NO. 130A-0001
IN THE PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR

BETWEEN:

HER MAJESTY THE QUEEN

AND:

RAYMOND PATRICK McLEAN

Heard: July 11th 2003
Judgment: July 16th 2003

DECISION OF GORMAN, P.C.J.
(*VOIR DIRE*)

INTRODUCTION:

[1] On September 19th 2002, a small dog was found hanging from a tree on a path in Corner Brook. A chain had been wrapped around its neck and it had been left there to die. Mr. McLean has been charged with unlawfully killing this dog contrary to section 445(a) of the **Criminal Code of Canada**, R.S.C. 1985.

[2] On December 8th 2002 and again on December 13th 2002, Mr. McLean was interviewed by members of the Royal Newfoundland Constabulary. On both occasions he provided them with a statement. On December 8th it was in a written format and on December 13th it was recorded by the use of audio and video equipment.

[3] The Crown seeks to present these two statements, as well as a comment made by Mr. McLean to a police officer on December 13th 2002, as evidence against him at his trial for the charge noted above. Mr. McLean objects to the admissibility of the statements he made on December 13th 2002. He argues that they were provided after he received an improper inducement and in violation of his right to contact counsel in accordance with section 10(b) of the **Canadian Charter of Rights and Freedoms**, Constitution Act, 1982.

[**4**] A *voir dire* was held so that a determination of admissibility could be made. I have concluded that both of the statements made by Mr. McLean on December 13th 2002, are inadmissable. I have concluded that a violation of section 10(b) of the **Charter** occurred and that an improper inducement was proffered. My reasons follow.[1]

THE EVIDENCE ON THE *VOIR DIRE*

DECEMBER 8th 2002:

[5] The interviews conducted with Mr. McLean occurred because an officer involved in a separate investigation followed up a lead.

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[1]With the consent of both parties, a single *voir dire* was held in which evidence was presented in relation to the manner in which the statements of December 8th and 13th 2002, were obtained by the police.

[**6**] Sergeant Pauls was investigating the theft of some microphones. On December 6th 2002, he received a telephone call from a used merchandise store. A young man was at the store attempting to sell a microphone. Sergeant Pauls went to the store to investigate.

[**7**] It turned out that the microphone was not stolen. However, this young man was able to provide Sergeant Pauls with some information concerning Mr. McLean's possible involvement in the killing of the dog. He told Sergeant Pauls that he and Mr. McLean were in the same class at a local college and that Mr. McLean had made a comment about getting rid of a dog.[2]

[8] As a result of receiving this information, on December 8th 2002 Sergeant Pauls went to Mr. McLean's residence. Mr. McLean was not at home. Sergeant Pauls left a message with Mr. McLean's girlfriend, asking that Mr. McLean contact him. When Mr. McLean returned to his home, his girlfriend told him about Sergeant Pauls' visit. She also told him that Sergeant Pauls wanted to speak to him about the killing of a dog. Approximately an hour and one-half later, Mr. McLean went to the

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[2]During the *voir dire*, the question of whether or not the Crown could lead evidence of what an officer had been told by another person and whether or not it could lead evidence of things said by Mr. McLean to the police, was raised. On a number of occasions during the *voir dire*, such evidence was presented. On each occasion that it was, it was entered by consent.

police detachment and introduced himself to Sergeant Pauls.

[**9**] Sergeant Pauls was in uniform. He identified himself and immediately told Mr. McLean that he was investigating the death of the dog found on the path and that this was a criminal investigation. He told Mr. McLean that he would like to talk to him about this incident.

[**10**] Mr. McLean testified that Sergeant Pauls asked him if it would be okay if he asked him a few questions. Mr. McLean testified that Sergeant Pauls made it clear that the interview would only be conducted if Mr. McLean agreed to it being conducted. Mr. McLean agreed to speak to Sergeant Pauls.

[**11**] A written statement was obtained. It took approximately an hour to complete. The interview took place in a small office in the lobby of the police station.

[**12**] Sergeant Pauls testified that he did not threaten Mr. McLean nor did he offer him any inducements in exchange for the provision of this statement. After the taking of the statement was finished, Sergeant Pauls read it to Mr. McLean and Mr. McLean signed it and initialed each of its pages.

[13] Prior to the taking of the written statement, the following exchange occurred:

> **Sergeant Pauls:** How do you feel about the investigation?
>
> **Mr. McLean:** I do not want to go to jail for killing a dog if I did not kill a

dog.

[**14**] Sergeant Pauls testified that when he interviewed Mr. McLean he had no grounds to believe that Mr. McLean was involved in this offence. As a result, he did not advise Mr. McLean of his right to contact counsel in accordance with section 10(b) of the **Charter**, nor did he "caution" him. Sergeant Pauls testified that at no time during the interview did Mr. McLean ask to speak to counsel nor did he request to leave.

[15] After the statement was obtained, Sergeant Pauls drove Mr. McLean home. During this ride, Mr. McLean asked Sergeant Pauls if someone could go to jail for killing a dog. Sergeant Pauls told Mr. McLean that he might, but that it was up to a judge and not everyone who killed a dog was sent to jail. As will be seen, Mr. McLean would return to the topic of jail when subsequently interviewed on December 13th 2002.

[**16**] Sergeant Pauls was a very impressive witness. He provided clear and direct evidence. He was able to provide a detailed description of the manner in which the interview with Mr. McLean took place. This type of evidence is crucial. The Crown must establish that any statement obtained by a police officer was provided voluntarily and they must do so beyond a reasonable doubt. As will be seen, this type of evidence was not available to the Crown concerning the events of

13th 2002.

[**17**] I accept that Sergeant Pauls did not view Mr. McLean as a suspect and that the interview was not primarily conducted for the purpose of obtaining incriminating evidence against him. Mr. McLean was not constitutionally detained and the statement he provided to Sergeant Pauls was provided voluntarily.

[**18**] At the completion of the *voir dire*, Mr. McLean's counsel advised the Court that he was withdrawing his objection to the admissibility of the statement obtained by Sergeant Pauls. This is a concession that was properly made. There is no basis for this statement to be excluded and the Crown may lead it at Mr. McLean's trial if it wishes to do so.

DECEMBER 13th 2002:

[**19**] Sergeant Barry Rideout was the investigating officer in relation to the killing of the dog. Sergeant Rideout was provided with a copy of the statement that Sergeant Pauls had obtained from Mr. McLean. In this statement, Mr. McLean had indicated that he had taken a dog to a park which was close to where the dog that had been hung was found and that he had released the dog there. He also mentioned to Sergeant Pauls something concerning a chain. At this stage of the

investigation, Sergeant Rideout was not aware of the information that Sergeant Pauls had received from Mr. McLean's classmate.

[**20**] After reading the statement, Sergeant Rideout decided that there were some points he wished to clarify and that he wanted to show Mr. McLean a photograph of the chain that was found wrapped around the dog's neck.[3] Thus, on December 13th 2002, Sergeant Rideout contacted Mr. McLean by telephone. Mr. McLean testified that when Sergeant Rideout spoke to him on the phone, Sergeant Rideout said that he was investigating the death of the dog and that he wanted to ask him a few "follow up" questions. Mr. McLean testified that Sergeant Rideout said that the interview could take place at a time that was convenient for Mr. McLean. Mr. McLean told Sergeant Rideout that he would rather not do it that day. Mr. McLean testified that Sergeant Rideout replied by stating that he preferred to do it that day and that it would only take a few minutes. Mr. McLean agreed. He understood that he had a choice as to whether or not he went to the police station to speak to Sergeant Rideout. No mention of a "Questionnaire" was made at this time.

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[3]The chain that was seized at the scene of the crime was destroyed before the police interviewed Mr. McLean. No evidence was presented during the *voir dire* as to whether or not the photograph of the chain was actually shown to Mr. McLean.

[**21**] Sergeant Rideout had also decided, though he did not tell Mr. McLean this during their telephone conversation, that he wanted to have Mr. McLean complete a "View Questionnaire." This document involves a series of questions that are

apparently prepared by a polygraph examiner. It appears that the answers to these questions are analyzed for the purpose of determining whether or not requesting that a suspect or a witness take a polygraph examination would be a useful investigative technique. Sergeant Rideout knew very little about the nature of this Questionnaire. He testified that he used it when there were "multiple persons of interest." As will be seen, the questions contained in this Questionnaire go well beyond what could be fairly called follow-up questions.

[**22**] After the telephone conversation with Sergeant Rideout, Mr. McLean went to the police sation. Sergeant Rideout was in uniform and he identified himself to Mr. McLean. Mr. McLean was taken to an interview room inside the police station where he spoke to Sergeant Rideout and in which the Questionnaire was administered. Sergeant Rideout took few notes of what was said and he took few notes in administering the Questionnaire. He was uncertain as to exactly what he explained to Mr. McLean before Mr. McLean commenced to complete the Questionnaire, whether or not he was present in the room when Mr. McLean

completed it and if so, for how long or when, whether the door to the room was open or closed and whether or not Mr. McLean was advised that he could leave if he wished.

[**23**] From Sergeant Rideout's evidence, it appears that Mr. McLean was provided

with the Questionnaire, a series of written instructions that were attached to it and then told to complete it. The instructions indicate that every "word is important and each one might be checked later on." It also requests that the person completing the Questionnaire sign the bottom of the sheet containing the instructions. Sergeant Rideout testified that he did not know why this was required.

[**24**] Mr. McLean testified that Sergeant Rideout showed him the Questionnaire and told him to complete it. Mr. McLean agreed to try to do so and Sergeant Rideout left the room. Mr. McLean testified that the door to the room was closed but not locked.

[**25**] Mr. McLean testified that he commenced to complete the Questionnaire but that he found a number of the questions difficult to understand. As a result, he went looking for Sergeant Rideout. He walked out of the room and down the hall. He spoke to another officer. That officer contacted Sergeant Rideout.

[**26**] When they were back in the interview room, Mr. McLean told Sergeant Rideout of the difficulty he was having. He testified that Sergeant Rideout read the questions to him, but that this was not of much assistance. He testified that he then attempted to complete the rest of the Questionnaire as best he could. He testified that Sergeant Rideout stayed in the room at this time. He also testified that he felt that he had to complete the Questionnaire. That he had no choice. He testified that

he did not believe that he could question Sergeant Rideout about whether or not the Questionnaire was necessary nor object to completing it.

[**27**] Mr. McLean also testified that he was concerned about completing the Questionnaire. He was concerned that his answers might be incorrectly analyzed and that the police would, as a result, conclude that he was lying.

[**28**] The Questionnaire contains the following questions and answers:

> **1.** We have reached the determination that some person(s) killed the dog by hanging it from a tree. How would you explain this?
>
> **A.** I don't know.
>
> **2.** If you were going to conduct this investigation, how would you do it?
>
> **A.** (1) Put up posters.
>
> (2) Offer a reward.

(3) Call the news.

(4) Follow up every lead.

3. List the five (5) most important questions that would have created this situation.[4]

A. (1) Someone got issues.

4. Tell us everything you did on the day the dog was killed.

A. I left my apartment, walked to the bean, let the dog go around the playground then went home.

5. Would you like to change the information you have provided?

A. No.

Before you answer the following questions, we would like to inform you that each word of your answer will be evaluated. We would like you to take your time and think before you answer.[5]

6. Do you know who killed the dog?

A. No.

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[4]Sergeant Rideout could not recall whether or not he explained to Mr. McLean what the words “this situation”meant.

[5]Sergeant Rideout testified that he does not know what the purpose of this evaluation is. He testified that he would “normally” read the questions in the Questionnaire to the person asked to answer them and then leave that person alone. He did not recall what he did in this particular case.

7. Did you kill the dog?

A. No.

8. Did you have anything to do with killing and hanging the dog from the tree?[6]

12.

A. No.

9. How do you feel now that you have completed this form?

A. I don't know.[7]

10. Should we believe your answers to the questions?

A. Yes.

11. If your answer to the last question was yes, give us one reason why.

A. Because I have a nine month old daughter. I would not risk being taken away from her by killing a dog.

12. What would you say if it was later determined that you lied on this form?

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[6]These are rather peculiar questions to be asking, unless the person being interviewed is a suspect.

[7]Sergeant Rideout did not know what to make of this answer. He testified that someone else analyzes the answers.

A. It is not going to say that.[8]

13. While filling out this form, what were your emotions?

A.[9]

14. Were you afraid while filling out this form?

A. When dealing with cops a man is always afraid.

15. Did you ever discuss the reasons and possibilities for this incident?

16. If you were asked to write an apology, what would you say?

WHAT WILL HAPPEN TO THE PERSON WHO COMMITTED THE OFFENCE?

[**29**] Mr. McLean testified that people in the community were saying that the person who committed this offence would go to jail for five years. He testified that he asked Sergeant Rideout about what would happen to the person who committed the offence.

[**30**] Sergeant Rideout conceded that at some point in time, Mr. McLean asked what would happen to the person that killed the dog. He was not sure when this was said, but he testified that he told Mr. McLean that this was a summary

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[8]Mr. McLean testified that Sergeant Rideout told him that this question was referring to a subsequent polygraph examination.

[9]Mr. McLean did not answer this question nor questions 15 or 16. Sergeant Rideout testified that he did not discuss this with Mr. McLean.

conviction offence and therefore a less serious offence. Sergeant Rideout agreed that Mr. McLean expressed some concern to him about being in jail during the Christmas period and being away from his young daughter. Sergeant Rideout testified that he told Mr. McLean that he was not the "trier."

ANY SUSPECTS?

[**31**] Mr. McLean testified that he asked Sergeant Rideout if he had sufficient evidence to charge anyone. Sergeant Rideout also testified that Mr. McLean asked him if he had a suspect or enough evidence to charge anyone. Sergeant Rideout

testified that he responded to these questions by indicating "no." Mr. McLean then apparently said to Sergeant Rideout that if he did not say anything or if no one came forward, then no one would be charged. Sergeant Rideout testified that he indicated that he "agreed."

RIPPING IT UP

[32] Mr. McLean testified that after the Questionnaire was completed, Sergeant Rideout told him that he did not believe that he was being completely truthful and that if he admitted to having killed the dog, he would "tear" the Questionnaire up. Mr. McLean testified that he threw the Questionnaire on to the desk and said "f... it. I did it." He testified that Sergeant Rideout then picked it up and tore it into four

pieces.

[**33**] Sergeant Rideout testified that after Mr. McLean completed the Questionnaire, Mr. Mclean threw it at him and told him to tear it up (obviously this means Sergeant Rideout was present at this time). However, he was uncertain as to why Mr. McLean did this or if it was in response to anything that he may have said to Mr. McLean.

[**34**] Sergeant Rideout testified that he did as requested. He tore it into four pieces. Based on his testimony, he does not appear to have asked Mr. McLean why he wanted him to tear the Questionnaire up nor does he appear to have read it before he

did so. The original Questionnaire, taped back together, was entered as an exhibit.

[**35**] It is difficult from Sergeant Rideout's evidence to determine why he would tear up a piece of evidence, particularly something that he had not even read. It is also difficult to understand why he would comply with such a bizarre request. In contrast, Mr. McLean's description of why the Questionnaire was torn up is a very sensible and logical one.

[**36**] Sergeant Rideout testified that up to that point in time, Mr. McLean was cooperative. He also testified that Mr. McLean did not ask to speak to counsel nor

did he request to leave. Sergeant Rideout testified that if he had asked to leave that he would have been free to do so. He added that he thought Mr. McLean was going to leave when he threw the Questionnaire at him.

[**37**] Sergeant Rideout conceded that up to this point in time he not advised Mr. McLean of his right to contact counsel. He testified that he did not have any basis to arrest Mr. McLean and that he was not detained. He testified that Mr. McLean was not a suspect and that there was evidence which connected other people to the offence. However, Sergeant Rideout did not explain why, if this is true, he was asking Mr. McLean if he committed the offence.

[**38**] Sergeant Rideout testified that when Mr. McLean threw the Questionnaire at him this "changed everything." Apparently, he now viewed Mr. McLean as a

suspect. As a result, he decided to speak to Constable Greeley so that a videotaped statement could be obtained. Constable Greeley had considerable experience in using this equipment.

[**39**] Mr. McLean testified that when Sergeant Rideout left the room this time, he locked the door and when he came back they had another discussion. Mr. McLean testified that he asked Sergeant Rideout if he could keep his name out of the press. He testified that Sergeant Rideout told him that he would "see what he could do"

but that he could not guarantee it.

[**40**] Sergeant Rideout left the room at approximately 11:43 a.m. The videotaped statement commences at 12:02 p.m. Sergeant Rideout believes that he came back to the interview room to tell Mr. McLean that it would take approximately ten to fifteen minutes to set up the room in which the videotaped statement would be recorded. He was not certain if he had any other conversation with him at this point in time. He did not take any notes of this portion of his contact with Mr. McLean.

[**41**] Sergeant Rideout was not sure if anyone else entered the interview room during the period that he was outside of it preparing the video equipment. He did not know if the door was open or closed. He did not believe that it would have been locked, but he was not sure.

WILL I GO TO JAIL?

[**42**] Mr. McLean testified that after the Questionnaire was completed, but before the videotaped interview began, Sergeant Rideout told him that if he admitted to having committed the offence, he would “guarantee” that he would not go to jail. Mr. McLean testified that he had earlier told Sergeant Rideout that he had not

committed the offence and that he had a young daughter that he could not leave. Mr. McLean testified that he had concluded that the police did not believe his denials and that he would be going to jail despite his innocence. He testified that he was willing to falsely confess to this crime to avoid this consequence. In his view, falsely confessing was better than being in jail and away from his daughter.

[**43**] Sergeant Rideout denied that he provided such a guarantee. However, he was not sure if he used the word jail in any of his conversations with Mr. McLean prior to the videotaped statement being taken. He conceded that he might have used the word "lock-up" but he was not sure when he may have said this. He agreed that it might have been after the Questionnaire had been completed. He was not sure. As will be seen, Mr. McLean makes a specific reference to this alleged guarantee prior to the videotaped statement being taken. This time, it is recorded by the video and audio equipment.

THREATS

[**44**] Mr. McLean testified that Sergeant Rideout was polite and courteous to him throughout the interview. He testified that he was not threatened in any fashion and that he was not frightened of Sergeant Rideout.

THE VIDEOTAPED STATEMENT

[45] Constable Greeley testified that on December 13th 2002, he was asked by Sergeant Rideout to conduct a videotaped interview with Mr. McLean. Constable Greeley had not been advised of the nature of the earlier conversations that had occurred between Mr. McLean and Sergeant Rideout. The interview takes place in a different room from the one in which Mr. McLean completed the Questionnaire.

[46] The videotaped statement commences with Constable Greeley explaining to Mr. McLean that the interview was being recorded by video and audio tape. Constable Greeley then reads Mr. McLean the standard police caution. Mr. McLean appears to Constable Greeley to be " a bit confused." Constable Greeley then advises Mr. McLean that he is a "suspect" in the killing of the dog and he reads the police caution to Mr. McLean again. Mr. McLean is asked if he understands, to which he replies "ya." Constable Greeley says "okay."

[**47**] Mr. McLean then makes a comment that illustrates his view of what he had

been promised:

You said all were going, you said there's definitely no jail time.[10]

[**48**] Surprisingly, this comment is not directly responded to by either police officer. It is left hanging in the air and it taints the entire process that follows. This comment should have set off alarm bells. It should have been seen as a clear warning to both officers that the statement that Mr. McLean was about to provide to them might be tarnished by Mr. McLean believing that as a result of providing the statement, he was "definitely" not going to go to jail. This should have been immediately clarified. Instead, Mr. McLean is advised by Constable Greeley to "to be focused on right now..." Mr. McLean says "Okay." Sergeant Rideout remains completely silent. The taking of the statement continues without Mr. McLean's suggestion of an agreement existing being clarified or refuted.

[**49**] Mr. McLean testified that when he was cautioned by Constable Greeley he thought that he might not be able to rely on Sergeant Rideout's guarantee but he still had hope that this guarantee would be honored.

[**50**] Constable Greeley then fully informs Mr. McLean of his right to contact counsel in accordance with section 10(b) of the **Charter**. This is the first time that

[10]With consent, the beginning and the end of the video taped statement was presented as evidence and transcripts were filed as exhibits. At both times, Mr. McLean appears to be very calm and relaxed.

this occurs. When Mr. McLean is asked if he wishes to contact a lawyer, he replies "no." He is not asked if he understands his right to do so.

[**51**] After the videotaped statement has been completed, Constable Greeley tells Mr. McLean that they appreciate him coming in. The conversation then returns to the topic of jail. Sergeant Rideout says: "I'll do whatever I can for you." He testified on the *voir dire* that what he meant was that he would speak to the Crown and mention Mr. McLean's cooperation. He agreed that he may have told Mr. McLean of his willingness to do so prior to the commencement of the videotaped statement. He was not sure.

[**52**] Mr. McLean then makes a reference to Sergeant Rideout telling him that the police did not "have enough evidence to get anybody." Mr. McLean then says that if he has to go to jail that he has "no problem with that" but that he would "definitely want to be home for Christmas." Constable Greeley responds to this comment by telling Mr. McLean that he will not even be appearing in court before Christmas. Once again, neither officer attempts to clarify why Mr. McLean is making these type of comments.

[**53**] Then, the following exchange takes place:

Mr. McLean: And you're going to try to see what you can do about like keeping my name out of it.

Cst. Greeley: Well...

Sgt. Rideout: I know...

Mr. McLean: See what you can do.

[**54**] Sergeant Rideout testified that prior to commencement of the videotaped statement he did not make any reference to keeping Mr. McLean's name out of the press. He testified that Mr. McLean may have asked him to see what he could do about it. Sergeant Rideout was not sure.

[**55**] Finally, the interview ends with Sergeant Rideout making a reference to "counselling." Sergeant Rideout testified that he may have discussed this topic with Mr. McLean before the videotaped statement commenced. He was not sure.

THE POSITIONS OF THE PARTIES

THE CROWN:

[56] The Crown concedes that Sergeant Rideout was not able to supply a detailed account of his contact with Mr. McLean on December 13th 2002. However, Mr. Sparkes points to Sergeant Rideout's explicit denial that he provided any type of

guarantee to Mr. McLean. He submits that the Court should accept Sergeant

Rideout's evidence over that given by Mr. McLean. He concedes however, that because of the onus placed upon the Crown to establish beyond a reasonable doubt that the statement was provided on a voluntary basis, it is not simply a matter of the Court choosing which witness it believes.

[**57**] Mr. Sparkes also submits that prior to the commencement of the videotaped statement commencing, Mr. McLean was not detained and therefore Sergeant Rideout was not obliged to advise him of his right to contact counsel. He argues that Mr. McLean understood that he did not have to cooperate with the police nor complete the Questionnaire. He concedes, quite properly, that if Mr. McLean was detained then a breach of section 10(b) of the **Charter** occurred and any statement obtained from Mr. McLean should be excluded.

THE ACCUSED:

[**58**] Mr. Short responds by reminding the Court that the Crown must prove that any statement provided by Mr. McLean was provided voluntarily. He argues that Sergeant Rideout's inability to recall much of what occurred on December 13th 2002 makes it impossible for the Crown to discharge this onus. He points to Mr. McLean's comments at the commencement of the videotaped statement as conclusive proof that Mr. McLean had been given an undertaking by Sergeant

Rideout that he would avoid imprisonment if he confessed.

[**59**] Mr. Short also argues that Mr. McLean was detained when asked to complete the Questionnaire. He submits that this was a demand or direction to which Mr. McLean reasonably believed that he had no choice but to comply with. He refers to the nature of the questions contained in the Questionnaire as proof that Sergeant Rideout was attempting to obtain incriminating evidence against Mr. McLean. Therefore, he submits that Sergeant Rideout had a constitutional obligation and duty to advise Mr. McLean of his right to contact counsel before asking him to incriminate himself.

ANALYSIS

THE CHARTER:

[**60**] Section 10(b) of the **Canadian Charter of Rights and Freedoms** states:

> Everyone has the right on arrest or detention
> to retain and instruct counsel without delay and to be informed of that right.

[**61**] Mr. McLean was not advised of his right to contact counsel until the commencement of the taped interview on December 13th 2002. The police have a constitutional obligation, responsibility and duty to advise any person they detain or arrest of their right to contact counsel without delay. They also have an obligation to take steps to safeguard against false confessions being mistakenly obtained. This

requires a commitment to proper interview techniques and a detailed recording of their contact with suspects and witnesses. The time has come to put away the pen and paper. The advantage provided by modern recording equipment in relation to the taking of statements from both witnesses and suspects has been ignored by the police for too long.

[**62**] The key words in section 10(b) of the **Charter** are the words "arrest or detention." In this case, Mr. McLean was not arrested and therefore, the issue involves a determination of whether or not he was constitutionally detained.

DETENTION

[**63**] Before considering the concept of detention in the context of section 10(b) of the **Charter**, it is important to recognize that the mere fact that a person the police are speaking to is a suspect does not automatically mean that the person is detained as a result. Rather, the status of the accused as a suspect, or not, is a factor and at times a crucial one in determining if a "constitutional detention" occurred. The police do not have to advise suspects of their right to contact counsel. They only have to advise people who are arrested or constitutionally detained by them (see **R. v. Keats** (1987), 39 C.C.C. (3d) 358 (N.L.C.A.), **R. v. C. (S.)** (1989), 74 Nfld. & P.E.I.R. 252 (N.L.C.A.) and **R. v. Dawson** (1996), 143 Nfld. & P.E.I.R. 252

(N.L.C.A.). The police are entitled to ask questions of any person, even a suspect. They have no legal obligation to advise such people of the right to contact counsel unless, as stated by our Constitution, the person is detained or arrested (see **R. v. Esposito** (1985), 24 C.C.C. (3d) 88 (Ont. C.A.) and **R. v. Smith** (1986), 25 C.C.C. (3d) 361 (Man.C.A.).[11]

[**64**] It can be safely assumed that when the police conduct an interview they are seeking information in an attempt to determine if an offence has occurred and/or whom committed it. This inherent nature of police interviews does not mean that everyone interviewed by the police is detained.[12] As pointed out by former Chief Justice Goodridge in **Keats**, "Questioning of itself does not create a psychological detention. One must view the overall situation and have regard to what is said and done and in what manner."

[**65**] It would be ridiculous to require that the police advise every person they

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[11] Even questioning a person at a police station does not automatically result in a detention. However, it is an important factor to consider (see **R. v. Bazinet** (1986), 25 C.C.C. (3d) 273 (Ont. C.A.).

[12] In **R. v. H.(C.R.)**, [2003] M.J. No. 90, the Manitoba Court of Appeal stated:

> The mere fact of conversation between a citizen and a police officer does not raise a presumption of detention. See *United States of America v. Alfaro* (1992), 75 C.C.C. (3d) 211 at 236 (Que. C.A.), per LeBel J.A. Police officers may enter into conversations with individuals and ask questions.

speak

to of the right to contact counsel. However, it certainly would be prudent for them to do so in relation to anyone that they even remotely suspect is involved in a criminal offence.

[**66**] It is also important, however, for the police to understand that the determination as to whether or not a person being interviewed by them is constitutionally detained is not determined on the basis of the subjective opinion of the officer involved. It is the state of mind of the person being interviewed which is the crucial consideration. As the Manitoba Court of Appeal states in **H.(C.R.)** **(**at paragraph 21):

> The elements of a police demand or direction, coupled with a voluntary compliance that results in a deprivation of liberty, are essential to the existence of a psychological detention. These elements assure that a common thread - control over the movements of the individual - runs through all three types of detention identified in the *Therens* test. Without some control over an individual's movements, there is no detention - not even psychological detention. The only distinction is one of degree. In the third category of detention, the control emanates from the accused, who submits to a police demand or direction by restraining their own freedom of movement in the reasonable belief that they have no other choice.

[**67**] And at paragraph 28:

> To the above factors must be added the subjective belief of the accused. The personal circumstances of the accused, such as age, intelligence and level of

> sophistication, may be considered in determining whether an accused had a subjective belief that he was detained. However, a subjective belief is not determinative. The test has an objective component. The belief must be a reasonable one.

[**68**] Therefore, failing to properly advise suspects of their right to counsel is a risky procedure for the police to engage in. Constitutional detention is determined judicially, on an *ex post facto* basis after an interview takes place and after a statement has been obtained. If it is determined that the suspect was detained at the time he or she was interviewed by the police and if that person was not advised of their right to contact counsel, then any statement obtained which the Crown seeks to introduce at trial will likely be considered to negatively affect the fairness of the accused's trial and thus it will likely be excluded (see **R. v. Buhay**, 2003 SCC 30, **R. v. Law**, [2002] 1 S.C.R. 227 and **R. v. Fliss**, [2002] 1 S.C.R. 535). This of course defeats the purpose of interviewing suspects.

[**69**] When then does a constitutional detention occur? It can occur as a result of a physical or psychological detention. In the latter instance, there must be an act of acquiescence by an accused person as a result of a demand or direction from a police officer. The test to be applied has been succinctly summarized by one author as follows:

> ...the issue is really determined on whether or not there was coercion, on a "demand or direction" and on acquiescence on the part of the suspect based on an actual and reasonable belief of the suspect that freedom was restrained. That determination may include words spoken, gestures and other related actions. An *ex post facto* belief of restraint by an accused may not be

> sufficient.[13]

[**70**] This formulation can be traced back to the Supreme Court of Canada's judgement in **R. v. Therens**, [1985] 1 S.C.R. 613.[14]

[71] Therens involved a case in which a breathalyzer demand had been made to the accused. The Supreme Court of Canada ultimately concluded that the nature of a breathalyzer demand resulted in a constitutional detention because the accused in such a situation has no choice but to comply with the demand because a refusal to do so can constitute an offence. Constitutional detention was described as follows:

> The purpose of s. 10 of the *Charter* is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay. The situations specified by s. 10 -- arrest and detention -- are obviously not the only ones in which a person may reasonably require the assistance of counsel, but they are situations in which the restraint of liberty might otherwise effectively prevent access to counsel

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[13]The Honourable R. J. Marin, **Admissibility Of Statements** (9th ed.), Canada law Book, 2003, at page 2-21.

[14]In **R. v. Schmautz**, [1990] 1 S.C.R. 398, the Court referred to its judgement in **Therens** as being the "ultimate reference on the subject."

> or induce a person to assume that he or she is unable to retain and instruct counsel. In its use of the word "detention", s. 10 of the *Charter* is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.
>
> In addition to the case of deprivation of liberty by physical constraint, there is in my opinion a detention within s. 10 of the *Charter* when a police officer or

> other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.
>
> In *Chromiak*, this Court held that detention connotes "some form of compulsory constraint". There can be no doubt that there must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action that amounts to a detention within the meaning of s. 10 of the *Charter*. The issue, as I see it, is whether that compulsion need be of a physical character, or whether it may also be a compulsion of a psychological or mental nature which inhibits the will as effectively as the application, or threat of application, of physical force. The issue is whether a person who is the subject of a demand or direction by a police officer or other agent of the state may reasonably regard himself or herself as free to refuse to comply.

[**72**] **Therens** was subsequently considered by the Supreme Court of Canada in its judgement in the case of **R. v. Thomsen**, [1988] 1 S.C.R. 640. In that case, the accused was given an "A.L.E.R.T." demand requiring that he provide a sample of his breath for a roadside screening device. The accused refused and was given an appearance notice for the offence of failing to comply with such a demand. The

Court after referring to **Therens** stated:

> 1. In its use of the word "detention", s. 10 of the *Charter* is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.
>
> 2. In addition to the case of deprivation of liberty by physical constraint, there is a detention within s. 10 of the *Charter*, when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which

> prevents or impedes access to counsel.
>
> 3. The necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply.
>
> 4. Section 10 of the *Charter* applies to a great variety of detentions of varying duration and is not confined to those of such duration as to make the effective use of habeas corpus possible.

[**73**] These cases led to the formulation referred to earlier. Though these cases dealt with situations in which an accused person was asked to potentially incriminate themselves by virtue of statutory compulsion, they have also been applied to cases involving the interviewing of suspects. This has led to some peculiar results.

[**74**] **Therens** was subsequently referred to by the Ontario Court of Appeal in its

judgement in **Bazinet**. In **Bazinet**, the Court formulated a test which has been generally accepted as the correct one:

> In *Therens* the Supreme Court of Canada held that a demand to accompany a police officer to a police station to submit to a breathalyzer test pursuant to section 235 of the *Criminal Code* amounted to a detention. Although he dissented on the question of exclusion of evidence pursuant to section 24(2) of the *Charter*, it was Lamer J., who gave the view of the court on the issue of what constitutes a detention. In the context of that case he suggested that the word is directed to a restraint or liberty other than arrest. And that in addition to the case of depravation of liberty by physical constraint there is, in my opinion, a detention within section 10 of the *Charter*

> when a police officer or other agent of the state assumes control over the movement of a person by demand or direction which may have significant legal consequences and which prevents or impedes access to counsel.

[**75**] In **Smith**, the accused was charged with the offence of manslaughter. The victim of the offence was an infant child. The mother of the child, with whom the accused was living, brought the child to the hospital. Following the death of the child the accused and the child's mother were asked by the police to come to the police station. They agreed to do so. The Manitoba Court of Appeal described the circumstances of what occurred next, as follows (at pages 364-365):

> On the second floor of the public safety building there was a small waiting room where the accused and his parents waited while Donna Popiel, the mother, was questioned by police officers in an interview room. Then it was the accused's turn while Donna joined the others in the waiting room. The accused entered the interview room around 10:45. The door to the interview room was closed but the accused

> was not then under arrest or under any restraint. The police officers knew that the accused and Donna Popiel were the adult persons who had recent care of the child, but they were simply seeking information. There could have been an explanation for the injury consistent with the innocence of both the accused and Donna Popiel.

[**76**] The accused subsequently provided a statement. The question which was raised in **Smith** was whether or not he had been constitutionally detained at the time. The Court of Appeal concluded that he had not been (at page 368):

> In the present case there is no physical constraint. Nor was there any demand or direction. There was a request that the accused attend the public safety building which the accused was free to refuse. There was

> a request that he cooperate in providing information as to the circumstances of the death of the child, which once again he was free to refuse. There was no physical constraint nor any demand or direction that he remain in the interview room after the first interview had been completed and throughout the entire period, until the police officers had a second interview with Donna Popiel the police officers had no reason to think that the accused was criminally involved in the death of the child.

[77] In **R. v. Moran** (1987) 36 C.C.C. (3d) 225, the Ontario Court of Appeal set out a series of factors which it concluded might be relevant in determining if a detention had occurred. Mr. Justice Martin, at pages 258-259, wrote:

> I venture to suggest that in determining whether a person who subsequently is an accused was detained at the time he or she was questioned at a police station by the police, the following factors are relevant. I do not mean to imply, however, that they are an exhaustive list of the relevant factors nor that any one factor or combination of factors or their absence is necessarily determinative in a particular case. These factors are as follows:

1. The precise language used by the police officer in requesting the person who subsequently becomes an accused to come to the police station, and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home;

2. whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request;

3. whether the accused left at the conclusion of the interview or whether he or she was arrested;

4. the stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and
that the accused was the perpetrator or involved in its commission and

the questioning was conducted for the purpose of obtaining incriminating statements from the accused;

5. whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;

6. the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt.

7. the subjective belief by an accused that he or she is detained although relevant, is not decisive, because the issue is whether he or she reasonably believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained.

[78] If a purposeful approach is taken to the interpretation of the word detention in

section 10(b) of the **Charter**, then factors four and five of **Moran** are the most important ones to be applied in determining whether or not a suspect, whom is being interviewed by the police, is detained. However, as has been seen and as will be seen again, the generally accepted approach involves attempting to apply to such situations a standard of constitutional detention developed to deal with statutory compulsions. The Court of Appeal of this province attempted to construct a test which would more naturally apply to cases in which a suspect is interviewed by the police. However, it was not endorsed by the Supreme Court of Canada.

[79] In **R. v. Hawkins** (1992), 72 C.C.C. (3d) 524 (N.L.C.A.), the accused was

charged with the offence of sexual assault. A statement was obtained from the complainant in which the accused was incriminated. The investigating officer contacted the accused and asked him if he would come into the police station to be interviewed. The accused agreed. The circumstances concerning the meeting were described by the Court of Appeal as follows:

> The statement was taken in the course of a police questioning of the appellant. The interview took place as a result of a complaint laid on April 27, 1988, by the daughter of a friend of the appellant at whose house he had been a frequent visitor. The first contact which he received from the police concerning the allegation was through a telephone call around 10 a.m. on

> June 24, 1988. At that time the investigating officer contacted him at his home requesting an interview and suggesting that, at the appellant's election, it could be conducted either at his home, place of business or at police headquarters.
>
> The phone call did not take the appellant unawares as the complainant's mother had apprised him of her daughter's allegations to the police. He agreed to the interview and elected to go to the constabulary's headquarters where he arrived at 2 p.m. that same afternoon.

[**80**] The accused was interviewed by the investigating officer and he provided a statement. The investigating officer did not advise him of his right to contact counsel.

[**81**] A *voir dire* was conducted. The accused did not testify. The trial judge concluded that a breach of section 10(b) of the **Charter** had not occurred because the accused was not detained when the interview took place. The accused was

convicted. He appealed.

[**82**] A majority of the Court of Appeal concluded that the accused had been detained. They concentrated on the purpose of section 10(b) of the **Charter** and concluded that a constitutional detention had occurred because the investigating officer had focused and concentrated upon the accused as the “perpetrator of the crime he was alleged to have committed.” Mr. Justice Marshall stated:

> ...in my view, *Therens* was not laying down as a hard and fast rule that these

standards are the exclusive foundation of every psychological detention. The last quoted passage forms part of an inquiry into the nature of a detention which fell short of physical constraint but was one, nevertheless, which entailed control over the movements of an individual. In such instances there will invariably be some type of demand or direction and impression by the affected party of suspension of freedom of choice and it is upon these elements that the psychological compulsion founding such a detention must be assessed. This is not to say, however, that they are the sole criteria.

In cases such as the present, where detention is being considered in the context of a police interview which has no aspect of physical constraint or control, the absence of any demand or direction, or even of subjective feelings of compulsion by the person interviewed to respond to the questions posed to him or her, does not necessarily, in my opinion, signal an absence of detention and disentitlement to the protection of being advised of one's right to counsel before communicating with the police. While the presence of these factors will undoubtedly signify a detention, their absence is not necessarily determinant. It is still necessary to weigh further the entire tenor and ambience of the interview to determine whether the impugned statements emanating from it were obtained in a manner which infringed the purpose of s. 10(b).

It is necessary to go beyond the absence of demand and direction because just as it is generally unrealistic, as *Therens* notes, to regard compliance with a

police order as truly voluntary, it must also be illusory in most instances to regard acquiescence with a police request for an interview to answer an accusation against one as voluntary. It is one thing to say an accused came without objection and quite another that he or she came willingly. No matter how precatory the request nor outwardly willing seems the response, compliance will normally be dictated, if not by a feeling of obligation to comply, by a feeling of need to answer the accusation and defend oneself. The mental compulsion and perception of suspension of choice would in my view be present, if not to the same degree as if responding to a demand or direction, at least to an extent which would stretch the bounds of reality to count the response as voluntary.

> In this case, the appellant went to the police station knowing the visit was for the purpose of addressing a complaint of serious criminal activity against him. It is fair to assume that he did not submit to this diversion from his daily routine willingly no matter how outwardly voluntary his reaction to the police request may appear. The known objective of the encounter being the need to respond to the accusation against him affords the psychological compulsion and cohesion that *Therens* has prescribed requisite "...to constitute an interference with liberty or freedom of action that amounts to a detention within the meaning of s. 10 of the *Charter*" (per Le Dain J., p. 504).[15]

[**83**] The conviction was set aside.

[**84**] Former Chief Justice Goodridge dissented. He found much to commend the approach taken by the other two members of the Court. However, he felt compelled to disagree with them because he concluded that the evidence failed to establish that the accused felt compelled to speak to the officer:

> The right to counsel arises not because a person has the right to remain silent but because a person has been detained. When detained, his right to be

> advised of his right to counsel will serve to protect his right to remain silent. The fact that a suspect is being asked to give up his right to remain silent without more does not amount to a detention and, absent a detention, there is no obligation to advise a suspect of his right to retain and instruct counsel.
>
> If the suspect is asked to give up his right to remain silent and there is evidence before the trial judge that the suspect felt compelled to do so, or even that he was unsure as to whether he was under compulsion or not and decided to act as if he were, then there may be a detention within the meaning of the *Charter*. In this particular case, there was no such evidence before the trial judge. The request for a statement without some evidence of

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[15]Also see **R. v. Caputo**, [1997] O.J. No. 857 (C.A.), at paragraphs 29-30.

> a sense of compulsion does not amount to a detention under s. 10(b). It is on that point alone that I disagree with Marshall J.A.
>
> The appellant must show by a preponderance of evidence that his *Charter* right was violated, that he was entitled to be advised of his right to counsel and that he was not so advised. His entitlement springs from a detention, real or perceived. There was no real detention and no evidence of a perceived detention. A detention within the meaning of the *Charter* does not arise by virtue of a suspect being asked to give up his right to remain silent, to comment on the complaints against him. This conclusion is reinforced in a situation where a suspect has been advised of his right to remain silent. It is not sufficient for the suspect to show that he was questioned. He must show that, from a subjective view, there was an element of compulsion.
>
> I am of the opinion that circumstances did not exist in this case that would require that the appellant be advised of his right to counsel.

[**85**] The Crown appealed to the Supreme Court of Canada ([1982] 2 S.C.R. 157).

In a brief oral judgement, the Court simply stated:

> We are all of the view that on the facts of this case the respondent was not detained. It follows that there could not be any infringement of his rights guaranteed by s. 10(b) of the *Canadian Charter of Rights and Freedoms*.
>
> The appeal is therefore allowed. The order of the Court of Appeal is set
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> **38.**
>
> aside and the conviction restored.[16]

[**86**] So, the **Therens** test rules and it must be applied. What then is the result of its application in this case?

[**87**] It must, in my view, result in a conclusion that when Mr. McLean was asked

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[16]Also see **R. v. D.M.F.** (1999), 139 C.C.C. (3d) 144 (Alta. C.A.).

to complete the Questionnaire he was constitutionally detained.

[**88**] Why? Because the "request" to complete the Questionnaire in this case constituted a demand or direction for the purpose of section10(b) of the **Charter**. A constitutional detention does not always require that a refusal to cooperate will constitute an offence. A demand or direction can be politely given. In this case, I conclude that by December 13th 2002, Mr. McLean was viewed by the police as a suspect. The purpose of having him complete the Questionnaire was to obtain incriminating evidence against him. It was not solely an information gathering technique. Mr. McLean was not being interviewed as a possible witness. If he was, then Mr. McLean would not have been asked if he committed the offence. He was not being asked to assist in the investigation, he was being asked to confess.

[**89**] I also conclude that Mr. McLean subjectively believed that he had no choice but to complete the Questionnaire. I accept his evidence on this point. I also

conclude that this was a reasonable conclusion for him to reach. He was now inside the police station and he was being directly asked if he killed the dog. The circumstances of what occurred on December 13th 2002 stand in stark contrast to what occurred on December 8th 2002.

[**90**] Therefore, Mr. McLean has met his onus of establishing that a breach of

section 10(b) of the **Charter** occurred. I accept as correct the Crown's concession that this must result in the exclusion of Mr. McLean's remark to Sergeant Rideout in which he is purported to have said: "f... it. I did it." The admission of this evidence would affect the fairness of the trial and it would bring the administration of justice into disrepute.[17]

THE COMMON LAW CONFESSION RULE

[91] Prior to the videotaped statement being obtained, Mr. McLean was fully advised of his right to contact counsel. Therefore, no constitutional issue arises in relation to this statement. The determination as to whether or not this statement is admissible requires a consideration of the common law rule that demands that to be admissible, such a statement must have been provided voluntarily.

[**92**] In order for a statement given to a person in authority to be admissible, the Crown must establish beyond a reasonable doubt that it was provided voluntarily (**R. v. Boudreau**, [1949] S.C.R. 262). A statement may be involuntary if it is the result of either an inducement or a threat (**R. v. Hebert**, [1990] 2 S.C.R. 151). It may also be involuntary if it is not the product of an operating mind (**R. v. Horvath** (1979), 44 C.C.C. (2d) 385 (S.C.C.).

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[17]For an analysis of the factors to be considered in applying section 24(2) of the **Charter**, see **R. v. Saunders**, [2002] N.J. No. 159 (P.C.) and **R. v. Pelley**, [2002] N.J. No. 244 (P.C.).

[**93**] The statement of the rule, long considered definitive, is found in **Ibrahim v. The King**, [1914] A.C. 599 (P.C.):

> ...no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised by a person in authority.

[**94**] The common law confession rule is based on the premise that involuntary confessions are more likely to be unreliable than ones provided voluntarily. The fear is that the admission of involuntary confessions will increase the ranks of the wrongfully convicted. This underlying principle was reaffirmed and expanded upon by the Supreme Court of Canada in **R. v. Oickle**, [2000] 2 S.C.R. 3.

[**95**] In **Oickle**, the Court decided that it was time to "restate the rule." The Court stressed the dangers of false confessions and it encouraged trial judges to consider whether or not a particular inducement or promise had an actual impact upon an

accused person's decision to speak to the police. The Court also indicated that in applying the “confession rule” that “it is important to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes.”

THREATS AND PROMISES

[**96**] The most common type of false confessions are what the Supreme Court of Canada describes in **Oickle** as "coerced-compliant confessions" (at paragraphs 39 and 44). These are confessions that are induced by threats or promises:

> ... the literature bears out the common law confessions rule's emphasis on threats and promises. Coerced-compliant confessions are the most common type of false confessions. These are classically the product of threats or promises that convince a suspect that in spite of the long-term ramifications, it is in his or her best interest in the short- and intermediate-term to confess.[18]

[**97**] In **Oickle**, the police were investigating a number of fires. When they spoke to the accused they "intimated that it might be necessary to question [the accused's fiancee] to make sure she was not involved in the fires at all, either alone or in collaboration with the [accused]." The accused then provided a statement.

[**98**] The Supreme Court of Canada concluded that these comments did not affect the voluntariness of the accused's statement because "they lacked strength" and "there was no causal connection between the police inducements and the subsequent confession" (at paragraph 84). The Court noted that the police had

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[18]Torture was at one time commonly used to extract confessions. One gruesome method used during the Inquisition for instance, involved hanging the suspect by his or her arms, weighing them down and then pouring water down their throats. Ropes that had been tied around them would then be tightened. See Kamen, Henry, **Inquisition And Society In Spain: In The Sixteenth And Seventeenth Centuries**, Indiana University Press, 1985, at page 175.

never "threatened to bring charges against her." As a result, the Court concluded, at paragraph 104, that:

> ...The [accused] was never mistreated, he was questioned in an extremely friendly, benign tone, and he was not offered any inducements strong enough to raise a reasonable doubt as to the voluntariness in the absence of any mistreatment or oppression.[19]

PROPER INDUCEMENTS

[**99**] The Supreme Court of Canada stated in **Oickle** that it is important that trial judges carefully review the nature of the inducement said to have been offered. The Court concluded that not all statements obtained as a result of an inducement will be ruled inadmissible. In **Oickle**, it was held that exclusion will occur "only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne" (at paragraph 57). In addition, the inducement must be offered by a person

in authority. Self-generated inducements will not result in a statement being ruled inadmissible.

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[19]**Oickle** has been the subject of significant academic criticism. See for instance, Don Stuart, **Oickle: The Supreme Court's Recipe for Coercive Interrogation** (2001), 36 C.R. (5th) 188.

A *QUID PRO QUO?*

[**100**] According to the Supreme Court of Canada, the "most important consideration in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise" (**Oickle**, at paragraph 57):

> In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne. On this point I found the following passage from *R. v. Rennie* (1981), 74 Cr. App. R. 207 (C.A.), at p. 212, particularly apt:
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> > Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.
>
> **44.**
>
> The most important consideration in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise.

THE OFFERING OF LENIENCY

[**101**] As regards the offering leniency in exchange for the providing of a statement, the Court concluded that such an inducement "will warrant exclusion in all but exceptional circumstances" (at paragraph 49):

> As noted above, in *Ibrahim* the Privy Council ruled that statements would be inadmissible if they were the result of "fear of prejudice or hope of advantage". The classic "hope of advantage" is the prospect of leniency from the courts. It is improper for a person in authority to suggest to a suspect that he or she will take steps to procure a reduced charge or sentence if the suspect confesses. Therefore in *Nugent*, *supra*, the court excluded the statement of a suspect who was told that if he confessed, the charge could be reduced from murder to manslaughter. See also *R. v. Kalashnikoff* (1981), 57 CCC (2d) 481 (B.C.C.A.); *R. v. Lazure* (1959), 126 CCC 331 (Ont. C.A.); R. J. Marin, *Admissibility of Statements* (9th ed. (loose-leaf)), at p. 1--15. Intuitively implausible as it may seem, both judicial precedent and academic authority confirm that the pressure of intense and prolonged questioning may convince a suspect that no one will believe his or her protestations of innocence, and that a conviction is inevitable. In these circumstances, holding out the possibility of a reduced charge or sentence in exchange for a confession would raise a reasonable doubt as to the voluntariness of any ensuing confession. An explicit offer by the police to procure lenient treatment in return for a confession is clearly a very strong inducement, and will warrant exclusion in all but exceptional circumstances.

[**102**] The Supreme Court of Canada has had an opportunity to apply **Oickle**. In **R. v. Tessier** (2001), 153 C.C.C. (3d) 361 (N.B.C.A.), the accused was acquitted of the offence of second degree murder. At the trial, his confession was excluded. The trial judge concluded that it had been obtained as a result of an improper inducement. A

majority of the New Brunswick Court of Appeal set aside the acquittal and ordered a new trial. It held, at paragraph 42, that the trial judge, in light of **Oickle**, had applied the wrong test:

> It follows that Justice McLellan did not conduct the inquiry that was required of him by the confessions rule. He was required to determine if there was, on the evidence, a reasonable doubt about whether the interrogating officers made a quid pro quo offer that caused Mr. Tessier to lose his freedom to choose between giving a statement or remaining mute. After all, that freedom to choose is the very essence of the confession rule. See *R. v. Hebert*, [1990] 2 S.C.R. 151, at p.173, per McLachin J., as she then was, for the majority. Justice McLellan did not direct his mind to the question that must be answered if tolerable persuasion is to be distinguished from vitiating inducement: what quid pro quo offer did the interrogating officers make to Mr. Tessier that might have caused his will to be overborne? That is the legal test that emerges from *Oickle* and, for that matter, the essential nature of the confession rule.

[**103**] In a dissenting opinion, Deschenes J.A. concluded that the trial judge had applied the correct test and that as a result, no error of law had occurred and thus no right of appeal existed.

[**104**] The Supreme Court of Canada ([2002] 1 S.C.R. 144) agreed that the trial judge had applied the correct test and that the appeal to the New Brunswick Court of Appeal "did not raise a question of law alone." As a result, the acquittal entered at the trial was restored. The Court also expressed its agreement with the following comments made by Justice Deschenenes:

> As can be seen from the comments of the trial judge, he took the view that the question of voluntariness had to be decided on the basis of a consideration of all

> the circumstances surrounding the taking of the statements. In adopting the wider approach he did not, in my view, apply the wrong test. The appropriate test to be applied in this case was whether the evidence raised a reasonable doubt that the statements were voluntary by reason of a combination of oppressive conditions and inducements, taking into account all the circumstances surrounding the taking of the impugned statements. This is precisely the test utilized by the trial judge.

[**105**] As a result of **Oickle**, a proper analysis requires consideration of whether or not a *quid pro quo* offer was made to the accused and whether it was strong enough to overcome the will of the accused. Thus, in **R. v. W.T.V.**, [2001] O.J. No. 4197 (O.S.C.), it was held that even if the comments of the police constituted an inducement, it was not such that it "could overbear the will of this seasoned and mature criminal."

[**106**] Applying these principles to this case results in what? In my view, it results in a conclusion that the videotaped statement taken from Mr. McLean on December 13th 2002, is inadmissable. It was obtained after an improper inducement was proffered.

[**107**] This does not mean that the Court has conclusively concluded that Sergeant Rideout acted improperly. That is not the test that the Court must apply. Remember, the Crown must prove beyond a reasonable doubt that this statement was provided voluntarily. When it is unable to present a detailed accounting of the interaction between a suspect and a police officer, then this burden provides it with a significant challenge. A challenge it cannot meet in this case.

[**108**] Much to Sergeant Rideout's credit, he was brutally frank in admitting how little

he could recall about his contact with Mr. McLean on December 13th 2002.

[**109**] There is no reason for the Court to reject Mr. McLean's assertion that he falsely confessed to this offence because he had been guaranteed that it would result in him not being imprisoned. In fact, his comment at the beginning of the videotaped statement provides compelling evidence that this is exactly what occurred. In short, I am left with a reasonable doubt concerning the voluntariness of the videotaped statement obtained from Mr. McLean on December 13th 2002. Accordingly, it is ruled to be inadmissable against him.

CONCLUSION

[**110**] For the reasons given, I hereby rule that the written statement obtained by Sergeant Pauls on December 8th 2002 is admissible in this matter. However, the oral statement and the videotaped statement of December 13th 2002 are inadmissible.

[111] Judgement accordingly.

Appearances:
Mr. A. Sparkes for Her Majesty the Queen.
Mr. B. Short for Mr. McLean.