SCC File No.: 39350

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Alberta)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant (on Appeal)
(Respondent)

- and -

RUSSELL STEVEN TESSIER

Respondent
(Appellant)

FACTUM OF THE RESPONDENT, RUSSELL STEVEN TESSIER

(Pursuant to Rules 36 and 29(3) of the *Rules of the Supreme Court of Canada* and s. 40 of the *Supreme Court Act*)

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Abbreviations Used in Footnotes

- **TT** → Trial Transcript
- **RA(#)** → Record of the Appellant, Volume #
- **RR** → Record of the Respondent

PART I – OVERVIEW AND STATEMENT OF FACTS

OVERVIEW

1. Before they ever step foot in a courtroom, accused individuals are impacted by the adversarial nature of our criminal justice system. For many, the first engagement with the opposing side occurs in a police interview room. With their liberty placed in jeopardy by the criminal process[1], they face the state alone – an engagement that is almost always a mismatch of skill, experience, and knowledge. Like any individual, they have the right to remain silent – a central tenet of our criminal justice system, the scope and ramifications of which are not universally known.[2] For this right to be meaningful, interviewees must be told it exists and provided an opportunity to exercise it. The standard police caution attempts to impart basic information about this right in a preliminary effort to level the playing field. In practice, the goal of state agents in an interview is to extract evidence. This conflicts with the objective of permitting interviewees to make a meaningful choice about their cooperation. Injustice can result when police try to balance these conflicting objectives without clear guidance.

2. The common law confessions rule is grounded in the principle against self-incrimination,[3] a cornerstone of our criminal law.[4] While fairness in adversarial interactions between state agents and interviewees has always been a concern, the confessions rule was traditionally focused on the reliability of confessions. Correspondingly, it focused on acts that could undermine the truth of a statement – inducements, threats, and oppressive circumstances. Over time, the rule has encompassed broader concerns of fairness.[5] Increasingly, it has targeted abusive state conduct, including

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[1] *R v Hebert*, [1990] 2 SCR 151 at p. 175.
[2] *R v Esposito* (1985), 12 OAC 350 at p. 2.
[3] *R v Grant*, 2009 SCC 32 at para 89; *R v White*, [1999] 2 SCR 417 at para 44.
[4] *Grant*, para 89; *R v Henry*, 2005 SCC 76 at para 2.
[5] *R v Sweeney* (2000), 136 OAC 238 at paras 44 & 57; *R v Whittle*, [1994] 2 SCR 914 at p. 932.

interviewing those without the capacity to make a meaningful choice, the use of statutorily compelled statements, and the use of police trickery.[6]

3. Demonstrating the influence of fairness in this evolution, *Singh* articulated voluntariness as a positive right. While it also encompasses reliability considerations, voluntariness affords individuals the right to make *a meaningful choice* about whether to speak with police.[7]

4. A meaningful choice requires knowledge. To provide a voluntary statement, individuals need at least basic information about their potential jeopardy and their corresponding legal rights. If this information is not given at the time of an interview, many individuals are unable to make a meaningful choice when doing so matters most. Often, the source of this information will be the police caution.

5. The Alberta Court of Appeal's decision in *Tessier* did not till new ground. Applying this Court's decisions in *Oickle* and *Singh*, it merely recognized the increased importance of *fairness* to the modern-day confessions rule. When actions of the state jeopardize liberty, fairness should not care how a particular officer subjectively characterized that individual at the time of their interaction. Whether viewed to be the prime suspect or merely a witness, what matters is the effect of the state's conduct on the person being interviewed.[8] To make a meaningful choice to speak with police, an interviewee must be aware of the adversarial role filled by police and that they do not have to say anything at all. They must also know that, while anything they say can be used to prosecute them, their silence cannot.[9]

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[6] *R v Oickle*, 2000 SCC 38 at para 69.

[7] *R v Singh*, 2007 SCC 48 at para 35

[8] Assessed through the modified-objective test of voluntariness.

[9] For a comprehension-tested caution, see: Krista Davis, C. Lindsay Fitzsimmons & Timothy E. Moore, "Improving the Comprehensibility of a Canadian Police Caution on the Right to Silence," J Police Crim

6. Contrary to the Appellant's assertion, the Alberta Court of Appeal did not impose a requirement that police caution everyone they speak with, nor did it suggest the absence of a caution will determine voluntariness. Consistent with decades of jurisprudence, the Court of Appeal endorsed a contextual analysis to which the presence or absence of a police caution is but one potential factor. The Trial Judge departed from this contextual analysis, deploying the so-called suspect rule to effectively ignore the absence of a caution entirely.

7. The Appellant seeks to create a bright-line rule that would permit judges to ignore interviewees' knowledge of the right to silence at the very moment they are expected to exercise it. In other words, voluntariness would no longer require a meaningful choice so long as police take the statement before detention (or the existence of reasonable suspicion). This is at odds with this Court's consistent jurisprudence since *Boudreau v The King*[10] because it would render the police caution *irrelevant* in these circumstances as opposed to the *important* factor it is acknowledged to be.

8. Within the first few questions, an interviewee may incriminate themselves.[11] The police caution remains relevant because, in those moments, most citizens are not aware of the precise limits of police authority or their individual rights in those interactions.[12] For some, this imbalance of knowledge is especially acute: newcomers to Canada, those with limited formal education or prior police experience, the developmentally challenged, and those with substance dependency or mental health concerns.[13] An

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Psych (January 7, 2011) at p. 7. ["Davis et al."] There is no nationally consistent formulation of the police caution – *R v KF*, 2010 NSCA 45 at para 28 (concurring reasons of Beveridge JA).

[10] *Boudreau v The King*, [1949] SCR 262 at p. 267. ["*Boudreau*"]

[11] *R v GTD*, 2017 ABCA 274 at para 74 (dissenting reasons of Veldhuis J.A. upheld at 2018 SCC 7).

[12] *R v Therens*, [1985] 1 SCR 613 at para 57; *R v Le*, 2019 SCC 34 [*Le*] at para 26.

[13] Davis et al., pp. 3-4.

accused person is in the most vulnerable position against the coercive power of the state "prior to or on arrest."[14] The protections of the right to silence cannot be left to chance.[15]

9. For interviewees, the right to make a meaningful choice is further jeopardized by rights denied upon the detention analysis set out by the trial judge. When exercised, the right to counsel can help narrow the informational gap between investigators and detainees.[16] By absolving police of their informational obligation, individuals like Mr. Tessier lose the benefit of a lawyer's advice when they need it most. The ruling demonstrates a need for this Court to address how, and to what extent, the modified-objective test for detention articulated in *Grant* and re-affirmed in *Le*[17] applies to police station interviews.

10. The Respondent submits that the modified-objective test for psychological detention applies with full force to pre-arrest police station interviews. Such determinations are not exercises in divining the subjective perspective of an accused nor a series of value judgements regarding what motivated police actions. The focus of such inquiries must be the effect of police actions on a reasonable person with the accused's characteristics: whether a reasonable person in the individual's circumstances would conclude they had been deprived by the state of the liberty of choice.[18] By deploying a subjective analysis, the trial judge's reasons leave this ultimate question unanswered, further necessitating a new trial.

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[14] *R v Crawford*, [1995] 1 SCR 858 at para 25.

[15] *Ibid.*

[16] See, for example: *GTD* (ABCA), paras 53-57.

[17] *Le* at para 31; *R v Tessier*, 2020 ABCA 289 ["*Appeal Reasons*"] at paras 35, 60-61 & 67-69. **[RA(I) pp. 55, 61 & 63]** Note: the Alberta Court of Appeal did not give fulsome reasons on this issue, the voluntariness errors of the trial judge having already necessitated a new trial.

[18] *Grant* at para 44.

STATEMENT OF FACTS

Investigation of the Offence

11. The Respondent agrees with the Appellant's recitation of the facts at paragraphs 9 to 19 of its Factum, with the following clarifications and corrections.

a. The cigarette butt with Mr. Tessier's DNA was located at an intersection nearly a kilometre away from where the deceased's body was discovered, not "at the scene."[19]

b. The Respondent retrieved his .22 calibre revolver two days before the shooting because he was called about a broken handle on the revolver he had on consignment at the Shooter's Edge. The Shooter's Edge was a gun store and shooting range.[20]

c. When the black Converse shoes were dropped off at Can-West was unknown – on the evidence available, this could have occurred before or after Mr. Berdahl's death.[21]

12. The day after the deceased's body was found, police began investigating Mr. Tessier. A phone call was placed to Mr. Tessier, requesting he attend at the Didsbury RCMP station to make a statement.[22] Approximately 15 minutes later, Sgt. White called Mr. Tessier again, directing him to the station.[23]

13. As a veteran investigator and experienced interrogator, Sgt. White had been tasked with interviewing Mr. Tessier.[24] When Mr. Tessier arrived, Sgt White asked Mr. Tessier to come into an interview room for a recorded interview, closing the only door behind them.[25]

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[19] TT pp. 937/4-40 & 1502/34-37 **[RR pp. 5 & 6]**, as compared to the Appellant's Factum, para 10.

[20] TT pp. 363/3-12 & 367/37-39. **[RR pp. 1 & 2]**

[21] TT p. 482/30 – 483/6. **[RR p. 3 & 4]**

[22] Testimony of Cst. J. Desilets – TT pp. 23/2-4, 26/14 & 32/39 – 33/11. He could not recall whether he told Mr. Tessier the nature of the investigation (TT p. 23/16). **[RA(II) pp. 23, 26 & 32-33]**

[23] TT p. 13/2-3 & 86/41 – 87/5. **[RA(II) pp. 13 & 86]**

[24] TT p. 12/5. Sgt. White had been an RCMP officer from 1977 to 2012 (TT p. 10/39) and a Major Crimes investigator for 5 years before Mr. Tessier's interview (TT pp. 11/4-5 & 78/29). He had been involved in approximately 100 homicide investigations and previously interviewed 25 homicide suspects (TT pp. 78/32-36 & 79/3-10.). **[RA(II) pp. 11-12 & 78-79]**

[25] TT pp. 13/37-38 & 16/9. **[RA(II) pp. 13 & 16]**

14. At no time was Mr. Tessier informed he did not have to cooperate with police or that he did not have to speak with Sgt. White. Despite Mr. Tessier repeatedly requesting permission to leave the company of police, Sgt. White never informed him that he was free to leave the station any time he wanted.[26] Mr. Tessier specifically sought permission to leave the room for a cigarette,[27] inquired if he should travel separately from police to attend at his vehicle[28] and, at the end of the interview, he sought permission to go.[29]

The 12:55 pm Police Station Interview (Statement #1)

15. Before interviewing Mr. Tessier, Sgt. White was aware of several facts, including:

a. that Mr. Tessier was the last person to see the deceased alive;[30]

b. that he was investigating a homicide, the body having been found on the shoulder of a road with "severe trauma" to the head and a blanket partially covering the body;[31]

c. that tire tracks, footprints, cigarette butts and blood spatter had been found nearby;[32]

d. that the deceased and Mr. Tessier were best friends, spending a lot of time together;[33]

e. there was a conflict between the deceased and Mr. Tessier involving a car, and the deceased had a plan to leave for Winnipeg.[34]

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[26] TT pp. 90/7-8 & 92/27-32. **[RA(II) pp. 90 & 92]**

[27] TT p. 91/25-27. **[RA(II) p. 91]**

[28] TT p. 91/33-39. **[RA(II) p. 91]**

[29] Transcript of March 17, 2007 Statement beginning at 12:55 PM ["*12:55 Statement*"], p. 42/1410: "I'm free to go, am I?" **[RA(IV) p. 139]**

[30] Although Sgt. White attempted to resile from this testimony in re-examination, he acknowledged having known this very early on in the interview – TT pp. 93/34-40, 35/38, 97/39 – 98/5 & 138/35-40. **[RA(II) pp. 35, 93, 97-98 & 138]**

[31] TT pp. 12/8-13, 69/15-18 & 97/12-19. **[RA(II) pp. 12, 69 & 97]**

[32] *Ibid.*

[33] TT pp. 12/20 & 94/35-39. **[RA(II) pp. 12 & 94]**

[34] TT pp. 113/15-17, 27/11-13, 27/36-41, 95/23-25 & 209/17-33. **[RA(II) pp. 113, 27, 95 & 209]**

16. During Statement #1, police engaged in several forensic tests of Mr. Tessier's property. Sgt. White asked Mr. Tessier for his shoes, which he removed and turned over so police could photocopy their soles. During this time, the interview continued. Later, those photocopies were compared to shoeprints found at the scene.[35] While the interview was ongoing, other officers travelled to Mr. Tessier's truck. Before it concluded, police were aware the tread pattern of his tires was a possible match to the impressions located on scene.[36]

17. At no point during Statement #1 did Sgt. White inform Mr. Tessier that he was being investigated, that he was detained in relation to the homicide, that he had the right to consult with counsel, or that anything he said could be used as evidence against him.[37] No waiver of his right to counsel was sought from him.[38]

18. In the *voir dire*, Sgt. White testified:

a. he asked Mr. Tessier questions calculated to produce a confession;[39]

b. very early in the interview he was trying to determine if Mr. Tessier was "in a position to provide *inculpatory evidence* about the crime."[40] For example, he asked Mr. Tessier to comment on why police would find his DNA on scene;[41]

c. he sought admissions regarding the deceased's appearance at the time of his death, including about one item of evidence characterized as "holdback";[42]

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[35] TT pp. 37/5-8, 105/22-34, 102/14-40 & 150/35-38. Note: Mr. Tessier's truck was parked at his friend's home during the interview. **[RA(II) pp. 37, 105, 102 & 150]**

[36] TT p. 151/31-39. **[RA(II) p. 151]**

[37] TT p. 89/15-39. **[RA(II) p. 89]**

[38] TT pp. 89/41 – 90/5. Note: He was informed of a right to speak with counsel if he was going to provide his DNA (TT p. 91/19-20). **[RA(II) pp. 89-90 & 91]**

[39] TT pp. 39/28-30, 99/1-2 & 125/40-41. **[RA(II) pp. 39, 99 & 125]**

[40] TT p. 35/13-29. **[RA(II) p. 35]**

[41] TT p. 100/3-17. **[RA(II) p. 100]**

d. his approach involved asking cross-examination style questions to force Mr. Tessier into admissions or provable lies regarding his DNA being left on cigarettes at the scene;[43]

e. on multiple occasions, he insinuated or accused Mr. Tessier of being the murderer.[44] He did this to see if Mr. Tessier reacted like the person who killed the deceased;[45]

f. he was hoping for a confession[46] and appealed to Mr. Tessier's conscience in the hopes he would get one;[47]

g. getting admissions of guilt is exactly what he tries to do in interviews of people he classifies as suspects;[48]

h. after asking Mr. Tessier to prove he did not murder the deceased, he told Mr. Tessier he did not believe his denials.[49]

While answers to these questions placed Mr. Tessier at risk of deprivation of liberty, they all occurred when Sgt. White claimed Mr. Tessier was not a "person of interest" or suspect.[50] Sgt. White claimed Mr. Tessier was still not a suspect at the end of the first police interview, although police wanted to "confirm his alibi" and "eliminate him."[51]

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[42] TT pp. 107/21-22, 108/14-41, 110/36-37, 111/1-3 & 111/21-27. **[RA(II) pp. 107, 108, 110 & 111]**
[43] TT pp. 115/33 – 117/9. **[RA(II) pp. 115-117]**
[44] TT pp. 117/18-31 119 /24-40 **[RA(II) pp. 117 & 119]**; *12:55PM Statement*, pp. 12/376, 13/392-394 & 20/651-653. **[RA(IV) pp. 109, 110 & 117]**
[45] TT pp. 118/2-14 & 119/7-16. **[RA(II) pp. 118 & 119]**
[46] TT p. 120/24-26. **[RA(II) p. 120]**
[47] TT p. 120/7-12 **[RA(II) p. 120];** *12:55PM Statement*, p. 20/661. **[RA(IV) p. 117]**
[48] TT p. 86/6. **[RA(II) p. 86]**
[49] TT pp. 121/33 – 123/14 **[RA(II) pp. 121-123]**; *12:55PM Statement*, p. 30/985-1003. **[RA(IV) p. 127]**
[50] TT p. 14/17-28. **[RA(II) p. 14]**
[51] TT pp. 39/15 & 40/3-7. **[RA(II) pp. 39 & 40]**

19. In Sgt. White's opinion, keeping people in the dark about their rights to counsel and their right to silence was useful to getting confessions. Providing people their *Charter* rights and police caution made interviewees less comfortable and sometimes stopped them from talking further. To get admissions, you have to keep people talking.[52]

The 5:10 pm Interview (Statement #2)

20. Mr. Tessier returned to see Sgt. White at 5:10 pm. To Sgt. White, he still appeared nervous.[53] During the drive back to Mr. Tessier's home with police, Mr. Tessier became so nervous and agitated that he stopped driving and asked Sgt. White to drive his truck for him.[54] Sgt. White "had him take off his jacket", Mr. Tessier submitted to this demand, and Sgt. White gave him a pat-down search for weapons before driving.[55] Sgt. White claimed that Mr. Tessier remained continually emotional for all of his interactions.[56]

21. Sgt. White testified that Mr. Tessier became a "person of interest" during the 5:10 interview when he disclosed that he had recently picked up a firearm from the shooting range.[57] Sgt. White defined a person of interest as someone "worthy of further scrutiny into his actions and movements to verify or eliminate" as the person responsible for the death.[58] By this time, police were aware that the cause of death appeared to be a gunshot wound.[59]

22. Sgt. White considered him a suspect because he introduced the missing revolver into the investigation.[60]

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[52] TT p. 86/4-24. **[RA(II) p. 86]**
[53] TT p. 43/12. **[RA(II) p. 43]**
[54] TT p. 45/10-17. **[RA(II) p. 45]**
[55] TT p. 45/21-22 & 128/38 – 129/12. **[RA(II) 45 & 128-129]**
[56] TT p. 61/26-31. **[RA(II) p. 61]**
[57] TT p. 63/28-30. **[RA(II) p. 63]**
[58] TT p. 63/34-36. **[RA(II) p. 63]**
[59] TT pp. 171/6-15 & 175/21-32. **[RA(II) pp. 171 & 175]**
[60] TT pp. 62/4-8 & 126/24-25. **[RA(II) pp. 62 & 126]**

23. At the house, Mr. Tessier took the police to a gun case that was found to be empty, except for one grip.[61] Sgt. White oscillated in his position that Mr. Tessier became a suspect at this point. At times he claimed that he cautioned Mr. Tessier at this point *only* because he was being careful; not because Mr. Tessier was a suspect.[62] Nonetheless, after being satisfied Mr. Tessier was a suspect, Sgt. White continued questioning him prior to reading him *Charter* rights.[63]

24. Sgt. White decided to give a form of police caution to Mr. Tessier after about three hours between both interviews. However, the wording he chose failed to advise Mr. Tessier that anything he had already said could be used against him in court.[64] When Mr. Tessier asked for clarification, Sgt. White posited that only what he said going forward could be used in court against him.[65] When confronted, Sgt. White testified that he thought this was the state of the law in 2007.[66]

The Trial Judge's Decision on Voluntariness

25. In reaching his decision, the trial judge incorrectly articulated that the only policy reason for the right to silence and the confessions rule was "to prevent the state from receiving false confessions."[67] He further considered that the test for voluntariness "focuses on the actions of the police and the effect that those actions have on the accused person, the accused person's individual characteristics are also relevant…"[68] The trial judge then listed and explained the accepted factors of threats, promises, inducements, oppressive conditions, lack of an operating mind and police trickery.[69]

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[61] TT pp. 57/39 – 58/5. **[RA(II) pp. 57-58]**

[62] TT pp. 124/18-26 & 135/3-10. **[RA(II) pp. 124 & 135]**

[63] TT p. 126/24-41. **[RA(II) p. 126]**

[64] TT p. 132/3-8 **[RA(II) p. 132]**; Transcript of March 17, 2007 Statement beginning at 5:10PM ["*5:10 PM Statement*"], p. 35/1203. **[RR p. 11]**

[65] TT p. 133/29. **[RA(II) 133]**

[66] TT pp. 135/3-17 & 134/23-35. **[RA(II) pp. 135 & 134]**

[67] *R v Tessier,* 2018 ABQB 387 at para 16. ["*Voir Dire Reasons*"] **[RA(I) p. 16]**

[68] *Voir Dire Reasons,* para 18. **[RA(I) p. 16]**

[69] *Voir Dire Reasons,* paras 18-22. **[RA(I) pp. 16-17]**

Assessing each of these factors in turn, the trial judge determined there was no evidence of threats, promises, or inducements…"[70] The police did not use any non-existent or inadmissible evidence during either interviews.[71] Moving to the operating mind criterion, the trial judge understood it required only that "Mr. Tessier possessed the limited degree of cognitive ability to understand what he was saying."[72] He was satisfied that Mr. Tessier met that criterion.

26. Turning again to the police caution, the Trial Judge relied on the test articulated in *R v Higham*[73] by Brown J. for a police officer to "ask for a statement without cautions or counsel advice."[74] This so-called suspect rule requires a reasonable belief by the officer at the time of interrogation that the person giving the statement is *not* culpably involved in the event under investigation.[75] Having concluded such a belief was reasonably held by Sgt. White, the Trial Judge concluded there was no need to further consider the presence or absence of a police caution.[76] Consequently, excluding this factor from his ultimate analysis, the trial judge focused on whether Mr. Tessier appeared to be a person "whose will has been broken."[77]

The Alberta Court of Appeal's Reasons on Voluntariness

27. Identifying the trial judge's errors, the Court of Appeal explained a proper voluntariness analysis is rooted in the concept of a *meaningful choice* as articulated in *Singh*.[78] "[A]n operating mind is not the only mental element required for a statement to be voluntary."[79] Since *Boudreau,* the

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[70] *Voir Dire Reasons,* para 36. **[RA(I) p. 19]**
[71] *Voir Dire Reasons,* para 37. **[RA(I) p. 19]**
[72] *Voir Dire Reasons,* para 41. **[RA(I) p. 20]**
[73] *R v Higham*, [2007] OJ No 2147 (ONSC) at para 7.
[74] *Voir Dire Reasons,* para 49. **[RA(I) pp. 22-23]**
[75] *Ibid*.
[76] *Voir Dire Reasons,* para 51. **[RA(I) p. 23]**
[77] *Voir Dire Reasons,* para 52. **[RA(I) p. 23]**
[78] *Singh*; *Appeal Reasons,* para 24. **[RA(I) p. 54]**
[79] *Appeal Reasons,* para 29. **[RA(I) p. 55]**

"presence or absence of a caution" has remained an important factor. Applying the contextual approach endorsed in *Oickle,*[80] the Court of Appeal concluded that the impact of a caution – or the lack of one – must be considered on a modified-objective basis (from the perspective of the person giving the statement) to determine if they made a voluntary decision or *meaningful choice* to speak to the police.[81] When no caution is given, the effect of its absence is gauged by determining "if the person making the statement understood they did not have to say anything, and understood that if they responded to questions, their answers could be used against them."[82]

28. The Court of Appeal found the Trial Judge erred by failing to address this key issue – whether Mr. Tessier understood that what he said could be used against him and that he was not obligated to say anything to the police.[83] The root of the trial judge's error was that he focused on the perspective of Sgt. White and not Mr. Tessier. Even if Sgt. White did not subjectively perceive Mr. Tessier as a suspect, this did not determine the impact of the absence of a caution for voluntariness purposes.[84] By focusing on this Court's advice about when police officers should caution a suspect, the Trial Judge erred by "elevating the 'suspect' rule of thumb to a legal test."[85]

29. While there are several cases where statements are ruled voluntary despite the absence of a caution, they normally involved defendants who already knew the bulk of the information it would have contained.[86] The same could not be said for Mr. Tessier. Consequently, by excluding its absence from his voluntariness analysis, the Trial Judge erred.[87] His further search for a "broken will" was

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[80] *Appeal Reasons,* para 34. **[RA(I) p. 56]**
[81] *Appeal Reasons,* para 35. **[RA(I) p. 56]**
[82] *Appeal Reasons,* para 37. **[RA(I) p. 56]**
[83] *Appeal Reasons,* para 46. **[RA(I) p. 58]**
[84] *Appeal Reasons,* para 55. **[RA(I) p. 60]**
[85] *Appeal Reasons,* para 55-56. **[RA(I) p. 60]**
[86] *Appeal Reasons,* para 59. **[RA(I) p. 61]**
[87] *Appeal Reasons,* para 56. **[RA(I) p. 60]**

equally flawed, answering another non-determinative question: "the test for meaningful choice is not an unbroken will."[88] A new trial was necessary to determine if "in the absence of a caution, Mr. Tessier made a meaningful choice to speak to the police, as that concept is properly understood."[89]

The Trial Judge's Reasons on Detention

30. While the Trial Judge cited the leading authorities on detention, he instead applied the factors first articulated in *R v Moran* in relation to a police station questioning.[90] Concluding the *Grant* factors were "to some extent, subsumed into [these] factors",[91] he listed the considerations relevant to his analysis:

> 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

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[88] *Appeal Reasons*, para 57. **[RA(I) p. 60]**

[89] *Appeal Reasons*, para 60. **[RA(I) p. 61]**

[90] *R v Moran* (1987), 21 OAC 257; *Voir Dire Reasons*, pp. 13-18. **[RA(I) pp. 26-31]**

[91] *Voir Dire Reasons*, para 62. **[RA(I) pp. 26-27]**

> 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.[92]

31. Although his subsequent analysis was lengthy, it never answered the ultimate question for determination – would a reasonable person in the shoes of Mr. Tessier have felt obliged to cooperate with police. Indeed, the last factor in the Trial Judge's *Moran* analysis invited an erroneous consideration: the reasonable "subjective belief by an accused" as to their detention.[93] On the basis of *Moran,* the Trial Judge focused on what could be inferred about Mr. Tessier's "subjective belief from his actions and statements" during the interviews.[94] The Trial Judge concluded that Mr. Tessier did not "subjectively" feel he was being detained at any point.[95]

The Alberta Court of Appeal's Comments on Detention

32. The Court of Appeal declined to determine Mr. Tessier's detention argument but offered a comment: it is not necessarily an error for trial courts to consider the *Moran* factors "to assist in a contextual analysis", but a "full consideration" of the *Grant* factors is still required. Those factors are aimed at determining the ultimate question in the *Grant* analysis*:* "would the police conduct cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction?"[96]

PART II – POINTS IN ISSUE

33. In their Memorandum of Argument, the Applicant has stated the Questions in Issue as follows, to which the Respondent replies (in sum):

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[92] *Voir Dire Reasons,* para 61 (citing *R v Seagull*, 2015 BCCA 164). **[RA(I) p. 26]**
[93] *Voir Dire Reasons,* paras 86-88. **[RA(I) pp. 30-31]**
[94] *Voir Dire Reasons,* para 85. **[RA(I) p. 30]**
[95] *Voir Dire Reasons,* para 88-90. **[RA(I) pp. 30-31]**
[96] *Appeal Reasons,* para 69. **[RA(I) 63]**

Appellant's Question A: Does the confessions rule require proof beyond a reasonable doubt that the accused actually knew he had the right to remain silent and that anything he said could be used against him in evidence?

Response: The Crown is not required to prove any single voluntariness factor beyond a reasonable doubt. A proper determination of voluntariness where police place the accused in risk of losing their liberty requires a full contextual analysis which includes assessment of the actual knowledge of the accused of their right to silence.

Appellant's Question B: Are police required to caution persons who are not suspected of an offence before questioning? If so, what is the impact of the presence or absence of the caution on the voluntariness of any statements made?

Response: Admissibility of a statement turns on whether the accused made a meaningful choice to provide a statement to the police irrespective of how police officers have subjectively classified their level of suspicion of that person (i.e. as a witness, suspect, person of interest, or otherwise). When police create a risk of deprivation of liberty, they should caution any interviewee because a subsequent assessment of meaningful choice will include the accused's level of knowledge of the contents of a police caution.

Appellant's Question C: Was the Court of Appeal wrong to interfere with the trial judge's finding of voluntariness?

Response: The Court of Appeal was correct to interfere on the basis that the trial judge failed to consider a relevant factor in his analysis. The Trial Judge explicitly rejected considering the presence or absence of a police caution within his ultimate balancing of the voluntariness of the statement. This factor has been deemed important in every voluntariness analysis at least since this Court's decision in *Boudreau v The King*.[97]

34. Given the trial judge's erroneous analysis of psychological detention, the Court of Appeal's judgment can also be upheld pursuant to Rule 29(3).

Respondent's Question D: Has the test for detention in police station interviews articulated in *R v Moran,* 1987 CanLII 124, been overturned by subsequent decisions of this Court, including *Grant* and *Le*?

Summary of Respondent's Position: The trial judge erred by assessing psychological detention on a subjective basis. His analysis was guided by *Moran,* not *Grant.* On proper analysis, Mr. Tessier was detained. The order for a new trial should be upheld through application of Rule 29(3).

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[97] *Boudreau,* pp. 267, 272-273 & 283.

PART III – STATEMENT OF ARGUMENT

THE EVOLUTION OF THE CONFESSIONS RULE

35. The Respondent agrees with the general principles of law outlined by the Appellant at paragraphs 49 to 53 of its Factum. What is missing, however, is the increasing emphasis of "the fairness and repute of the administration of justice as an underlying rationale for the confessions rule…."[98] In *Hebert*, voluntariness was said to include the right to make a "free and meaningful choice as to whether to speak to the authorities or to remain silence."[99] Any conduct by police that "effectively and *unfairly* deprived the suspect of the right to choose…" could result in a s. 7 violation. *Oickle* reinforced "the right of the detained person to make a meaningful choice whether or not to speak to state authorities…"[100] In *Singh*, this broader notion of voluntariness was held to "prevail" in the post-*Charter* era, its status as a principle of fundamental justice having influenced its evolution.[101]

36. This broader notion is rooted in a lengthy legal history concerned with fairness in the interview context. Since *Ibrahim*, the presence or absence of a police caution has been a relevant factor in voluntariness determinations "and, in many cases, an important one."[102] Merely giving notice to an accused does nothing to enhance the reliability of their subsequent statements. However, it does ensure they do not act against their legal interests completely unaware of what they are doing. Consequently, the longevity of the caution confirms that fairness was historically a significant part of the confessions rule.[103]

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[98] *Hebert*, p. 171; *Sweeney*, paras 1& 57; *R v Colson*, 2008 ONCA 21 at para 30.
[99] *Hebert*, p. 181.
[100] *Singh*, paras 34-35.
[101] *Hebert*, p. 175; *Whittle*, p. 931.
[102] *Boudreau*, p. 267.
[103] See, for example: *The King v White* (1908), 15 CCC 30 (ONCA) at p. 34.

37. The concern with fairness was also present in *R v Fitton.*[104] The reasons of Rand and Nolan JJ. show a concern with the format of questions asked of the interviewee.[105] Justice Rand's analysis suggests that questioning using "intimidating or ***suggestive*** *overtones*" could invalidate responses given.[106] The distinction between these types of questioning and others is primarily found in the degree of adversity between the investigator and the interviewee. Nolan J. expressed that while questioning of suspects was unavoidable, "the questioning must not, of course, be *for the purpose* of trapping the suspected person into making admissions…"[107] Again, the distinction is the degree of adversity between the police officer and the interviewee. These reasons support the argument that the police caution begins to matter in the overall voluntariness balancing at the moment when police place the liberty of the interviewee at risk.

38. Abbott J. adopted the majority reasons of Roach J.A. including the reproduced comment that having already been given the police caution, "it would have been quite a different matter if … he did not understand the caution…."[108] This concern with fairness also supports the Respondent's position that understanding of the caution and the placement of investigators in a position of adversity to the interviewee is what truly matters to the appropriate timing for a police caution. Kerwin C.J. also endorsed Roach J.A.'s interpretation and application of *Boudreau*.[109]

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[104] *R v Fitton* (1956), 116 CCC 1 (SCC).

[105] Note: Cumulatively, the two sets of reasons comprised the majority of the opinions of the Court which addressed the merits of this argument [composed of Rand, Kellock, Nolan, and Locke]. Neither Cartwright J nor Kerwin CJ opined on the issue and decided the appeal on other grounds.

[106] *Fitton*, p. 964.

[107] *Ibid*, pp. 972-73.

[108] *Ibid*, p. 990.

[109] *Ibid*, p. 960.

39. Developing these principles further, the reasons of Beetz and Pratte JJ. in *Horvath v The Queen*, recognized that the underlying reason for the police warning is that "voluntariness implies an awareness of what is at stake in making a statement to a person in authority."[110] This language was adopted by Watt J. (as he then was) in *R v Worral*, to hold that "voluntariness implies an awareness about what is at stake in speaking to persons in authority, or declining to assist them."[111] This proposition has also been adopted in several lower court decisions across the country including the case of *R v Higham*.[112]

40. The confessions rule is an expression of a principle of fundamental justice found in the general "notion that a person whose liberty is placed in jeopardy by the criminal process cannot be required to give evidence against himself or herself, but rather has the right to choose whether to speak or to remain silent."[113] A person's liberty is placed in jeopardy by police when they interview them in an adversarial fashion. It is irrelevant to the application of this principle whether police would seek to classify the person as a witness, person of interest, suspect, or accused. Whatever moniker police choose, fairness requires a levelling of the playing field when the degree of adversity between the police and an interviewee could place their liberty at risk.

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[110] *R v Horvath*, [1979] 2 SCR 376 at p. 425. Note: This is not a fulsome understanding of the potential consequences in the accused's matter based on perfect information of the Crown's case. It is a basic understanding of the possible uses of any statement by the state.

[111] *R v Worral*, [2002] OJ No 2711 (ONSC) at para 106. **[Appellant's Authorities, Tab 1]**

[112] *Higham*, paras 6-7. See also, for example: *R v Gough*, 2017 ONSC 2097 at paras 64, 66; *R v Shaw*, 2011 ABPC 155 at para 20; *R v Popwell*, 2007 CanLii 9618 (ONSC) at para 53; *R v Ahmed*, 2020 ONSC 5990 at paras 17-18 & 20; *R v Biddersingh*, 2015 ONSC 5904 at paras 68-70; *R v St. Germaine*, 2014 NWTSC 52 at paras 17-18 & 38; *R v Blackduck*, 2014 NWTSC 58 at paras 75-77; *R v Pidborochynski*, 2018 NWTSC 10 at paras 15-16; *R v AG*, 2018 ABQB 1043 at paras 20-21; *R v Benson et al*, 2009 MBQB 310 at para 79; *R v Van Ieperen*, 2009 BCSC 350 at paras 41-42; *R v Lambert*, 2020 NSPC 37 at para 54.

[113] *Hebert*, p. 175.

41. A level playing field is the premise from which statements defining a coerced or induced confession gain their meaning. For a person's will to be *overborn* they must have a will to refuse to begin with. Knowledge of the information contained within a police caution is what creates such a will. Once a person understands that they have a legally protected right to choose silence, they can accurately gauge how much effort they are willing to expend or how much pressure and discomfort they are prepared to endure to maintain it in their circumstances.

42. Properly understood, *Whittle* supports the notion of a necessary mental element beyond mere capacity. The operating mind factor outlined in *Whittle* requires that the accused person "possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused."[114] This cognitive ability and comprehension would mean very little without the contemporaneous knowledge that the person has the right to silence, that their silence cannot be used against them, and that anything they say can be used in a subsequent trial to convict them. Justice Sopinka listed a "lack of information" as one method of police depriving a suspect of making an effective choice.[115] Indeed, the *Whittle* test presumes the conveyance of the informational component of a police caution informing the interviewee that *their statement may be used as evidence against them in a proceeding*.[116]

43. A police failure to inform an interviewee of their potential jeopardy can result in a reasonable doubt on voluntariness.[117] In the context of a s.7 claim in *WRW*, the British Columbia Court of Appeal found that knowledge of a detainee of their right to silence is a "threshold question" to the assessment

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[114] *Whittle*, p. 939.
[115] *Whittle*, p. 932.
[116] *Whittle*, p. 941.
[117] *R v Fernandes*, 2016 ONCA 772 at para 30.

of the voluntariness of their statement.[118] They upheld an exclusion where the accused had been cautioned for the wrong offence.[119] In *Higham*, the failure to caution was viewed as an inducement by "minimizing the legal consequences" of speaking to the police.[120] The Respondents submits that the position in *WRW* is the more persuasive conceptualization. The threshold to determining if someone's will has been overborn is an assessment of their understanding of the right to silence. There can be no will to resist without knowledge that resistance is legally permissible and protected.

44. The central proposition advanced by the Respondent is rooted in the acceptance of this court's ruling in *Singh* that a *meaningful* choice is at the core of voluntariness. Awareness of what is at stake is of central importance to a meaningful choice.[121] The difference between a *meaningful* and a meaningless choice is the awareness of one's adversarial position to the state agent and the legal uses of utterances or silence. A meaningful choice is an *informed* one.

The Police Caution in England and Wales

45. While the Appellant relies on the law of England to support its proposal for a bright-line suspect rule in Canada, English law supports the Respondent's position that the caution is an important and potentially determinative consideration in voluntariness. As the police caution in Canada is the result of adoptions of the Judges' Rules in Britain, it is useful to consider what impact a lack of police caution could have there. According to those rules a police officer was required to caution anyone they had reasonable grounds to suspect committed an offence.[122] Prior to codification in 1984, non-

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[118] *R v WRW* (1992), 17 BCAC 38 at para 52

[119] *WRW*, paras 26-27.

[120] *Higham*, para 32.

[121] *Horvath*, p. 425.

[122] *Practice Note (Judges' Rules*), [1964] 1 WLR 152 at p. 153. **[Appellant's Authorities, Tab 3]**

conformity with those rules was acknowledged to be a possible cause of exclusion of utterances from evidence in subsequent criminal proceedings.[123]

46. Since these rules were codified in the *Police and Criminal Evidence Act*, 1984 [*PACE*], their development has mirrored development of the law in Canada towards a greater concern with fairness. Section 78 of *PACE* includes discretion for trial judges to exclude evidence which "would have such an adverse effect on the fairness of proceedings that the court ought not to admit it."[124] This section allows exclusion of evidence in addition to s. 76 which allows for exclusion of statements based on factors tracking reliability concerns such as inducements, threats, and oppression.[125] Section 78 has been interpreted by the courts as allowing exclusion of evidence where the has been a breach of Code C which includes the police caution.[126] The section provides broad discretion to exclude and limiting guidance has been resisted as "circumstances vary infinitely".[127] Consequently, in the England and Wales, failure to appropriately caution could lead to exclusion of a statement.

APPELLANT'S QUESTION A: DID THE ALBERTA COURT OF APPEAL ERR BY REQUIRING A PROOF OF WAIVER OF THE RIGHT TO SILENCE?

47. The Appellant suggests the Alberta Court of Appeal has instituted a requirement that "proof of a meaningful choice would *require* proof that the respondent subjectively 'understood the police could use his statements to his detriment and that he was not obligated to speak."[128] This is not accurate. The Alberta Court of Appeal held that "where no caution has been given, a court must make a determination whether the person understood they did not have to say anything, and understood that if

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[123] *K.F.*, para 23-24 (citing the Honourable Fred Kaufman, *The Admissibility of Confessions*, 3rd ed. (Toronto: Carswell, 1979) pp. 150-1); *Esposito*, p. 12.

[124] *Police & Criminal Evidence Act* (UK), 1984, c. 60, s. 78(1). ["*PACE*"]

[125] *PACE*, s. 76.

[126] *Pitman and Hernandez v The State (Trinidad and Tobago)* [2017] UKPC 6 at para 20.

[127] *R v Samuel*, [1988] 2 WLR 920, 87 Cr App Rep 232

[128] *Appellant's Factum*, para 59. [Emphasis added]

they responded to questions, their answers could be used against them."[129] It did not suggest the answer to this question would be determinative of voluntariness.

48. Contrary to the Appellant's suggestion that the Court of Appeal effectively required a "proof of waiver"[130], the Court said that the trial judge merely failed to consider whether Mr. Tessier "was able to make a meaningful choice to speak to the police *in the absence of a police caution*."[131] Highlighting that a "case-specific, contextual analysis" was required, the Court held that a new trial was needed to determine the answer.[132] Simply put, the Trial Judge explicitly excluded consideration of the police caution and the Respondent's knowledge of its contents from his analysis because he determined that police did not have to caution in these circumstances.

49. In *Singh*, this Court indicated that a useful yardstick for determining whether police should give a caution is reasonable suspicion that the interviewee has committed an offence.[133] This was not suggested to be a limit on where police would be well advised to caution.

50. The Appellant suggests police will now have to caution "virtually everyone with whom they speak, just in case that person admits and offence."[134] By considering *Hebert*, the error in this analysis is revealed. Not just anyone is entitled to the assistance of the confessions rule – it is reserved only for those persons whose "liberty is placed in jeopardy by the criminal process."[135] Such jeopardy is created the moment the state agent takes an adversarial approach to an interviewee, thereby objectively increasing the risk of self-incrimination. The scope of inquiry is focused on the conduct of the police

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[129] *Appeal Reasons*, para 37. **[RA(I) 56]**
[130] *Appellant's Factum*, para 59.
[131] *Appeal Reasons*, para 56. **[RA(I) 60]**
[132] *Appeal Reasons*, para 60.
[133] *Singh*, para 32-33.
[134] *Appellant's Factum*, para 64.
[135] *Hebert*, p. 175.

and its objective effect on the suspect's ability to exercise his or her free will.[136] Whenever police begin to occupy a position adversarial to an interviewee, they should caution them. In all other circumstances, they are unlikely to objectively place the interviewee's liberty in jeopardy through their questioning, rendering a caution unnecessary.

51. This is not a suggested test, but merely a restatement of the point at which voluntariness becomes a potential issue. No one would reasonably argue that a person who comes into a police station of their own accord to report they have committed an offence would need to be cautioned for their initial utterance to be voluntarily – they are merely passive receivers of that preliminary information.[137] The fairness and repute of the administration of justice would not suffer any blemish from the admission of such utterances. It is only where police, with the leverage of greater knowledge of the functioning of the justice system engage with an uninformed interviewee to the potential detriment of their liberty that fairness concerns arise.

APPELLANT'S QUESTION B: ARE POLICE REQUIRED TO CAUTION PERSONS WHO ARE NOT SUSPECTED OF AN OFFENCE BEFORE QUESTIONING?

52. The Respondent challenges the Court of Appeal decision on the basis that the Trial Judge actually "*did* consider the absence of a caution, but gave it limited weight…."[138] This argument is divorced from a fulsome consideration of the Trial Judge's reasons. The trial judge did not give the lack of caution *limited weight*; he *excluded* it as a factor from further analysis. The Trial Judge explicitly stated that he *agreed* with the test articulated in *Higham* for taking " 'a statement without cautions or counsel advice….' "[139] This test requires an objectively reasonable belief that the person

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[136] *Singh,* para 36.

[137] See, for example: *R v Turcotte*, 2005 SCC 50, as cited in *Appellant's Factum,* para 65.

[138] *Appellant's Factum,* para 68.

[139] *Voir Dire Reasons,* para 49

giving the statement is not culpably involved in the event under investigation.[140] He then found that Sgt. White reasonably held such a belief.[141] After so finding, the Trial Judge never returned to consider the effect a lack of caution had on Mr. Tessier or a reasonable person in his circumstances.

53. If he had given it *any* weight, he would have had to consider Mr. Tessier's demonstrated lack of understanding of his right to silence by the time he finally received a caution from Sgt. White.[142] Any analysis that considered the effect of a lack a police caution upon the voluntariness of Mr. Tessier's statements would naturally have had to mention or deal with this exchange. This was the only time any form of police caution was given. The Trial Judge's failure to even mention this exchange demonstrated his exclusion of the police caution factor from his overall weighing in voluntariness.

54. In considering the Appellant's purported challenge to any "bright-line rule premised on the reasoning *Worrall*," it is important to note the Court of Appeal made no such declaration.[143] Contrarily, it endorsed a fulsome contextual analysis of voluntariness while rejecting the Trial Judge's use of a bright-line rule to exclude the absence of a caution from consideration in his voluntariness analysis. Before this Court, it is the Appellant that seeks a bright-line rule – one that would allow police and trial courts to ignore any informational deficit before police claim grounds for arrest (i.e. after the police have already secured the maximum benefit to their case from an ill-informed accused). This Court should reject any bright-line rule premised on the subjective categorization of the accused by the police as suspect, person of interest, witness or otherwise. This Court's advice in *Singh* about cautioning persons suspected of an offence should remain mere advice. It is not a rule by which all

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[140] *Higham,* para 7.
[141] *Voir Dire Reasons,* para 51.
[142] *5:10PM Statement,* p. 35/1203-1218. **[RR 11]**
[143] *Appellant's Factum,* para 76.

others should be deprived of the caution. To adopt the position of the Appellant is to invite police abuse in various forms. For example

a. maintaining a subjective ignorance of facts by the interviewing officer would be placed at a premium because then they could interview without concern for cautioning the interviewee. Indeed, such straw men could be created for interview purposes by police quite easily. This would dispense with any need to caution.

b. the level of suspicion of a police officer has nothing to do with a reasonable person's response to the actions and words of police.

c. creating a bright line test based on degree of suspicion excludes relevant factors from analysis for no persuasive reason when what is actually important is the effect of this treatment on the interviewee.

d. It would allow police to behave as if they are interrogating a suspect and apply all the pressure of their skills so long as they stop short of a formal detention. In other words, police will be allowed to *interrogate* everyone as though they were a suspect, hoping to get a lucky break.

55. What is needed is a simple, positive statement of the point at which the right to make a meaningful choice begins. This is the moment at which everyone should be cautioned. An interviewee needs to know what they are up against, lest they be unaware they are facing potential jeopardy at all. If it looks, sounds, and feels like a custodial interview, it should be treated as one and police should provide a caution. There would be numerous benefits to this type of positive re-statement.

56. First, identifying a positive threshold or trigger point would allow judges to precisely target behaviour by police that affects voluntariness. Judges could identify behaviour that officers monitor in themselves, such as calling the person a murderer to see how they react or demanding they convince

the officer they are innocent. Police would be able to modify their behaviour by consideration of *acts* identified by judges that tend to undermine voluntariness and increase the need for a voluntariness caution.

57. Second, as trial courts identify constellations of factors where the police objectively cross this line, they would introduce a significant level of predictability to the point at which a caution should be given. The impact of subjective officer assessments of suspicion would be negligible. With the caution remaining only one factor, however, courts would retain significant discretion to determine the ultimate impact of any failure to provide one.

58. Third, this positive re-statement would be consistent with the underlying principle of fundamental justice identified in *Hebert*. The moment when the state places someone's liberty in potential jeopardy the presence or absence of a police caution starts to matter to whether they ultimately make a meaningful choice to speak to police.

59. Fourth, this restatement would best express the confession rule's animating concern with fairness. It is *fair* to place the risk of exclusion at the feet of police, who exercise an informed choice to caution or not. Police are trained for and in control of the interview environment. If they are objectively attempting to elicit a confession, they should not be permitted insulate those efforts from later judicial oversight by claiming the interviewee was a witness not a suspect.

60. Finally, it would be consistent with other appellate authorities holding that whether police consider a person to be a suspect or not is completely irrelevant to a proper assessment of voluntariness. The absence of a caution remains an important factor in any voluntariness inquiry

irrespective of whether the person was being questioned as a suspect.[144] The reasonable grounds to suspect standard outlined in *Singh* was "nothing more than sound advice".[145]

61. The Respondent agrees with the Appellant that the presence or absence of a caution may be a more or less important factor depending on whether the accused is detained.[146] However, the Respondent rejects the suggestion the voluntariness of an accused's statement is impacted in any way whatsoever by the "stage of the investigation and the information known to police."[147] The reasonable person in the position of the accused is not aware of the stage of the investigation or the information known to police. These factors are strictly in the minds of police officers. Consequently, they cannot affect a reasonable person's decision to speak or not.

62. A reminder that police should caution people before they objectively create the risk of self-incrimination strikes the correct balance between the principles that ground the confessions rule and police interests in gathering information and investigating crimes. By focusing officer attention on objective risks of self-incrimination, they can make dynamic and even split-second decisions about whether to ask certain questions before delivering a caution. In most circumstances, questions like: "Tell me what happened next?" will remain unproblematic. Meanwhile, questions that seek to gauge the interviewee's response to being called a murderer or otherwise aimed at securing incriminating evidence will place the interviewee's liberty at potential risk, rendering a caution prudent.

APPELLANT'S QUESTION C: WAS THE COURT OF APPEAL WRONG TO INTERFERE?

63. The Appellant argued that once the caution is ignored, the other confessions rule factors would not result in a finding of involuntariness. If this Court determines there was an analytical route by

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[144] *R v Pearson*, 2017 ONCA 389 at para 19, as well as authorities cited in the *Appellant's Factum* at p. 26, FN103.

[145] *R v Joseph*, 2020 ONCA 73 at para 55.

[146] *Appellant's Factum*, paras 82-83.

[147] *Appellant's Factum*, para 84.

which the trial judge permissibly ignored the absence of a police caution in his ultimate voluntariness analysis, the Respondent submits he erred nonetheless. His finding that Sgt. White subjectively believed "that the person giving the statement was not culpably involved in the event under investigation" was the product of palpable and overriding error.[148] Even if this was Sgt. White's subjectively held belief, it was not objectively reasonable – a finding reviewable for correctness.[149]

64. Sgt. White's belief about Mr. Tessier evolved over the time of his interview. During Statement #1, his beliefs about Mr. Tessier are evident from the questions he posed and his testimony in the *voir dire*. The information he possessed before the interview would reasonably have led an investigator of admit the *possibility* that Mr. Tessier was connected to this crime. He knew he was dealing with a homicide. He knew that Mr. Tessier and the deceased were best friends who had had a recent falling out. He knew Mr. Tessier was the last person to see the deceased within a fairly short period before he died. These facts suggest a reasonable *possibility* he was connected to the homicide. Consequently, any subjective believe on the basis of this knowledge that he was *not culpably involved* would have been objectively unreasonable.

65. Sgt. White's behavior during Statement #1 demonstrate his belief such a connection was possible. To this seasoned investigator, Mr. Tessier's immediate level of nervousness was blood in the water. He methodically reviewed the physical evidence he knew was present at the scene and compared Mr. Tessier's knowledge and possessions to that of a possible killer. He suggested on several occasions that Mr. Tessier was the killer, making several attempts to obtain a confession. An experienced interviewer does not ask anything repeatedly if they do not think the answer sought is a significant possibility - even if it is not something they can immediately prove.

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[148] *Voir Dire Reasons*, para 49, citing the test in *Higham*.

[149] *R v Chehil*, 2013 SCC 49 at para 60, citing *R v Shepherd*, 2009 SCC 35 at para 20.

66. These actions should be contrasted with his Sgt. White's stated belief that there was no "evidence" to make Mr. Tessier a suspect. Such a statement is not a statement of internal belief; it is a statement about the legal sufficiency of evidence. This is not the same as a belief in the lack of culpable involvement. Consequently, the Trial Judge's finding of objective reasonableness was an error in law.

67. Moreover, Sgt. White explicitly testified that his beliefs changed. He admitted that at the beginning of the 5:10 interview Mr. Tessier had become a "person of interest" for him. This alone suggests he harboured a suspicion of Mr. Tessier well before he provided a caution. When this admission is coupled with his earlier actions, the Respondent submits a finding that he had a subjective belief that Mr. Tessier was not culpably involved in the homicide was a palpable and overriding error.

68. To the degree the Appellant's position suggests a police caution would not have made a difference to a person in the Respondent's position, the Appellant is wrong. An apt counterargument is demonstrated by Mr. Tessier's actions when told he could refuse to provide a DNA sample. After consulting with a friend, he declined to provide it. Similarly, when incorrectly cautioned, he sought and accepted the clarification offered. He was depending on the police providing him with accurate information about his right to silence. This informational inequity was used to its fullest by a seasoned investigator intent on getting admissions against the Respondent's legal interests, depriving Mr. Tessier of a meaningful choice.

APPLICATION OF RULE 29(3) & QUESTION D: THE TRIAL JUDGE'S ERRONEOUS DETENTION ANALYSIS FURTHER SUPPORTS THE NEW TRIAL ORDERED.

Summary of Respondent's Position

69. Detention was a "mandatory prerequisite" to the *Charter* applications advanced by Mr. Tessier at trial, triggering informational obligations with which Sgt. White failed to abide.[150] Despite having

[150] *R v LaFrance*, 2021 ABCA 51 at para 22. Note: In *LaFrance*, the appellant did not appeal from the *voir dire* finding that his statement was voluntary – see paras 17 & 20.

accurately summarized several seminal decisions, the trial judge distilled the wrong threshold and inapplicable factors to guide his own detention analysis. On proper application of the relevant jurisprudence, it is clear that Mr. Tessier was detained. While the Alberta Court of Appeal offered guidance on the correct legal threshold, its voluntariness determination rendered further analysis unnecessary. When fully considered, the trial judge's erroneous *Charter* analysis further necessitates the new trial be ordered.

70. The root of the trial judge's error was his unequivocal reliance on *Moran.* Despite indicating he would examine the *Grant* factors using *Moran,*[151] his analysis focused on Mr. Tessier's subjective perception of the situation and the stated intentions of police officers that interacted with him. His ultimate determination failed to ask or answer the fundamental question for psychological detention post-*Grant*: whether a reasonable person in the accused's shoes would have felt obligated to comply with a police direction or demand and that they were not free to leave.

71. When detention determinations arise in the police station interview context, aspects of the reasoning in *Moran* may still assist. However, *Tessier* demonstrates why its unbridled transposition into post-*Grant* determinations is dangerous. For the benefit of individuals, trial courts and police, the continued relevancy of the *Moran* factors should be addressed.

Proper Protection of Subsidiary Rights Requires a Purposive Approach

72. What constitutes a detention must be defined purposively, guided by the principles and values underlying the constitutional guarantees it triggers.[152] Those subsidiary rights recognize the

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[151] *Voir Dire Reasons,* paras 61-62 **[RA(I) pp. 26-27]**, where the trial judge cited the adoption of the *Moran* factors in *Seagull.*

[152] James Stribopoulos, " The Forgotten Right: Section 9 of The Charter, Its Purpose and Meaning." Supreme Court Law Review (2d) 40 (2008): 211-248 at p. 233. ["Stribopoulos"] See also: *Grant*, paras 15, 17, 20, 22 & 26.

vulnerability of individuals under the (actual or perceived) control of the state.[153] Affording "individual legal protection against the state's superior power," the reciprocal obligations of police upon detention promote informed and effective choices "consistent with the overarching principle against self-incrimination."[154]

73. Detention is analyzed objectively.[155] In most cases, evidence of the accused's subjective perception of the situation is not necessary.[156] While their personal characteristics and circumstances are relevant to placing a reasonable person in their shoes,[157] "it is not a mandatory prerequisite to a conclusion of psychological detention that an accused person provide reliable testimony as to his state of mind while allegedly detained."[158] The question is whether a properly-constituted reasonable person would have felt no choice but to comply. While police behaviour is obviously relevant to this inquiry, their directions or demands tend to compel compliance from most citizens (to whom the precise limits

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[153] Reasons of Le Dain J in *Therens*, pp. 641-642. See also: *Grant*, para 22.

[154] *Grant*, paras 19-23.

[155] *Le*, paras 111-114, noting that this may have been unclear pre-*Grant*, when some statements of law may have suggested the subjective perceptions of the accused be analyzed for reasonableness.

[156] *Le*, paras 98, 106 & 111. As such, it is the Respondent's position that earlier trial and appellate decisions emphasizing the absence of evidence from the accused indicating a subjective perception of detention should be read with caution – see, for example: *R v Oland*, 2018 NBQB 255 at para 138(2) & (4); *Seagull*, para 59. The Respondent further submits these detention issues also were wrongly decided, incorrectly focusing on an "objective view" of "how the police interacted" with the accused (*Oland*, paras 122-123 & 135; *Seagull*, paras 55 & 59) instead of the modified-objective assessment of how police conduct *would have been interpreted by* a reasonable person imbued with his characteristics and circumstances (*Le*, paras 111, 114 and 122).

[157] *Grant*, para 44; *Le*, para 71.

[158] *LaFrance*, para 24. See also: *Le*, para 114-116; *LaFrance*, para 27. This can be contrasted to the decision of the trial judge in the case at bar (*Voir Dire Reasons*, para 86), wherein repeated reference was made to Mr. Tessier's subjective perception of the situation, including that his actions were inconsistent with "a person who subjectively felt he was being detained" (para 88). **[RA(I) p. 30]**

of police powers are unknown).[159] Psychological detention can arise the most cordial or routine of circumstances.[160] What must ultimately be assessed is how a reasonable person would have perceived the police behaviour at issue.[161]

74. On objective assessment, "perceived power imbalances" between the individuals and police are both actual and inevitable.[162] Many compelled encounters derive from more subtle circumstances influenced by an officer's heightened status, with even verbal communication of their title conjuring images of authority – a uniform, a badge, guns, tasers, handcuffs, and batons. Such symbolism naturally contributes to atmospheres of compulsion, without any overt action or demands by an officer. The power imbalance innate to such interactions ought to place the burden of resolving ambiguities on police, their actions and directions clearly communicating whether cooperation is optional or compliance required.[163]

75. Currently, leaving an interviewee's status vague most often works to the benefit of police, who can pose questions absolved from the corollary obligations triggered by a detention.[164] With the threshold to detention blurry and "the prospect of evidentiary exclusion distant and uncertain," relief from their informational duties "will often tempt police to stretch the boundary of non-detention past its breaking point." Against the malleable factors outlined in *Grant*, "the coercive nature of a dynamic

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[159] *Therens*, p. 644: "Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand." See also: *R v Nolan* (1987), 34 CCC (3d) 289 (SCC) at p. 300; *Le*, para 26.
[160] *Le*, paras 46-47.
[161] *Le*, para 116.
[162] Quoting *Grant*, para 33.
[163] For similar discussion, see: Stribopoulos, pp. 242 & 245-248.
[164] Stribopoulos, p. 246. See also: Steven Penney and James Stribopoulos, "'Detention' under the *Charter* after *R. v. Grant* and *R. v. Suberu*, "The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 51 (2010), pp. 439-440. ["Penney & Stribopoulos"]

encounter can easily become obscured." Ultimately, this incentivizes ambiguity, often inuring such doubts to the benefit of the state.[165]

76. The permissibility of such ambiguity stands in stark contrast to the jurisprudence in other circumstances, where the law has resisted attempts to characterize acquiescence as consent.[166] If a generous and purposive interpretation is the goal, police should be expected to use plain language to communicate "the true nature of their interactions" with individuals.[167] Where they fail to do so, acquiescence should be recognized "for what it most probably is" – a detention.[168]

Police Station Interviews – Challenges Post-Grant

77. *Grant* offers a "conceptual methodology" for psychological detention determinations, although "practical simplicity and predictability" are not its hallmarks.[169] While the breadth of its potential application makes articulation of a bright-line test difficult, police station interviews are a predictable and frequent circumstance for which additional guidance could be provided. While police and trial courts may consult *Moran* in such circumstances, it includes now-irrelevant factors and applies the wrong legal threshold. Clarification is required to bring such analyses in line with the hallmarks of psychological detention delineated in *Mann, Grant* and *Le.*

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[165] Penney & Stribopoulos, pp. 453-454; Stribopoulos, p. 246."

[166] Stribopoulos, pp. 246-247, drawing analogy to waiver requirements under s. 8.

[167] Stribopoulos, p. 247; *Grant*, para 17. Note: Even where police tell an individual they are free to go and are not required to answer questions, a contextual approach will still be required: "It is essential that trial judges not treat this kind of police assurance as a prophylactic, but continue to examine all of the circumstances when considering whether there has been a detention" – Jonathan Dawe & Heather McArthur, "*Charter* Detention and the Exclusion of Evidence after *Grant, Harrison* and *Suberu*." The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 51 (2010) at p. 402.

[168] Stribopoulos, p. 247.

[169] *R v Omar*, 2018 ONCA 975 at para 81.

78. Before the Alberta Court of Appeal, Mr. Tessier argued the trial judge erred by applying the *Moran* factors in determining detention,[170] which focus on police conduct as opposed to the perspective of the accused. While it was unnecessary for the panel to determine this ground of appeal, it noted that a proper detention analysis cannot be focused solely on the police perspective. Rather, the test to be applied was as articulated in *Grant* and confirmed in *Le*. The *Moran* factors could be considered as part of that contextual analysis, "provided full consideration is given to the *Grant* factors in answering the ultimate question posed…: would the police conduct cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction?"[171]

79. While it may be necessary to delineate additional considerations particular to police station interviews, such determinations must remain congruent with broader conceptualizations of psychological detention. Imbalances of knowledge and power are the same, irrespective of how police initiate contact. As Mr. Tessier's case exemplifies, however, continued reliance on the *Moran* factors offers police both 'home field advantage' and greater chance of avoiding their informational obligations. While the manner and location of a police interaction remain relevant under *Grant,* the operative analysis must remain objective – on the whole of the circumstances, would a reasonable person in the shoes of the interviewee have felt obligated to cooperate?[172]

80. To provide predictability and guidance for both police and trial courts, Professor Steven Penney and (now-Justice) James Stribopoulos have suggested a reformulation of concepts that historically guided determinations under *Moran* – the language used to initiate the encounter and the nature of the questioning that ensues:

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[170] In *R v Eaton,* 2019 ONCA 891 at para 12, this was found to be an error (although the result in that case would have been the same had the *Grant* factors been considered).

[171] *Appeal Reasons*, paras 67-69.

[172] *Grant,* para 53; *Le,* para 26.

> (1) The language used to initiate the encounter: Permissive language would be far less likely to result in a detention than obligatory language. For example…, for "sit down" interviews, "I'd like to speak with you at a time and place of your choosing" is less likely to trigger detention than, "We want you to come with us to the police station to talk about this right now."
>
> (2) The nature of any ensuing questioning. Purely exploratory questions are unlikely to trigger detention. … [I]n a more formal interview context, a detention would not likely arise from open-ended, nonaccusatory questions designed to gather preliminary information; questions designed to elicit self-incriminating evidence from someone strongly suspected of committing a crime likely would.[173]

81. Both avoid the potential pitfalls of *Moran* and *Seagull* by steering the analysis away from the intention of police and the subjective viewpoint of the interviewee. Fostering the "claimant-centered" modified objective test required by *Grant* and *Le*, they aid a purposive interpretation and consideration of psychological detention and its corollary consequences for ss. 7 and 10(b):

> The first of these variables targets the liberty interests inhering in section 9, the second aims to protect the interests inhering in section 10(b) — preventing inquisitorial abuses and compelled self-incrimination. Each also allows police to seek preliminary investigative information without significant restraint. Without factor (1), as long as they do not engage in interrogation-like questioning, police could coercively restrain people's freedom without reasonable suspicion that they have committed a crime. And without factor (2), as long as they do not coercively restrain people's freedom, police could conduct accusatory (and potentially abusive) interrogations, again without reasonable suspicion and without extending the protections of the right to counsel.[174]

82. The potential reformulation and articulation of factors aimed at police station interviews is illustrated by *LaFrance*, a decision of a differently constituted panel of the Alberta Court of Appeal. Ordering a new trial, the majority did not fault the trial judge for relying on *Moran* in addition to *Grant*. The error stemmed from his failure to then analyze the circumstances of the police station

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[173] Penny & Stribopoulos, pp. 460-461. On nature of questioning, see also: *R v Mann*, 2004 SCC 52 at para 19; Stribopoulos, p. 245 (when conversational exchanges begin to resemble interrogations, they become correspondingly more invasive on an individual's liberty interests).

[174] Penney & Stribopoulos, pp. 460-461.

interview against the factors he had delineated.[175] After appropriately filtering the facts found, identified shortcomings in the trial judge's analysis included:

a. the need to assess the circumstances surrounding the interview "from the appellant's perception," and not from that of police officers with whom he interacted;
b. that police were not providing general assistance or maintaining order. They "had no other suspects" and interviewed the appellant having "singled him out for focused investigation";
c. at every point, the appellant had been "in police presence or alone in the interview room at the police station";
d. the appellant was not offered the option of being interviewed at his home;
e. the appellant "had had very limited prior exposure to the police" and had never previously been advised of his right to speak to counsel or given the opportunity to exercise that right;
f. the appellant was not interviewed within a context of police interviewing a number of witnesses contemporaneously, but was singled out for focused investigation;
g. the interviewer questioned the appellant "with the goal of obtaining evidence that would assist in identifying the perpetrator, at a time when the police knew he had been the last person to telephone the deceased";
h. "the police had good reason to believe that the accused was involved in the killing";
i. the questions posed included those "designed to identify the appellant as the person responsible" for the homicide, although the appellant "was not directly asked and did not admit" to the offence during that interview. [176]

83. The majority was satisfied that, "objectively speaking," the "only objectively reasonable inference" from these factors was that Mr. LaFrance was detained. The majority took a purposive approach, linking the importance of his detention to the subsidiary rights it triggered. Despite facing significant legal jeopardy as the only suspect under consideration, he was not advised of his right to speak with a lawyer or provided the opportunity to do so. That "analytical landscape" was not altered by the interviewer framing "each of his questions as a request not an order" or his initial statement to

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[175] *LaFrance*, paras 29-30 & 32.

[176] *LaFrance*, paras 29-32. Facts absent in Mr. Tessier's case but present in *LaFrance* include being Indigenous and youthful, being told he was a suspect, being transported for the interview in a police car, being in the presence of police or alone in the interview room for the duration of the encounter, evidence the interview room was within a secure portion of the police station that LaFrance was told he could not leave without a police escort.

Mr. LaFrance "that he did not have to participate if he did not wish to do so"; the statement was neither given by consent nor informed waiver.[177]

84. A similar analysis is available and appropriate in Mr. Tessier's case. As in *LaFrance,* the police were not attempting to get their bearings or acquaint themselves with a scene. They were engaged in a focused investigation into the death of Mr. Berdahl. Interfering with Mr. Tessier's ability to go about his normal business, police repeatedly directed that he attend the police station for questioning. At no time was Mr. Tessier informed he had no obligation to attend or provide information to police.[178] A reasonable person in his circumstances would have reasonably felt obligated to comply.[179]

85. On arrival, that reasonable person would not have felt empowered to leave the interview room of their own volition. Mr. Tessier was asked extensive questions surrounding his actions and whereabouts around the time of the alleged homicide. While subjective perception of detention is not necessary, Mr. Tessier's own actions support a finding of detention. Each time he wished to leave the interview room or the presence of police, he sought permission to do so.[180] He complied with requests for his identification documents and submitted to a pat-down search of his person.[181] As directed, he handed over his shoes in the cold of March. These were directions "of the kind that no one, other than

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[177] *LaFrance,* para 33 (as compared to *Voir Dire Reasons*, para 66, 70 & 84). **[RA(I) p. 27-28 & 30]**

[178] *Le,* para 64. Note: That Mr. Tessier had no actual legal obligation to cooperate with police does not answer the question of whether, objective, a reasonable person in his shoes would have felt compelled to do so (*Therens,* p. 644; *Le,* para 26). A reasonable person imbued with Mr. Tessier's characteristics would similarly have no suggested experience with the criminal justice system or other potential source of imputed knowledge about his legal rights – see, by analogy: *LaFrance,* para 32.

[179] *Le,* paras 114-117 & 121.

[180] *12:55PM Statement*, pp. 32/1080 & 42/1411. **[RA(IV) pp. 129 & 139]**

[181] TT p. 45/21-22 & 128/38 –129/12 **[RA(IV) pp. 45 & 128- 129];** *12:55PM Statement*, p. 1/8. **[RA(IV) p. 98]**

a seasoned defence lawyer, might reasonably think they have the option to refuse."[182] They "were not polite requests to be considered, but were treated as orders to be obeyed."[183]

86. In questioning Mr. Tessier, the police were not seeking to get their bearings or familiarize themselves with a scene. The interaction was not brief or preliminary – it was a fulsome interview punctuated by evidentiary searches. Pointed questions were posed about his relationship with the deceased, his opportunity to commit the offence and potential evidence that might implicate him. Mr. Tessier was peppered with insinuations and direct accusations. These questions were not 'shots in the dark'[184] – on Sgt. White's own evidence, he was trying to get a confession. To the extent the trial judge found facts to the contrary, those were palpable and overriding errors.

87. Sgt. White had sufficient evidence to know that Mr. Tessier could be connected to this offence. That he did not believe he had enough evidence to prove it did not entitle him to interrogate Mr. Tessier without regard to his constitutional rights until that changed. From the perspective of a person in Mr. Tessier's situation, the only reasonable inference was that Mr. Tessier considered himself legally obligated to attend at the station, to comply with the requests made once he arrived and answer the questions posed by Sgt. White.[185] When objectively assessed against the appropriate legal factors, the only reasonable conclusion is that Mr. Tessier was detained. The *voir dire* decision being otherwise, a new trial is required.

CONCLUSION

88. At base, the issues advanced by the Appellant with respect to the confessions rule and the test for detention both seek to enhance and protect the ability of police to leverage the ignorance of an

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[182] Stribopoulos, pp. 241-242, discussing *R v Grafe* (1987), 36 CCC (3d) 267 (ONCA).
[183] *Le*, para 63.
[184] Crown Submissions – Oral Hearing, Alberta Court of Appeal, October 9, 2019.
[185] By analogy, see: *LaFrance*, para 35.

accused to undermine the principle against self-incrimination. When the police are in a position adverse to an interviewee, that individual's liberty is at risk. The Appellant seeks to prevent the caution from being given in such circumstances so that those ignorant of the basic protections provided by law will be prevented from making meaningful decisions about whether to speak or remain silent. The Appellant seeks to prevent the application of normal rules of detention to police station interviews, ensuring lawyers cannot fill that informational gap. The exercise of the constitutionally protected right to silence cannot be left to mere chance. Fairness demands more.

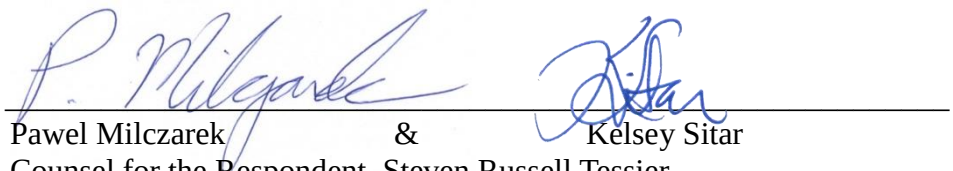
PART IV – SUBMISSIONS REGARDING COSTS

89. The Respondent makes no submissions with respect to costs.

PART V – ORDER SOUGHT

90. The Respondent requests that the appeal be denied, and the ruling of the Alberta Court of Appeal be affirmed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF JULY, 2021.



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