Docket:20010124
YOA

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

BETWEEN:

HER MAJESTY THE QUEEN

PLAINTIFF

- and -

MC

DEFENDANT

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on August 5, 2008.

D E C I S I O N

Heard Before:	The Honourable Justice Suzanne M. Hood at Supreme Court, Family Division on November 21, 22, 28, December l and 4, 2000.
Decision:	December 4, 2000 Orally
Written Release of Oral:	January 24, 2001
Counsel:	Jennifer MacLellan for the Crown Megan Longley for the Defendant

HOOD, J:

[1] M.C. is charged with robbery of the CIBC and use and possession of an imitation firearm.

[2] M.C. was arrested on October 12, 2000 at the bus station in [...] on his return from [...]. He was taken to the Halifax Police Station and questioned. He eventually confessed.

[3] The issue is whether his statement should be admitted. On the *voir dire*, I heard evidence about the taking of the statement from Constable Fred Armitage and Constable William Morris and watched a portion of the videotaped statement but not the confession itself.

[4] The defence submits that the statement should not be admitted because it was not given voluntarily and because the police did not comply with s. 56 (2) (b) of the *Young Offenders Act.*

VOLUNTARINESS

[5] Constable Armitage and Constable Morris testified about their arrest of M.C. and taking him to the police station. Once there, Constable Armitage testified that he set up and operated the videotape until he left, leaving the tape running. He testified that, before his departure, no inducements, promises or threats were made. He himself had no conversations with M.C..

[6] Constable Morris testified about his arrest of and interview with M.C.. He testified that he gave no inducements nor made any promises or threats in his dealings with M.C..

[7] Both officers testified that no other persons in authority had any contact with M.C. during the relevant time. Constable Morris testified as well that he had no discussions with M.C. other than those which were videotaped. He testified that he was not in uniform and removed his sidearm before interviewing him.

[8] Constable Morris testified on cross-examination that he might have told M.C. that he would not be transferred to adult court. He admitted that the decision is not his to make but that he has had input on other occasions. He testified that, in his experience, some young persons charged with murder were not transferred to adult court.

[9] Constable Morris also testified on cross-examination that he might have told M.C. that there were other unrelated charges which were being investigated. On re-examination, Constable Morris testified that he did not promise M.C. that he would not be transferred to adult court.

[10] The videotape showed that M.C. asked what court he would go to. Somewhat later in the interview, Constable Morris said that M.C. would not be transferred to adult court. He said

he might be if he was seventeen (M.C. had turned 15 [in 2000]). Constable Morris did tell him however that he would be looking at "secure custody" for this offence.

[11] The videotape also disclosed that Constable Morris referred to M.C. as being an accessory before or after the fact to some of his father's bank robberies. He also made reference to a possible charge for the stolen car used in this offence.

[12] M.C. asked on the videotape whether he could be remanded on that day rather than spend time in cells. Constable Morris said he would see what he could do after the interview. M.C. asked again about this. On the first occasion, Constable Morris said "I'm not going to deal with that now". On the second occasion, he said he could not promise M.C. anything and said only that he would phone about it when they were done. M.C. said "the last time" he was in cells overnight. Again, Constable Morris said he could not promise anything but that he would check when they were done. He said the final decision was that of Constable MacDonald.

[13] Constable Morris discussed with M.C. his previous offences and previous sentences and talked about the time he could get for this offence. He said it could possibly be a year.

[14] The defence submits that giving M.C. false information about the jeopardy he was in was an inducement. Ms. Longley says that telling M.C. that he would not be transferred to adult

court induced him to give the statement. She submits that Constable Morris said this, although he knew it was not his decision to make and he could not guarantee it. In her submission, however, he did guarantee it.

[15] Ms. Longley also submits that it was an inducement for Constable Morris to give information to M.C. with respect to the penalty for this offence. He told M.C. the chances were he would not face a sentence of three years which he said was the maximum under the *Young Offenders Act*.

[16] Ms. Longley also says that Constable Morris was wrong in his information to M.C. that his young offender record could not be brought up on job applications.

[17] Ms. Longley also submits that the reference by Constable Morris to investigating other offences was a threat to M.C.. As she put it, there was no reason for it to be mentioned other than to induce M.C. to cooperate or threaten more trouble for him if he did not cooperate.

[18] Ms. Longley also submits that M.C.'s requests for remand and Constable Morris's responses constituted promises which caused M.C. to give his statement therefore rendering it not voluntary.

[19] Finally, Ms. Longley submits that, taking into consideration all these things, the statement of M.C. cannot be considered to be voluntary.

[20] After hearing the testimony of Constables Armitage and Morris and viewing the relevant portions of the videotape, I am satisfied beyond a reasonable doubt that the statement given by M.C. was voluntary.

[21] I am satisfied that Constable Morris's statement about transfer to adult court was not an inducement to M.C. to give a statement. M.C. had previous convictions and previous sentences and, therefore, was not unfamiliar with the workings of the *Young Offenders Act* and the court system. Furthermore, he had just returned from [...] where he would have been in contact with other young offenders. It is reasonable to conclude that he would have knowledge of the sorts of offences they had committed, their sentences and whether any had been dealt with in adult court. M.C., although only fifteen, was not a young person having his first dealings with the police and the *Young Offenders Act*.

[22] I am also satisfied that, when Constable Morris told M.C. "the chances" were that he would not get the maximum sentence under the *Young Offenders Act*, this was not an inducement. The word "chances", in my view, is neither a guarantee nor a promise

and, therefore, cannot reasonably be concluded as being the sort of wording that would induce a statement.

[23] I am also satisfied beyond a reasonable doubt that Constable Morris's comments about a young offender record and job applications was not an inducement to M.C. to give a statement. M.C. had at least one prior conviction and a confession to this offence would not change his situation in this regard.

[24] The other offences to which Constable Morris referred, accessory before or after the fact of his father's robberies and car theft, were less serious than the robbery which was being investigated since a weapon was allegedly used in the bank robbery. I am therefore satisfied beyond a reasonable doubt that mentioning these other offences was not capable of inducing M.C. to give a statement nor threatening to him such that he would give a statement.

[25] Constable Morris was very careful in the way he responded to M.C.'s repeated requests for remand. He consistently told him he could not do anything about it until they finished the interview. He told him that he would make a call but promised nothing. He ultimately said that the decision was that of Constable MacDonald. Had he said anything else, in my view, it could have been considered an inducement or promise. The way in which this was handled insured that M.C. took nothing untoward

from the responses of Constable Morris to his repeated requests. I am therefore satisfied that M.C. was not thereby induced to give his statement.

[26] In considering each circumstance referred to by Ms. Longley and overall in considering all the circumstances under which M.C. gave his statement, I am satisfied beyond a reasonable doubt that it was voluntary.

SECTION 56 (2) YOUNG OFFENDERS ACT

[27] The second issue with respect to admissibility raised by the defence is compliance with s. 56 (2) of the *Young Offenders Act*. Section 56 (2) provides as follows:

> No oral or written statement given by a young person to a peace officer or to any other person who is, in law, a person in authority on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless
>
> (a) the statement was voluntary;
>
> (b) the person to whom the statement was given has, before the statement was made, clearly explained to the young person in language appropriate to his age and understanding, that
>
> (i) the young person is under no obligation to give a statement,
>
> (ii) any statement given by him may be used as evidence in proceedings against him,

(iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and

(iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;

(c) the young person has, before the statement was made, been given a reasonable opportunity to consult

(I) with counsel, and

(ii) a parent, or in the absence of a parent, an adult relative, or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person; and

(d) where the young person consults any person pursuant to the young person has been given a reasonable opportunity to make the statement in the presence of that person.

[28] Paragraph (a) (ii) has been dealt with above, that is, the voluntariness of the statement.

[29] Paragraph (b) of subsection 2 provides that, before any statement can be admitted, the young person must be advised of certain things, including the right to consult with counsel and a parent and to be advised that any statement made by him is required to be made in the presence of those persons, unless the young person desires otherwise.

[30] Paragraph (c) of subsection 2 provides that, before a statement is admissible, the young person must have been given a reasonable opportunity to consult with counsel and a parent or other adult.

[31] Paragraph (d) provides that, before a statement is admissible, where the young person consults anyone referred to above, the young person must be given a reasonable opportunity to make the statement in the presence of that person.

[32] Constable Armitage testified that he had no dealings with M.C. or with his mother, C.C.. His role at the police station was to videotape the interview and to stop the tape when M.C.

talked to his mother or during any other privileged communications and to restart it when those communications ended.

[33] Constable Morris testified that C.C. was at the bus station when M.C. was arrested. He said she arrived at the police station and said she wished to speak to her son. He testified that he told her it was up to M.C. He also testified that, when he went through the Young Offender Form with M.C., M.C. said he wished to speak to his mother. Constable Morris testified he then left C.C. with M.C for approximately 15 minutes. When he re-entered the interview room, he continued the interview with C.C. present. He testified that M.C. said, in his mother's presence, that he did not want to give a statement.

[34] Constable Morris testified that part way through the interview he left M.C. and his mother together for twelve minutes so they could speak. He said that, at the end of that time, he spoke with C.C. after which she re-entered the interview room to speak with M.C alone. Thereafter, Constable Morris testified she came out of the interview room six minutes later and told him that she was leaving.

[35] Constable Morris testified that he then continued his interview with M.C. after his mother left. He said there was no change in M.C.'s demeanour after his mother left. He also testified that he did not induce C.C . to leave but said that she had previously mentioned that she had to pick her daughter up from school. He also said he told both M.C. and C.C. that he would continue the interview with M.C. after her departure and neither objected. Constable Morris testified that approximately one hour after his mother's departure, M.C. confessed.

[36] On cross-examination, Constable Morris testified that he did not go through the Young Offender Form and caution with M.C. again after his mother left.

[37] The defence's submission is that, when M.C.'s mother left, the police were obligated to go back over the Young Offender Form and tell him again that he had the right to consult a parent or other adult and that any statement he made must be made in the presence of that person unless he desired otherwise.

[38] The defence submits that M.C.'s statement is not admissible because this was not done a second time after M.C.'s mother left. Ms. Longley submits that M.C. was not given a reasonable opportunity to consult with another relative or other adult and was not given a reasonable opportunity to make his statement in the presence of that person. She therefore submits that any portion of the videotaped statement made after C.C.'s departure is inadmissible.

[39] Ms. Longley does not dispute that M.C. had an opportunity to consult with his mother. Her submission, however, is that, once she left, the police had a further obligation to comply with s. 56 (2). Failing compliance, she submits that the Crown must prove that M.C. waived his rights under paragraphs (2) (c) and (d) of s. 56. There is no dispute between the Crown and the defence that there was no such waiver.

[40] The Crown's submission is that as soon as M.C. asked for his mother, the interview stopped until he had consulted with her and that she was brought to him immediately. Ms. MacLellan submits that C.C. left voluntarily and that there is no evidence to the contrary. She says that M.C. was aware that his mother was leaving and that his demeanour did not change in the interview after her departure. She says that the conduct of the police in this case was entirely appropriate, unlike that of the police in some of the cases to which reference has been made.

[41] Ms. MacLellan submits that paragraph (b) of subsection 2 was clearly complied with as evidenced in the videotape. She says M.C. clearly had the opportunity to, and did, speak to his mother as required by paragraph (c). She further submits that M.C., having consulted with his mother, was given a reasonable opportunity to make a statement in her presence C.C.. says she was with M.C. for one hour, fifty-five minutes.

[42] Ms. MacLellan submits that paragraph (b) (iv) and (d) must be read together: that is, the young person must be told that any statement he makes must be given in the presence of a parent or other adult, unless he desires otherwise and, where the young person chooses to consult a parent or other adult, the young person must be given a reasonable opportunity to make the statement in the presence of that person.

[43] Both counsel agreed that they could find no reported case with a fact situation similar to this, that is, where a young person did consult with a parent who then left and the young person later confessed.

[44] In 1990, the Supreme Court of Canada ruled on s. 56 in R. v. J. T.J., [1990] 2 S.C.R. 755. In that case, Cory, J.J. said at para. __:

> By its enactment of s. 56, Parliament has recognized the problems and difficulties that beset young people when confronted with authority. It may seem unnecessary and frustrating to the police and society that a worldly wise, smug 17-year-old with apparent anti-social tendencies should receive the benefit of this section. Yet it must be remembered that the section is to protect all young people of 17 years or less. A young person is usually far more easily impressed influenced by authoritarian figures. No matter what the bravado and braggadocio that

> young people may display, it is unlikely that they will appreciate their legal rights in a general sense or the consequences of oral statements made to persons in authority; certainly they would not appreciate the nature of their rights to the same extent as would most adults. Teenagers may also be more susceptible to subtle threats arising from their surroundings and the presence of persons in authority. A young person may be more inclined to make a statement, even though it is false, in order to please an authoritarian figure. It was no doubt in recognition of the additional pressures and problems faced by young people that led Parliament to enact this code of procedure.

[45] He continued at para. __ :

> It is just and appropriate that young people be provided with additional safeguards before their statements should be admitted. Section 56 (2) to (6) inclusive specify the additional protection which must be provided to all young people under the age of eighteen.

[46] A number of decisions have applied R. v. J. T.J., but, as I have said, none with the same factual situation. In R. v. C.L.M., the young person was unable to reach her mother or other adult, although she clearly stated she wished to do so. Baynton, J. says at para. 12:

> At no point during the interview did she say that she had changed her mind, or that she was prepared to go ahead and give a statement before consulting an adult, or that she was prepared to give a statement in the absence of such an adult.

[47] The statement was ruled inadmissible.

[48] In R. v. S.P. ,[1991] O.J. No. 337 (Ont. C.A.), the young person said he wanted his father present but the police officers did not tell his parents this. They proceeded with their interview. Forty minutes later, they returned to the interview room. They testified that the young person then gave a statement, after they read a waiver form (s. 56 (4)) to him. The decision of the court says in para. ____:

> Once the appellant had stated unequivocally that he wanted his father present during the interview, he was entitled to have that right implemented immediately, where, as here, the father was already at the police station. The police should not have questioned the appellant further. The statement is not admissible in evidence.

[49] In R. v. A.L. [1998] S.J. No. 86 (Sask. Prov. Ct.), the young person's statement was inadmissible in circumstances where, as Halliday, Prov. Ct. J. said at para. 31:

> However, prior to producing the young offender's statement form or attempting to comply with the requirements of subsection 56 (2) of The Young offenders Act, the police spoke with the accused for a significant period of time. They specifically discussed the car fires and received a verbal admission of the accused's involvement in one fire. Only after the verbal admission did the police produce the statement form and attempt to comply with subsection 56 (2).

[50] In R. v. A.N., [1998] A.J. No. 855 (Alta. Prov. Ct., Youth Division), the warning was not given until the young person had made a statement to the police. It was not admissible.

[51] In these cases, either the young person was not advised of his or her right to have a parent or other adult present or, having so requested, was denied the opportunity. This is not the factual situation here.

[52] In R. v. K.W. [1997] O.J. No. 2873 (Ont. Ct. Just. (Prov. Div.)), the young person was denied the continued presence of his parent. As Culver, Prov. J. said at para. 26:

> The accused's mother, advised that she did not want the accused questioned, that she did not wish him to make a video statement, and did not wish him to make a statement. She further said that she was trying to get the accused a lawyer. Shortly thereafter the parents were removed from the room by the Windsor officers. I conclude that the only reason that the parents were removed from the room, was because the mother was advising the accused to say nothing further, and that the officers were concerned that if a lawyer was involved, the accused would exercise his rights to counsel, and not be cooperative with the officers in making a statement. I further find that the parents were removed, notwithstanding the express request of the accused that he be allowed to have his parents with him, particularly his mother. The mother was placed in the lobby of the police station, where she requested on numerous occasions to speak to her son. The two Windsor officers shortly thereafter re-entered the interview room, and continued the interview in the absence of the accused's parents.

[53] With respect to a later interview by two other police officers with respect to other charges, Culver, Prov. J. said at para. 32:

> After advising the accused that he would be facing charges in Brampton, the accused was removed from his father's presence. The stated reason by the officers was, so that the accused would not be influenced by his father in making a decision on this right to have a parent present. Given that the accused's parents had been allowed to be with him, or removed from his presence, notwithstanding his request, at the whim of the Windsor officers earlier, I find that this removal of his father, reinforces the general atmosphere of the accused being in the total control of the police, notwithstanding his attempt to exercise his rights. I further find, that wherever possible, it is important to have a parent present, to counteract the influence of the presence of the police, in circumstances such as this. In my view, there is no articutable *(sic)* reason, that would justify the removal of a parent under these circumstances, when the accused had already made it clear that he wished to have a parent present.

[54] The first statement was ruled inadmissible for a number of reasons, one of which was:

> ... violation of the accused's right to have a parent present, notwithstanding his specific request to have a parent present, in particular his mother. [para. 34]

The second statement was also inadmissible. In so deciding, Culver, Prov. J. quoted at para. 41 from an unreported decision of Wolder, Prov. J. in R. v. M.V., Brampton Registry 200836 at pp. 15-16:

> What we are really dealing with are competing interests and who will win the heart and mind of the accused, young person. The police are motivated to conclude their investigation by obtaining an inculpatory statement from the accused. It may be perceived by the police that the presence of a parent may make that task more difficult because a parent could instruct the child not to say anything to the police, thereby forcing the police to find evidence from other sources and, as a result, extend the investigation.

[55] In conclusion, Culver, Prov. J. said at para. 45:

> In the case at bar, the accused indicated that he wished both parents present, and in particular his mother. Both were in the police station. In fact the father was removed from the presence of the accused before being dealt with by the police. I find in this case that, with regard to the accused's right to have a parent present, both by the Windsor Police, and the Peel Police, that right was denied, in both letter and spirit.

[56] In that case, the police actively prevented the young person from consulting with a parent and he was prevented from making a statement in the presence of a parent. In this case, the police did not prevent M.C. from consulting with his mother or force her to leave.

[57] In R. v. M.G. and D.G., two brothers were arrested. M.G. said he did not wish to speak with a parent. D.G. said he did. The mother said she would come immediately to the police station and told D.G. to say nothing further to the police. D.G. wished to tell his brother that their mother was coming and what she had advised, but was not permitted to do so.

[58] The sergeant who was interviewing D.G. knew that the boy's mother was coming to the police station but did not tell M.G. of this. Greco, Prov. Ct. J. said at lines 21 and following at p. 9 of the decision:

> I am of the view, in this regard, that the police have an obligation to facilitate contact not only with a lawyer but also have an obligation to facilitate contact with all persons who are named in paragraph 2 (c), so that in the end it can truly be said that the young person would have a 'reasonable opportunity' not only to engage in discussions with any of those person *(sic*), but also would be given a reasonable opportunity to decide whether he wants to consult with them at all having regard to their availability.

[59] He then ruled that, although a waiver had been given by M.G., the statement was inadmissible because the facts upon which M.G. decided to give the waiver had changed to the knowledge of the police.

[60] In this case, both M.C. and Constable Morris had the same knowledge, that is, that C.C. was leaving, unlike the D.G. and M.G. case where the police officer had information that M.G. did not have.

[61] In R. v. B. (J.) (1990), 109 N.B.R. (2d) 361 (N.B.Q.B.), Riordon, J. dealt with s. 56. In that case, the young person gave four statements. the Crown agreed that the first was inadmissible. It was given in the police car before any compliance with s. 56 was even attempted and after the officers were told J.B. wanted to speak to his mother and a lawyer.

[62] The second statement was a videotaped statement given at the police station. The first segment of the questioning was videotaped before the arrival of the young person's mother and uncle and also before his lawyer arrived.

[63] J.B.'s mother and uncle met with him. So did his lawyer who met with him and then left for the police station.

[64] When the questioning started again, J.B. said he wanted his uncle present and his uncle, B.D., was brought into the interview room. he remained for approximately forty minutes, leaving with one of the police officers. J.B. was then alone with the other officer for approximately five minutes.

[65] When the officer returned, both were with J.B. for another five minutes and then after one officer left again, the other asked if he wanted his other uncle present. J.B.'s uncle, L.D., was then present in the interview room.

[66] Questioning continued with J.B.'s uncle present for approximately twenty-five minutes. J.B. asked to be left alone for half an hour and everyone left; however, one o the officers re-entered ten minutes later and began to question him. Three minutes later, the other officer returned and asked if J.B. wished to continue to speak to the officer alone or if he wanted his uncle present. J.B. then replied that it did not matter. The officer asked again, received the same answer and left the room. About two minutes later, J.B. confessed. Approximately five minutes later, the other officer returned with J.B.'s uncle, L.D., again.

[67] It was only at 2:10 a.m. that one of the officers read J.B. his rights under s. 56 (2).

[68] Riordon, J. concluded that the first part of the statement, taken before J.B.'s mother and uncle arrived, was inadmissible because s. 56 (2) (c) and (d) were not complied with.

[69] He concluded with respect to the rest of the statement:

> The major portion of this interrogation took place in the presence of an adult relative. It is my opinion that those portions of the interrogation that took place in the presence of an adult relative are admissible as at these times the statements given during the interrogation met the requirements of Section 56 of the Act.

This excluded the inculpatory portions of the statement. However, two other inculpatory statements were ruled admissible.

[70] I am not persuaded that the decision of Riordon, J. applies the correct interpretation of s. 56 (20. He has not, in my view, addressed the question of the meaning to be given to the phrase "reasonable opportunity" in s. 56 (2) (c) or particularly p. 56 (2) (d). he appears to treat s. 56 (2) (d) as requiring the person to be present.

[71] This review of the cases following R. v. J. T.J. then brings me back to the J. T.J. case itself. It sets out the principles to be applied but it also has a factual situation which, although dissimilar in many ways from this case, is the closest that can be found.

[72] J. T.J. was not arrested but was taken to the police station for questioning with respect to a murder. He was not told why. The first questioning session which began at approximately 7:30 p.m. took approximately three hours. During that time, he was not advised of his rights under s. 56 (2) of the *Young Offenders Act*.

[73] After a break in questioning of approximately one-half hour, the questioning continued at approximately 11:00 p.m. J. T.J. made some inculpatory oral statements and only thereafter was asked if he wished to have his uncle present. Arrangements were made for the uncle's attendance. At this time J. T.J. was charged with murder and advised of his right to counsel. His uncle was then present but not thereafter.

[74] J. T.J. then called a lawyer, was then returned to the interview room and spoke to the lawyer in person some time after that for approximately one-half hour. The lawyer then spoke to J. T.J.'s uncle.

[75] J. T.J. was fingerprinted, photographed and returned to the interview room and again interviewed with no one present commencing at approximately 2:00 a.m. As Cory, J. said at para. ____:

> The police concede that they did not ask him if he wished to have his cousin or lawyer present.

[76] J.T.J. refused to make a written statement but made an inculpatory oral statement. He again refused to put his statement in writing and did so again at approximately 2:10 a.m. After 3:30 a.m., J. T.J., while being transferred to the youth detention facility, was taken to the crime scene and gave verbal and non-verbal responses to further questions.

[77] After discussing the application of s. 56 as quoted above, Cory, J. said at para. ___:

> ... neither s. 56 (2) (b) (iii) nor (iv) were complied with in regard to any of the statements which were made by J. T.J. That is to say, J. T.J. was not told that before a statement was made he had the right to consult counsel or an adult relative. Further, neither counsel nor an adult person was present when he made any of his statements.

[78] Cory, J. referred to three inculpatory statements made by J. T.J. With respect to the first, Cory, J. said at para. ___:

> If the police had wished to obtain a statement from J. T.J. at 11:05 p.m. when they re-entered the interview room, then they should have complied with the provisions of s. 56 (2), particularly since they were admittedly familiar with its requirements. The first statement must be deemed inadmissible.

[79] He continued at para. ____:

> Even stronger reasons support the conclusion that the statement made at 1:55 a.m. was inadmissible. The police had advised counsel, who had earlier attended and given advice to J. T.J., that they were going to continue the interrogation. If such was their intention, then they were duty bound to again comply with the requirements of s. 56. On every occasion when he had been asked whether he wished to have an adult in attendance or obtain the services of a lawyer, J. T.J. had replied affirmatively. This therefore gives a strong indication that he would, if properly advised, have availed himself of the opportunity to have a lawyer or adult present during this next session of questioning.

[80] He then concludes at para. ____:

> There can be no question that if the police wished by their continued questioning to obtain a statement from J. T.J., then he should have been advised once again of his right to have either his cousin or lawyer present. A mistake was made. The police were aware of the requirements of s. 56 yet saw fit to ignore them. No matter how worldly wise J. T.J. may have been, by the time of his second statement he must have been a tired 17- year-old after spending nearly seven hours in police custody. He was entitled to be advised of his rights. Both he and his lawyer were entitled to expect that the police would comply with the provisions of s. 56.

[81] Cory, J.'s statement that the police were bound to "again" comply with s. 56 and that J. T.J. should have been advised once "again" of his right to have an adult or counsel present appears to lend support to the position of the defence in this case.

[82] However, in my view, these statements must be looked at in the context of that case and a comparison made of the circumstances in that case versus the circumstances in this one. I conclude that there are four factual differences in this case which are critical:

1. J. T.J. was never told of his rights under s. 56 (2) (b) (iii) and (iv) as Cory, J. said in para. ____ of the decision quoted above. In this case, M.C. was given this warning. That is not disputed.

2. The videotape with respect to M.C. began at 12:24 p.m. and ended at 4:58 p.m. It did not, of course, run when M.C. talked to a lawyer or consulted with his mother. These times set the outside parameters of the interview. From Constable Morris's evidence, it appears that M.C. was in the interview room from approximately 12:09 p.m. before the videotaping commenced for a period of approximately fifteen minutes.

Constable Morris first began his interview with M.C. at 12:53 p.m. after M.C. had an opportunity to, and did, speak with a lawyer. By 12:58, or 5 minutes after Constable Morris began to go through the so called "Young Offender Form" (Exhibit 2) with M.C., M.C. said he wished to have his mother present. The interview then did not restart until 1:15 and continued until 2:30 with . present. After C.C. left, the interview continued for approximately one hour before M.C. gave his inculpatory statement.

Constable Morris testified that, from the time of his arrival until M.C. confessed, it was approximately 4 hours, 12 minutes, that is, from 12:00 noon until 4:12 p.m. The interview was conducted during the day.

These facts are to be contrasted with those in J. T.J. He was picked up at 7:10 p.m., placed in an interview room at 7:30 and interviewed almost from that moment until 10:23 p.m. with no adult present and no opportunity to consult counsel. After a break of approximately one-half hour, the questioning began again. The first statement was given orally shortly thereafter. As Cory, J. said at para. ____:

> He had been held in custody by the police primarily in the same interview room for four hours. During this time, he had been questioned at length by the police. Thereafter he was left alone for a short time.

The second statement was given some time after 1:50 a.m. and the third some time after 3:40 a.m.

3. Cory, J. treated the interview process as being in three parts to correspond with the three statements, one given around 11:05 p.m., another at 1:55 a.m. and a third after 3:40 a.m.

In this case, I consider the interview to have been one continuous interview. The actual questioning related to the crime began after C.C. was in the interview room and after the Young Offender Form was completed which occurred some time after 1:15 p.m. After C.C.'s departure, the interview continued again beginning at approximately 3:00 p.m. immediately after her departure and only two hours after M.C. had been advised of his rights under s. 56 (2).

4. Furthermore, C.C. was with her son on three occasions without Constable

Morris present. It is not entirely clear from the J. T.J. decision whether J. T.J. was ever given an opportunity to consult with his uncle alone. Cory, J. says only that "It is worth noting that the uncle was only with the appellant for three minutes throughout the entire period of the police interrogation".

[83] In any event, C.C. was present with M.C. for a period of almost two hours. She was first alone with him between approximately 1:00 and 1:15 p.m.; then present during the interview between 1:15 and 2:30; and then alone with M.C again on two occasions between 2:30 and 2:54 p.m. after which time she voluntarily left the police station.

[84] In J. T.J., the young person was not even told of his right to consult counsel and a parent or other adult. The issue was not whether he had a reasonable opportunity to do so nor was it whether he had a reasonable opportunity to give a statement in that person's presence. There may be cases like J.T.J. where, as Cory, J. says, the warning must be given "again". In my view, in the circumstances of this case, this is not such a case. M.C. was given a warning at approximately 1:00 p.m. His mother left approximately two hours later, after being present with him for almost two hours.

[85] As Cory, J. said in J. T.J., "... it is unlikely that they [young persons] will appreciate their legal rights in a general sense or the consequences of oral statements made to persons made in authority ...". He also said, "It is just and appropriate that young people be provided with additional safeguards before their statements should be admitted". It is not disputed that M.C. was told of his right to have a parent or other adult present. In my view, M.C. had the benefit of the safeguards to which Cory, J. refers. He spoke to a lawyer; he consulted alone with his mother on three separate occasions. I therefore conclude that he had a "reasonable opportunity" to consult with a parent before making a statement. In my view, this requirement is complied with in this case because of the length of time M.C. spent alone with his mother on three separate occasions within approximately two hours. The police did not need to tell him after her departure that he could consult with someone else. The purpose of the right to consult referred to by Cory, J., that is, to appreciate his legal rights and the consequences of an oral statement, was met by the consultation M.C. had with his mother.

[86] The more difficult question is whether M.C. had a reasonable opportunity to give his statement in the presence of C.C.. C.C. left after approximately two hours. The questioning continued after her departure and M.C. then gave a statement.

[87] M.C. had been told not only that he had a right to consult a lawyer and a parent or other adult, he was told in his mother's presence that any statement he gave had to be made in that adult's presence unless he wished otherwise. There is no dispute that he was told

this. Section 56 (2) (b) (iv) was clearly complied with. I have concluded above that that warning did not need to be given again.

[88] What meaning then is to be given to s. 56 (2) (d) and, in particular, the phrase "reasonable opportunity" to make the statement in that person's presence - in this case, the presence of C.C..

[89] Although s. 56 (2) (b) (iv) uses the word "required" in the context of the statement being required to be made in the presence of the adult being consulted, s. 56 (2) (c) does not make it mandatory for the statement to be given in that person's presence. it provides instead for a "reasonable opportunity" for it to be given in that person's presence. To paraphrase s. 56 (2), a statement by a young person is not admissible unless it is voluntary; unless the young person was told certain things; unless the young person was given a reasonable opportunity to consult certain people; and unless the young person was given a reasonable opportunity to make the statement in the presence of any person consulted.

[90] To interpret s. 56 (2) (d), as the defence submits I should, would mean that every time an adult was consulted but was not, for whatever reason and through no fault of the police, present when a statement was given, a waiver would have to be obtained. I do not accept that interpretation. In my view, this is the very situation s. 56 (2) (d) contemplates.

[91] If Parliament had intended to make it mandatory that any person consulted be present when a statement is made, appropriate wording could have been used to so provide. Since the phrase "reasonable opportunity" was used, I must give it some meaning.

[92] In the context of this case, I conclude that M.C. did have a reasonable opportunity to give his statement in the presence of C.C.. C.C. was present during a substantial part of the interview by Constable Morris of M.C.. She had three opportunities to talk privately with M.C. M.C's demeanour did not change after his mother's departure. Just as significantly, the nature of the interview did not change after C.C.'s departure: Constable Morris continued with the same tone and on the same themes before and after C.C.'s departure.

[93] In all the circumstances, I am therefore satisfied beyond a reasonable doubt that s. 56 (2) of the *Young Offenders Act* was complied with and the statement of M.C. is admissible.

Hood, J.