature of the charges as alleging "online" rather than "in person"

contact, a misunderstanding Cst. Miller makes an effort to clarify much later in the interview.

[37] In addition to questions about R.S.S.'s understanding of what he is charged with, the evidence was clear that both Cst. Locke and Cpl. Paris had taken time to explain the Legal Aid system to R.S.S. and that he spoke to Malcom Campbell from Legal Aid. Yet when he is asked if he had a chance to speak to a lawyer he says "Uh, not a lawyer, uh, medical aid". R.S.S. later indicates his understanding that Mr. Campbell was "a Legal Aid, he's not a lawyer". He clearly did not understand the explanations provided by Cst. Locke and Cpl. Paris about the Legal Aid program.

[38] Cst. Miller does ask if R.S.S. would like to call another lawyer, but he phrases it in a way to suggest R.S.S. can call a lawyer if he has a specific lawyer in mind. At line 324 of the interview transcript, he says "Was there a specific lawyer that you wanted to talk to?" At line 362, he says "Uh, is there another lawyer or do you have a specific lawyer that you wanna talk to?" At line 379, he says "do you want to talk to a lawyer right now. A lawyer, your lawyer." R.S.S.'s response is that he does not have a lawyer and needs to search on Google or ask a friend. Cst. Miller says he can offer a phone book or list of lawyers "if there's a specific lawyer that you'd like to speak with". I do not believe Cst. Miller was intending to limit R.S.S.'s options to a lawyer that R.S.S. already knew, but given the aforementioned examples of issues with R.S.S.'s comprehension, I do not believe that R.S.S. would have understood that.

[39] R.S.S. indicates he wants to speak to a lawyer in person, and even says "so if the lawyer comes here I can talk to him in front of you". This indicates he has clearly

not grasped the confidential nature of his relationship with counsel implicit in the guarantee of consulting counsel in private. Indeed, there are questions about whether R.S.S. understands the role of a lawyer in protecting his rights as distinct from the role of the police. When Cst. Locke asks him if there is "a certain lawyer you wanna call or would you like to call Legal Aid?", R.S.S.'s response is "I would like to go with you. I don't have a lawyer".

[40] When Cst. Miller is addressing R.S.S.'s right to counsel, Cst. Miller indicates that he just wants to make sure that R.S.S. has spoken to a lawyer, he has spoken to a lawyer of his choice, and that he is satisfied with that call. R.S.S. simply agrees with each of these statements. However, I believe there are real questions as to whether he was, in fact, satisfied.

[41] It is clear that when R.S.S. spoke to Mr. Campbell, he did not seem to understand what he was charged with, and he clearly did not understand he was speaking to a lawyer. It is hard to imagine someone could actually be satisfied with legal advice received if they do not even know they are talking to a lawyer and receiving legal advice. Not understanding the charges and not understanding he was speaking with a lawyer would effectively mean R.S.S. was not in a position to ask important questions to receive advice about his legal jeopardy.

[42] In addition, R.S.S. clearly seems to want to speak to a lawyer, albeit in person. When Cst. Miller asks him, at one point, if he means now or after, R.S.S.'s response is "Can be now". When he is told he cannot leave, he seems to agree the he is speaking of going to counsel in a future sense. However, his repeated requests to end the

interview so that he has time to speak to a lawyer before it is too late in the day indicate his desire is a much more pressing one than sometime in the distant future. He clearly does not seem to understand that he has the right to speak to counsel, while detained, by telephone but not necessarily in person.

[43] All of this combines to persuade me that there are objective indicators that R.S.S. did not fully comprehend his right to counsel or have a meaningful opportunity to exercise that right. I am therefore satisfied, on a balance of probabilities, that special circumstances existed which required additional steps to be taken to ensure comprehension and meaningful application of his right to counsel. While Cst. Miller did take significant steps by offering more extensive explanation and examples, I am of the view that interpretation services should have been offered to ensure R.S.S. fully comprehended his rights and any legal advice he received. Failure to do so is a breach of R.S.S.'s s. 10(b) right to counsel.

Remedy

[44] This leaves the question of appropriate remedy pursuant to s. 24(2) of the *Charter*.

[45] The test for exclusion is set out in *R. v. Grant*, 2009 SCC 32, and requires consideration of three factors: the seriousness of the *Charter*-infringing conduct; the impact of the breach on the *Charter*-protected interests of the accused; and society's interest in a trial on its merits.

[46] The first branch of the test, the seriousness of the *Charter*-infringing conduct, weighs in favour of exclusion in this case. As noted by Copeland J. in *Bassi*, the law in relation to language issues and the right to counsel is well-established. We live in an increasingly multi-cultural society, and care must be taken to ensure that accused persons are given every opportunity to understand their rights when English is not their first language. While I accept that the officers were all well-intentioned, and Cst. Miller, in particular, made clear efforts trying to ensure comprehension, the fact remains that the police knew well in advance that R.S.S. was going to be arrested and that English was not his first language, and yet no efforts were made to ensure an appropriate plan to address any issues in language comprehension.

[47] The second branch of the test, the impact of the breach on the accused's *Charter*-protected interests, equally favours exclusion, in my view. As noted, meaningful comprehension and exercise of the right to counsel is a critical protection for vulnerable persons under arrest, a vulnerability that is heightened when the arrest and interview are not conducted in the accused's first language. Indeed, the *Grant* decision indicates that where statements are elicited from an accused in breach of his or her s. 10(b) right, exclusion is presumptive, though not automatic, a reflection of the importance of both the right to counsel and the right to remain silent.

[48] The Crown suggests the impact of a s. 10(b) breach, while normally a huge one, is less significant in this case as relatively little of the evidence obtained over the four hours and 40 minutes was of significance to the Crown's case. In my view, impact is not a question of proportion. There is no requirement that a certain percentage of the statement be inculpatory before the breach will be seen as significant. A four-hour

interview that elicits little evidence of value other than a five-minute confession, would, nonetheless, have a clear impact on the accused if the statement is admitted at trial.

[49] The third branch of the test, society's interests in adjudication on the merits, generally favours inclusion, although, in the majority of cases, the evidence is crucial to the prosecution. In this case, the statement does not have that same level of significance to the prosecutions case; however, I accept Crown's submission that the statement, nonetheless, is relevant to the truth-seeking function.

[50] When I weigh the three factors together, I am satisfied that the statement elicited in contravention of R.S.S.'s s.10(b) rights should be excluded.

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RUDDY T.C.J.