R. *v*. Latimer, [1997] 1 S.C.R. 217

Robert W. Latimer *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v*. Latimer

File No.: 24818.

1996: November 27; 1997: February 6.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for saskatchewan

Constitutional law -- Charter of Rights -- Detention or imprisonment -- Accused detained for questioning by police following death of his severely disabled daughter -- Whether accused under de facto arrest -- Whether accused's detention arbitrary -- Canadian Charter of Rights and Freedoms, s. 9.

Constitutional law -- Charter of Rights -- Right to be informed of reasons for detention -- Accused detained for questioning by police following death of his severely disabled daughter -- Whether failure to inform accused that he had been "arrested" and

could be charged with murder infringed his right to be informed of reasons for detention -- Canadian Charter of Rights and Freedoms, s. 10(a).

Constitutional law -- Charter of Rights -- Right to counsel -- Accused detained for questioning by police following death of his severely disabled daughter -- Whether police adequately informed accused of means to access available duty counsel services -- Canadian Charter of Rights and Freedoms, s. 10(b).

Criminal law -- Trial -- Jury -- Accused convicted of second degree murder after confessing to killing his severely disabled daughter -- Whether Crown counsel's interference with prospective jurors warrants new trial.

The accused was the father of T, a severely disabled child who suffered from extreme cerebral palsy and was quadriplegic. As a result of her physical condition, T was largely immobile and bedridden, and was physically unable to take care of herself. Her family provided her with constant care. T was in constant pain, and despite the administration of medication, experienced five or six seizures a day. T died while in the care of the accused, who advised the RCMP by telephone that she had passed away in her sleep. An autopsy found signs consistent with poisoning, and tests then indicated that T's blood was saturated with carbon monoxide. The RCMP began to treat the matter as a homicide investigation. Two officers went to the accused's farm, where one of them told the accused that what he was about to say had "very serious consequences". The accused was told that he was being detained for investigation into the death of his daughter. He was informed of his right to retain and instruct counsel without delay, of the availability of Legal Aid duty counsel, and of his right to remain silent. The accused was then taken to the police station, where he was interviewed after being again warned that this was a serious matter and reminded of his right to counsel and to remain silent.

There was a phone sitting in front of him, with a telephone number on it for Legal Aid. The accused made a full confession. After receiving a further reminder about the right to counsel and the right to silence, the accused then made a written statement. That afternoon, the accused returned with the officers to his farm, where he pointed out the equipment he claimed to have used to end his daughter's life. The tour of the farm was videotaped. During his trial by jury, the accused alleged that he had not been properly informed of the availability of Legal Aid duty counsel in the manner mandated in this Court's judgment in *Bartle*, which he argued entitled him to be advised of a toll-free number by which free legal advice could be accessed, irrespective of financial need. The trial judge found that the accused was adequately informed of his right to counsel. The accused was convicted of second degree murder and given the mandatory sentence of life imprisonment without eligibility for parole for ten years. The Court of Appeal dismissed his appeal.

Subsequent to the Court of Appeal's judgment, the parties jointly adduced fresh evidence before this Court which demonstrates that Crown counsel at trial had interfered with the jury. The affidavit indicates that trial counsel for the Crown and an RCMP officer prepared a questionnaire asking prospective jurors for their views on a number of issues. This questionnaire was administered by RCMP officers to 30 of the 198 prospective jurors and also led to some unrecorded discussions with prospective jurors, which went beyond the exact questions posed in the questionnaire. At no time did Crown counsel at trial disclose the direct contact with prospective jurors to the trial judge, the defence, or the Sheriff. Of the 30 prospective jurors who were administered the questionnaire, five served on the jury which convicted the accused.

Held: The appeal should be allowed and a new trial ordered.

The accused's detention was not arbitrary. Notwithstanding what their intention may have been, the RCMP officers who attended at the farm put the accused under *de facto* arrest. A *de facto* arrest occurred through the use of words that conveyed clearly that the accused was under arrest, the conduct of the officers, and the accused's submission to the officers' authority. Moreover, on the facts of this case, that *de facto* arrest was entirely lawful because it was based on reasonable and probable grounds that the accused had taken his daughter's life. Those grounds included the carbon monoxide in T's blood, strongly suggesting that she had been poisoned; the fact that it was extremely unlikely that T's death had been accidental; the fact that, because of T's physical condition, her death could not have been suicide; and the fact that the accused had both opportunity and motive. A *de facto* arrest which is lawful cannot be an arbitrary detention for the purposes of s. 9.

The failure to inform the accused that he had been "arrested" and that he could be charged with murder does not violate s. 10(*a*) of the *Charter*. The purpose of the section, which provides the right to be informed promptly of the reasons for one's arrest or detention, is to ensure that a person understands generally the jeopardy in which he or she finds himself or herself. The *Charter* lays down this requirement for two reasons: first, because it would be a gross interference with individual liberty for persons to have to submit to arrest without knowing the reasons for that arrest, and second, because it would be difficult to exercise the right to counsel protected by s. 10(*b*) in a meaningful way if one were not aware of the extent of one's jeopardy. On the facts of this case, the trial judge was right in finding that the accused understood the basis for his apprehension by the police and hence the extent of his jeopardy. He knew that his daughter had died, and that he was being detained for investigation into that death. The

arresting constable prefaced his comments by stating that what he was about to say had very serious consequences. The accused was informed of the right to counsel and the right to silence, and was told he could not go into his own house by himself to change his clothes. It is clear that the accused knew that he was in an extremely grave situation as regards his daughter's death, and that s. 10(*a*) cannot be said to have been violated.

The RCMP officers adequately informed the accused of the means to access available duty counsel services as is required by s. 10(*b*) of the *Charter*, as interpreted in *Bartle*. *Bartle* stands for the proposition that s. 10(*b*) encompasses the right to be informed of the means to access those duty counsel services which are available at the time of arrest. According to the evidence before this Court, toll-free access to duty counsel in Saskatchewan was offered only outside normal office hours. Since the accused was arrested during normal office hours, no toll-free service was available to him, and the RCMP therefore did not breach the informational component of s. 10(*b*) by failing to inform the accused of the existence of a toll-free number. Furthermore, the information that was provided to the accused adequately apprised him of the means to contact the duty counsel service which was available at the local Legal Aid Office. The accused was informed of that duty counsel service on two occasions — when he was arrested at his farm, and before the commencement of his interview at the police station. While on neither occasion did the arresting officers verbally give the accused the phone number for the local Legal Aid Office, s. 10(*b*) did not require them to take that extra step, in the circumstances of this case. Where an individual is detained during regular business hours, and when legal assistance is available through a local telephone number which can easily be found by the person in question, neither the letter nor the spirit of *Bartle* is breached simply by not providing that individual with the local phone number.

The actions of Crown counsel in interfering with prospective jurors were nothing short of a flagrant abuse of process and interference with the administration of justice. Given the interference with the jury, a new trial must be ordered, as conceded by the Crown.

Cases Cited

Referred to: *R. v. Bartle*, [1994] 3 S.C.R. 173; *R. v. Prosper*, [1994] 3 S.C.R. 236; *R. v. Pozniak*, [1994] 3 S.C.R. 310; *R. v. Matheson*, [1994] 3 S.C.R. 328; *R. v. Harper*, [1994] 3 S.C.R. 343; *R. v. Cobham*, [1994] 3 S.C.R. 360; *R. v. Whitfield*, [1970] S.C.R. 46; *R. v. Evans*, [1991] 1 S.C.R. 869; *R. v. Storrey*, [1990] 1 S.C.R. 241; *R. v. Smith*, [1991] 1 S.C.R. 714; *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Sussex Justices*, [1924] 1 K.B. 256; *R. v. Caldough* (1961), 36 C.R. 248.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 9, 10(*a*), (*b*), 24(2).

Constitution Act, 1982, s. 52.

Criminal Code, R.S.C., 1985, c. C-46, ss. 495(1)(*a*), 645(5).

Authors Cited

Hogg, Peter W. *Constitutional Law of Canada*, 3rd ed. Scarborough, Ont.: Carswell, 1992.

APPEAL from a judgment of the Saskatchewan Court of Appeal (1995), 134 Sask. R. 1, 101 W.A.C. 1, 126 D.L.R. (4th) 203, [1995] 8 W.W.R. 609, 99 C.C.C. (3d) 481, 41 C.R. (4th) 1, dismissing the accused's appeal from his conviction of second degree murder. Appeal allowed.

Mark Brayford, Q.C., for the appellant.

Carol A. Snell, Q.C., for the respondent.

//*The Chief Justice*//

The judgment of the Court was delivered by

THE CHIEF JUSTICE --

I. Introduction

1 Let me begin by saying what the case before the Court at this stage of the proceedings is not about. This case is not about those questions which have dominated public debate about Mr. Latimer's trial. It is not about the legality and morality of mercy killing, nor is it directly about Mr. Latimer's guilt or innocence. What this case is about are two narrower issues: first, the admissibility of certain evidence in light of the circumstances surrounding Mr. Latimer's arrest; and second, the consequences flowing from the unfortunate events that took place prior to the commencement of the trial with respect to potential members of the jury. I mention this to correct any impression that the Court, in its judgment today, has deliberately avoided answering difficult questions which are on the minds of many Canadians.

2 As will become apparent in my reasons, the disposition of this appeal requires the interpretation and application of this Court's judgment in *R. v. Bartle*, [1994] 3 S.C.R. 173. In *Bartle*, and the companion judgments handed down on the same day (*R. v. Prosper*, [1994] 3 S.C.R. 236, *R. v. Pozniak*, [1994] 3 S.C.R. 310, *R. v. Matheson*, [1994] 3 S.C.R. 328, *R. v. Harper*, [1994] 3 S.C.R. 343, and *R. v. Cobham*, [1994] 3 S.C.R. 360), this Court held that the informational component of s. 10(*b*) of the *Canadian Charter of Rights and Freedoms* included the right of an accused to be informed not only of the existence and availability of free duty counsel, but also of the means of access to duty counsel, including being informed of a toll-free telephone number to contact duty counsel where duty counsel is accessible at that number 24 hours a day. The question we must answer today is whether and to what extent *Bartle* applies in a province which has established a system of toll-free access to duty counsel which only operates outside normal office hours, while nevertheless offering the same service during business hours, though through the regular Legal Aid offices.

II. The Facts

3 The appellant, Mr. Latimer, was the father of Tracy Latimer, a severely disabled child who died at her family farm on Sunday, October 24, 1993. Tracy suffered from extreme cerebral palsy and was quadriplegic. As a result of her physical condition, she was largely immobile and bedridden, and was physically unable to take care of herself. Her family provided her with constant care. Eating was a difficult task, and Tracy had to be spoon fed. Unfortunately, even with this assistance, she could not consume a sufficient amount of nutrients, and as a result experienced weight loss.

4 It is undisputed that Tracy was in constant pain. The evidence traces this pain to an operation that Tracy underwent in 1990 to balance the muscles around her pelvis, and another operation in 1992 to reduce the abnormal curvature in her back. Although the latter surgery was successful, it led to the dislocation of her right hip, which caused considerable discomfort. As well, despite the administration of medication, Tracy experienced five to six seizures every day.

5 Tracy was in the care of Mr. Latimer when she passed away. The appellant had remained home to care for Tracy, while Tracy's mother and siblings were at church to attend a Sunday service. Tracy was found by Mrs. Latimer at approximately 1:30 p.m., when she went to get Tracy for lunch. At 2:00 p.m., Mr. Latimer advised the Wilkie detachment of the RCMP by telephone that Tracy had passed away in her sleep. The RCMP officer who took the call and the local coroner attended at the Latimer farm. While at the farm, the coroner examined Tracy's body in order to determine the cause of death. Finding no evidence to suggest suffocation, the coroner arranged for an autopsy. During the visit to the farm, Mr. Latimer maintained that Tracy had passed away in her sleep. He stated that Tracy had been in pain and put to bed at about 12:30 p.m.

6 The autopsy found no signs that would explain Tracy's death, but found signs consistent with poisoning. Samples of Tracy's blood were therefore sent to a forensic laboratory for further analysis. Tests indicated that Tracy's blood was saturated with carbon monoxide. Because of the high levels of carbon monoxide in Tracy's blood, the RCMP began to treat the matter as a homicide investigation.

7 The members of the Wilkie detachment of the RCMP inferred the possibility of motive and opportunity from the facts before them — the appellant was alone with

Tracy at the time of her death, and Tracy was bedridden and in constant pain. They then decided to seek the assistance of the General Investigation Section at North Battleford, representatives of which they met with on Wednesday, November 3, 1993. As a result of that meeting, members of the North Battleford detachment decided to attend at the Latimer farm, take Mr. Latimer into custody, interview his wife and execute a search warrant.

8 This plan was put into effect the next day, on Thursday, November 4, 1993. The events are described in the uncontradicted testimony of one of the principal investigators, Corporal Lyons, which is quoted in the trial judgment. Important portions of that testimony, which are central to the disposition of this appeal, are underlined for emphasis:

> At 8:28 that morning, Sergeant Conlon and I went to the residence.
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> . . .
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> We went to the door, we rapped on it, waited a couple of minutes. Robert Latimer came to the door. He was — appeared to have just been in the process of getting up, he was in a housecoat, hair messed a little bit. Sergeant Conlon introduced ourselves to him, identified us, of course. We shook hands. Sergeant Conlon told him that we were from North Battleford and were assisting Wilkie in the investigation of Tracy's death, being his daughter, and told Mr. Latimer that we'd like to speak to him. He went into a bedroom and got dressed, came out a couple of minutes later. We were waiting in the kitchen. Sergeant Conlon said that we'd like to speak to him outside. There was no response. He put on his -- put on his rubber boots and a jacket and went outside to the car with us. We had an unmarked police vehicle . . . I went into the driver's seat, Sergeant Conlon the passenger side, and Mr. Latimer in the back seat behind me.
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> . . .
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> At <u>8: 32</u> [a.m.] I turned in the bucket seats [*sic*] of the car and looked directly at him. I said, as Sergeant Conlon explained, we are assisting Wilkie detachment in the investigation of his daughter's death. I said I realize that this is a very trying time for him and his family and <u>I said what I am about to say has very serious consequences and he should listen very closely. He nodded to me. I said, "You are being detained for investigation into the death of your daughter Tracy." I then said, "You have the right to</u>

> retain and instruct counsel without delay. You may call any lawyer you wish. Legal Aid duty counsel is available to provide legal advice to you without any charge and can explain the Legal Aid plan to you." I asked, "Do you understand?" He replied, "Yes." I asked, "Do you wish to call a lawyer now?" He replied, "Not really, no." I then warned him the standard police warning, "You need not say anything. You have nothing to hope from any promise of favour, nothing to fear from any threat, whether or not you say anything. Anything you do say may be used as evidence." I asked, "Do you understand?" And he replied, "Yes." At that point, Sergeant Conlon told him that we would be going to North Battleford for the purpose of speaking to him. Mr. Latimer raised no objection.

9 Mr. Latimer asked if he could change his clothes. The RCMP officers informed him that he could, but that they would have to accompany him into the house because he was now in custody. After Mr. Latimer had changed his clothes, the RCMP officers drove him to the North Battleford detachment, where they interviewed him commencing at 9:22 a.m. At the commencement of this interview, Corporal Lyons again warned Mr. Latimer that this was a serious matter. He then repeated the statements regarding the right to counsel and the right to silence that he had made in the car. There was a phone sitting in front of Mr. Latimer, with a telephone number on it for Legal Aid. Corporal Lyons then asked Mr. Latimer if he had any questions, to which the Mr. Latimer replied "No". As well, Corporal Lyons asked Mr. Latimer if he wanted a lawyer; Mr. Latimer replied "No".

10 Corporal Lyons then proceeded to inform Mr. Latimer that he had "no doubt" that Mr. Latimer had caused the death of Tracy Latimer. Mr. Latimer went on to make a full confession. After receiving a further reminder about the right to counsel and the right to silence, Mr. Latimer then made a written statement. Before Mr. Latimer confessed to killing his daughter in this statement, Sergeant Conlon interjected, and asked Mr. Latimer if he understood that he could be charged with murder. He replied

"Yes". After Mr. Latimer completed his written statement, he was informed that he was being held for murder.

11 That afternoon, Mr. Latimer returned with officers Lyons and Conlon to the Latimer farm, where he pointed out the equipment he claimed to have used to end Tracy's life. The tour of the farm was videotaped.

12 On November 16, 1994, following trial by jury, Mr. Latimer was convicted of second degree murder. The presiding judge imposed the mandatory sentence of life imprisonment without eligibility for parole for ten years. An appeal was dismissed by the Saskatchewan Court of Appeal on July 18, 1995: (1995), 134 Sask. R. 1, 126 D.L.R. (4th) 203, [1995] 8 W.W.R. 609, 99 C.C.C. (3d) 481, 41 C.R. (4th) 1.

Fresh Evidence

13 Subsequent to the judgment of the Saskatchewan Court of Appeal, the parties jointly adduced in affidavit form fresh evidence before this Court which demonstrates that Crown counsel at trial (who was not counsel on appeal) had interfered with the jury. The affidavit indicates that trial counsel for the Crown and an RCMP officer from the Wilkie detachment prepared a questionnaire asking prospective jurors for their views on a number of issues, including religion, abortion, and euthanasia. This questionnaire was administered by RCMP officers to 30 of the 198 prospective jurors, either on the telephone or at various RCMP detachments. The evidence also discloses that the questionnaire led to some unrecorded discussions with prospective jurors, which went beyond the exact questions posed in the questionnaire. One prospective juror, for example, was asked by an RCMP officer how well the prospective juror knew the appellant.

14 It appears that it had been the intention of Crown counsel at trial and the RCMP officer who had prepared the questionnaire that there be no direct contact with prospective jurors. However, that intention was not initially communicated to the RCMP detachments involved. By the time that information was conveyed to the RCMP, some direct contact had already occurred. Nevertheless, at no time did Crown counsel at trial disclose the direct contact with prospective jurors to the trial judge, the defence, or the Sheriff. Of the 30 prospective jurors who were administered the questionnaire, five served on the jury which convicted Mr. Latimer.

III. Judgments Below

15 The proceedings below addressed many issues which were not placed before this Court by the parties. The summaries of the judgments below will therefore focus on those questions which were pursued on this appeal.

Saskatchewan Court of Queen's Bench, Voir Dire of September 27, 1994

16 Before the selection of the jury, and some weeks before the commencement of the trial, defence counsel moved pursuant to s. 645(5) of the *Criminal Code,* R.S.C., 1985, c. C-46, for a ruling on the admissibility of Mr. Latimer's incriminating statements and the real evidence uncovered as a result of those statements. Relying on the *Charter*, defence counsel argued, *inter alia*, that Mr. Latimer had been arbitrarily detained in contravention of s. 9, and that Mr. Latimer had not been informed promptly of the reasons for his arrest or detention in contravention of s. 10(*a*). On the basis of these alleged *Charter* violations, the defence submitted that Mr. Latimer's statements should be excluded pursuant to s. 24(2) of the *Charter*.

17 The trial judge, Wimmer J., found that Mr. Latimer's *Charter* rights had not been violated, and thus did not consider s. 24(2). Although he accepted without question the proposition that Mr. Latimer's s. 9 rights would have been violated if he had been detained for questioning, he held that in fact there had been a *de facto* arrest, and that this arrest had been lawful because it was based on reasonable and probable grounds. Furthermore, he held that Mr. Latimer's s. 10(*a*) rights had not been violated, because although he was not informed of the specific charge against him, his appreciation of his jeopardy was adequate to make an informed decision about whether to exercise his right to counsel.

Saskatchewan Court of Queen's Bench, Reconsideration of Ruling on the Voir Dire, November 7, 1994

18 During the trial, Wimmer J. was asked to reconsider his decision to admit the incriminating statements of Mr. Latimer, on the basis of the set of judgments delivered by this Court on the scope of s. 10(*b*): *Bartle*, *Prosper*, *Pozniak*, *Matheson*, *Harper* and *Cobham*. Mr. Latimer alleged that he had not been properly informed of the availability of Legal Aid duty counsel in the manner mandated by those judgments. Wimmer J. dismissed the motion. In his opinion, Mr. Latimer was adequately informed of his right to counsel, because he had been told about the availability of Legal Aid duty counsel. As well, Wimmer J. held that even if there had been a violation of s. 10(*b*), the incriminating statements should not be excluded under s. 24(2), because there was no evidence that, had Mr. Latimer been differently informed, he would have contacted duty counsel.

Saskatchewan Court of Appeal, July 18, 1995

19 An appeal on the issues before this Court (except for the interference with the jury) was unanimously dismissed by the Saskatchewan Court of Appeal, *per* Tallis J.A. Bayda C.J.S. dissented on the sentence imposed by the trial judge, but that issue is not before us. The Court of Appeal agreed with the trial judge, and held that there had been no violation of s. 9 of the *Charter*. Since Mr. Latimer had been lawfully arrested, he had therefore not been arbitrarily detained. The court also seems to have approved of the trial judge's holding on s. 10(*a*), although this point is unclear.

20 The Court of Appeal devoted most of its attention to the alleged violation of Mr. Latimer's right to counsel. Mr. Latimer had argued that *Bartle* entitled him to be advised of a toll-free number by which free legal advice could be accessed, irrespective of financial need. The court rejected this argument, arguing that *Bartle* had been complied with. The court relied on two factors which were present in this case but absent in *Bartle*. The officers advised Mr. Latimer of the existence and availability of duty counsel, and of his immediate right to consult duty counsel, whereas in *Bartle* the accused was not so advised. Furthermore, Mr. Latimer was informed of his right to counsel with a phone in front of him, which had the telephone number for Legal Aid. In the circumstances of the case, the court held that the failure to specifically mention a toll-free number was not fatal.

IV. Issues on Appeal

21 The following issues must be addressed in this appeal:

1. Was Mr. Latimer arbitrarily detained in contravention of s. 9 of the *Charter*?

2. Did the failure to inform the appellant that he had been "arrested" and that he could be charged with murder violate s. 10(*a*) of the *Charter*?

3. Did the RCMP officers adequately inform Mr. Latimer of the means to access available duty counsel services, as is required by s. 10(*b*) of the *Charter* as interpreted by *Bartle*?

4. Does the transitional period imposed by this Court in *Cobham* operate in Saskatchewan so as to preclude Mr. Latimer from relying on *Bartle*?

5. If there has been a violation of the *Charter*, should the statements of Mr. Latimer be excluded pursuant to s. 24(2)?

6. If the statements are excluded, should Mr. Latimer be acquitted?

7. Does the interference with prospective jurors warrant a new trial?

V. Analysis

1. Was the appellant arbitrarily detained in contravention of s. 9 of the *Charter*?

22 The appellant alleges that his right under s. 9 against arbitrary detention was violated when he was detained at his farm on the morning of November 4, 1993. There is no doubt in my mind that the appellant was detained, and the parties agree on this point. However, I am equally certain that Mr. Latimer's detention was not arbitrary.

The RCMP officers who attended at the Latimer farm put Mr. Latimer under *de facto* arrest. Moreover, on the facts of this case, that *de facto* arrest was entirely lawful because it was based on reasonable and probable grounds that Mr. Latimer had taken his daughter's life. A *de facto* arrest which is lawful, in my opinion, cannot be an arbitrary detention for the purposes of s. 9.

23 The appellant's strongest argument is that no arrest occurred because the officers deliberately chose not to arrest Mr. Latimer. He points to testimony by officers Lyon and Conlon at trial, in which they indicated that they decided prior to appearing at the farm they did not wish to arrest Mr. Latimer. As well, he also points to the use of the word "detention", instead of the word "arrest", as proof of that intention.

24 However, notwithstanding what the intention of the officers may have been, their conduct had the effect of putting Mr. Latimer under arrest. To understand why, we need only turn to the definition of arrest offered by this Court in *R. v. Whitfield*, [1970] S.C.R. 46. Judson J., speaking for the majority of the Court, held that an arrest consists either of (i) the actual seizure or touching of a person's body with a view to his detention, or (ii) the pronouncing of "words of arrest" to a person who submits to the arresting officer. The term "words of arrest" was not defined in that judgment. However, in my mind we should decline the invitation to adopt the narrow view of that term proposed by the appellant, i.e. that only the word "arrest" will suffice. As this Court has held with respect to s. 10(*a*) of the *Charter* (*R. v. Evans*, [1991] 1 S.C.R. 869, at p. 888), what counts is

> the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used. . . . The question is . . . what the accused was told, viewed reasonably in all the circumstances of the case. . . .

25 On the facts of this case, a *de facto* arrest occurred through the use of words that conveyed clearly that Latimer was under arrest, the conduct of the officers, and Mr. Latimer's submission to the authority of officers Conlon and Lyons. Mr. Latimer was told that he was being detained, and that he would be taken back to North Battleford to be interviewed. The police officers informed him of his right to silence and his right to counsel. They accompanied him back into his house while he changed his clothes, telling him that they were doing so because he was now in their custody. Finally, at no point did Mr. Latimer protest or resist the police — he submitted to the authority of the arresting officers.

26 The fact that a *de facto* arrest occurred, however, is not sufficient to dispose of the matter, because of the potential that his arrest was unlawful. Unlawful arrests may be inherently arbitrary: see P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), at p. 1073. However, it is not necessary to address that question, because Mr. Latimer's arrest was entirely lawful, and failing an attack against the legislative provision which authorized the arrest, I do not see how a lawful arrest can contravene s. 9 of the *Charter* for being arbitrary. The arresting power of police officers is set down by s. 495 of the *Criminal Code*. Section 495(1)(*a*) authorizes peace officers to arrest without a warrant

> a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence.

What counts as reasonable grounds was laid down by Cory J. in *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 250-51. Reasonable grounds have both a subjective and an objective aspect. The arresting officers must subjectively have reasonable and probable grounds on which to base an arrest. Moreover, those grounds must be justifiable from an objective point of view, such that a reasonable person placed in the position of the

arresting officer can conclude that there were reasonable and probable grounds for the arrest.

27 The trial judge made a specific finding that reasonable grounds for the arrest of Mr. Latimer existed, and I see no reason to disturb that finding. Subjectively, despite the fact that the officers decided not to arrest Mr. Latimer, it is clear that they believed that they had reasonable grounds to arrest him. They chose not to because at the time of the arrest, they believed that they did not have enough evidence to obtain a conviction. This is most evident from the testimony of Constable Lyons, who stated that "certainly the grounds to arrest were present" and "[c]ertainly there were reasonable and probable grounds to arrest him". Objectively, the reasonable person in the position of the arresting officer would have concluded there were reasonable grounds for arrest. Those grounds included: the carbon monoxide in Tracy's blood, strongly suggesting that she had been poisoned; the fact that it was extremely unlikely that Tracy's death had been accidental; the fact that, because of Tracy's physical condition, her death could not have been suicide; and finally, the fact that the accused had both opportunity and motive. I therefore conclude that the trial judge was correct in deciding that there were reasonable and probable grounds for an arrest.

2. Did the failure to inform the appellant that he had been "arrested" and that he could be charged with murder violate s. 10(*a*) of the *Charter*?

28 Section 10(*a*) of the *Charter* provides the right to be informed promptly of the reasons for one's arrest or detention. The purpose of this provision is to ensure that a person "understand generally the jeopardy" in which he or she finds himself or herself: *R. v. Smith*, [1991] 1 S.C.R. 714, at p. 728. There are two reasons why the *Charter* lays down this requirement: first, because it would be a gross interference with individual

liberty for persons to have to submit to arrest without knowing the reasons for that arrest, and second, because it would be difficult to exercise the right to counsel protected by s. 10(*b*) in a meaningful way if one were not aware of the extent of one's jeopardy: *R. v. Evans*, [1991] 1 S.C.R. 869, at pp. 886-87.

29 Mr. Latimer makes two distinct submissions in which he challenges the adequacy of the information he was provided on arrest. His first submission is that anything short of the word "arrest" was insufficient to convey to him the jeopardy that he was in. His second submission explicitly invokes the interrelationship between the need to understand one's jeopardy and the right to counsel; he alleges that had he known that he was under arrest for killing or murdering his daughter, he would not have waived his right to counsel. As a variation on his second submission, Mr. Latimer links his concern regarding the right to counsel and s. 10(*a*) with the right to silence — that had he been aware of the true circumstances surrounding his arrest, he would not have given up his right to silence without first consulting a lawyer. I note that Mr. Latimer's second submission was based on s. 10(*b*). However, I think that it is more appropriately dealt with under s. 10(*a*).

30 There is no doubt that Mr. Latimer was not told that he was under "arrest"; he was told that he was being "detained". Nor was he explicitly told that he could be charged with murder. However, as with determining whether there has been a *de facto* arrest, when considering whether there has been a violation of s. 10(*a*), one must look beyond the exact words used. As the Court held in *Evans*, *supra*, at p. 888:

> When considering whether there has been a breach of s. 10(*a*) of the *Charter*, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to

permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to understand his right to counsel under s. 10(*b*).

31 Although the two submissions were presented separately, it is convenient to deal with them together. On the facts of this case, I have no doubt that the trial judge was right in finding that Mr. Latimer understood the basis for his apprehension by the police and hence the extent of his jeopardy. He knew that his daughter had died, and that he was being detained for investigation into that death. Constable Lyons prefaced his comments in the car by saying "what I am about to say has very serious consequences". Mr. Latimer was then informed of his right to counsel and his right to silence, which clearly conveyed that he was being placed under arrest. Finally, he was told that he could not go into his own house by himself to change his clothes. It is clear on these facts that Mr. Latimer knew that he was in an extremely grave situation as regards his daughter's death, and that s. 10(*a*) cannot be said to have been violated.

3. Did the RCMP officers adequately inform the appellant of the means to access available duty counsel services, as is required by s. 10(*b*) of the *Charter* as interpreted by *Bartle*?

32 When Mr. Latimer was arrested by the police, he was not specifically informed of the existence of a toll-free telephone number by which he could access immediate free legal advice by Legal Aid duty counsel. Relying on this Court's judgment in *Bartle*, the appellant argues that this omission was unconstitutional, because it did not meet the standard for the informational component of s. 10(*b*). However, I reject this submission, because *Bartle* stands for quite a different proposition — that s. 10(*b*) encompasses the right to be informed of the means to access those duty counsel services which are available at the time of arrest. As we shall see, at the time of day when Mr. Latimer was arrested, the toll-free number in Saskatchewan was not in operation, and so it was unnecessary to inform him of that number. Moreover, he was

made aware of the duty counsel service that was offered by the local Legal Aid office, which could be reached by a local phone call at no cost to him. Mr. Latimer's s. 10(*b*) rights were therefore not violated.

33 The informational component of s. 10(*b*) is of critical importance because its purpose is to enable a detainee to make an informed decision about whether to exercise the right to counsel, and to exercise other rights protected by the *Charter*, such as the right to silence. In *R. v. Brydges*, [1990] 1 S.C.R. 190, this Court engrafted two requirements upon the informational component: first, information about access to counsel free of charge provided by provincial Legal Aid where an accused meets financial criteria with respect to need, and second, information about access to duty counsel, who provide immediate and temporary legal advice to all accused, irrespective of financial need.

34 However, *Brydges* only required that information be provided about the existence and availability of duty counsel; there is no doubt that the appellant was told about duty counsel here, and so *Brydges* is satisfied. *Bartle* imposed the additional requirement that persons be informed of the means necessary to access such services. However, whether the police have met this burden in a particular case must always be determined with regard to all the circumstances of that case, including the duty counsel services available at the time of arrest or detention.

35 For example, in *Bartle*, this Court held that s. 10(*b*) required that persons be informed of toll-free telephone numbers to access duty counsel. But it only imposed that requirement where such numbers were in operation. As I said in *Bartle*, *supra*, at p. 195:

> . . . the specific nature of the information provided to detainees would necessarily be contingent on the existence and availability of Legal Aid and duty counsel in the jurisdiction. . . .

Thus, in *Bartle*, as well as in *Pozniak, Harper* and *Cobham*, s. 10(*b*) was violated because the accused persons in those cases were not informed on arrest about the existence of 24-hour duty counsel, accessible by a toll-free telephone number, available free of charge to all detainees. By contrast, in *Prosper* and *Matheson*, there was no violation of s. 10(*b*), because there was no toll-free, 24-hour duty counsel service. There was nothing useful to tell the accused. Thus, the proposition which emerges from these cases is that the nature of the information provided pursuant to s. 10(*b*) depends on the actual services available in a jurisdiction. As I said in *Prosper, supra*, at p. 259:

> if there is in existence a 24-hour duty counsel service which can be accessed by dialling a toll-free number . . . this must be communicated to all detainees as part of the standard s. 10(*b*) caution delivered by police. Obviously, it would make no sense to inform detainees of a service which does not in fact exist and which is, therefore, unavailable to them. The point of the information component under s. 10(*b*) is to enable detainees to make informed decisions about services which actually exist. [Emphasis added.]

36 According to the evidence before this Court, toll-free access to duty counsel in Saskatchewan was only offered outside normal office hours. Thus, the position in Saskatchewan is in between those provinces where there is a 24-hour service, and those provinces where there is no service at all. The service in Saskatchewan was commenced in July 1990, and is operated out of Saskatoon. Normal office hours, according to the Saskatchewan Legal Aid Commission, are 8:30 a.m. to 5:00 p.m. Mr. Latimer, however, was arrested at 8:32 a.m. by the RCMP, and hence during normal office hours. At the time of his arrest, no toll-free service was available to him. I therefore find that the RCMP did not breach the informational component of s. 10(*b*) by failing to inform Mr. Latimer of the existence of a toll-free number.

37 I also have no doubt that the information that was provided to Mr. Latimer adequately apprised him of the means to contact the duty counsel service which was available at the local Legal Aid Office. Mr. Latimer was informed of that duty counsel service on two occasions — when he was arrested at his farm, and before the commencement of his interview at the police station. Admittedly, on neither occasion did the arresting officers verbally give Mr. Latimer the phone number for the local Legal Aid Office. However, s. 10(*b*) did not require the arresting officers to take that extra step, under the circumstances of this case. Where an individual is detained during regular business hours, and when legal assistance is available through a local telephone number which can easily be found by the person in question, neither the letter nor the spirit of *Bartle* is breached simply by not providing that individual with the local phone number. Mr. Latimer was perfectly capable of obtaining the number. He could have consulted a telephone book either at his farm, or at the police station if he had asked for one. Moreover, at either location, he could have obtained the number from Directory Assistance. There is nothing to suggest that had he asked the police for it, they would not have provided it. Finally, at the police station, there was a telephone sitting in front of Mr. Latimer, with a telephone number on it for Legal Aid. I also note that at both locations, Mr. Latimer was asked if he understood or had any questions about what he had been told. He replied in the negative on both occasions.

38 I hasten to add that there will be cases in which it will be necessary to provide more information to an accused or detained person than was provided to Mr. Latimer about the means to access duty counsel. For example, a young person, or even more obviously an individual who is visually impaired, may require more assistance from the police than Mr. Latimer. As well, someone whose facility in the language of the jurisdiction is not sufficient to understand the information provided about duty

counsel may require more explicit information than was provided to Mr. Latimer. This list of examples should not be taken to be exhaustive.

39 Finally, I add another point. The principle that an accused or detained person must be provided with the information which is necessary to ensure access to counsel means that if an accused were arrested during normal office hours in a jurisdiction where duty counsel was accessible by a 24-hour toll-free service and was also available by a local call during the day, s. 10(*b*) would not require that the toll-free number be given, because that number is not necessary to ensure access to counsel.

4. Does the transitional period imposed by this Court in *Cobham* operate in Saskatchewan so as to preclude the appellant from relying on *Bartle*?

40 In addition to receiving submissions on whether s. 10(*b*), as interpreted by this Court in *Bartle*, was violated in the circumstances of this case, we also heard argument on whether Mr. Latimer was legally precluded from relying on *Bartle* at all, as a result of the order granted by this Court after its judgment in *Cobham*. That order, dated October 20, 1994, reads in full:

> The application for a re-hearing is granted on the issue of whether there should be a transition period, and the operation of the judgment herein [i.e. *Cobham*] is stayed for a period of 21 days from the date such judgment was issued, namely September 29, 1994.

However, given that I have found there to be no violation of s. 10(*b*), it is unnecessary for me to examine the remedial effect of this order.

5. If there has been a violation of the *Charter*, should the statements of the appellant be excluded pursuant to s. 24(2)?

41 Since I have found that there were no violations of the appellant's *Charter* rights, there is no need to consider whether his incriminating statements should be excluded under s. 24(2).

6. If the statements are excluded, should the appellant be acquitted?

42 Similarly, because the statements of the appellant were not inadmissible, it is not necessary to answer whether the appellant should have been acquitted.

7. Does the interference with prospective jurors warrant a new trial?

43 I need only address this issue very briefly. The actions of Crown counsel at trial, which were fully acknowledged by Crown counsel on appeal, were nothing short of a flagrant abuse of process and interference with the administration of justice. The question of whether the interference actually influenced the deliberations of the jury is quite beside the point. The interference contravened a fundamental tenet of the criminal justice system, which Lord Hewart C.J. put felicitously as "justice should not only be done, but should manifestly and undoubtedly be seen to be done": *R. v. Sussex Justices*, [1924] 1 K.B. 256, at p. 259; also see *R. v. Caldough* (1961), 36 C.R. 248 (B.C.S.C.).

IV. Disposition

44 Given the interference with the jury, a new trial cannot be avoided, as the Crown itself concedes. The admissibility of Mr. Latimer's incriminating statements at

that trial will be a matter for the trial judge, who will be governed by these reasons, on matters of law, but who will, of course, decide the question on the facts of the case as they are presented to him or her at that time.

45 The appeal is therefore allowed. The order of the Court of Appeal dismissing the appeal and the conviction entered by the trial judge are set aside, and a new trial is ordered.

Appeal allowed.

Solicitors for the appellant: Brayford-Shapire, Saskatoon.

Solicitor for the respondent: The Attorney General for Saskatchewan, Regina.