SCC File No.: 39350

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal of Alberta)

BETWEEN:

HER MAJESTY THE QUEEN

Applicant (on Application for Leave)
(Respondent)

- and -

RUSSELL STEVEN TESSIER

Respondent
(Appellant)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
RUSSELL STEVEN TESSIER, RESPONDENT

(Pursuant to Rules 27 and 29(3) of the *Rules of the Supreme Court of Canada* and s. 40 of the *Supreme Court Act*)

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MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND FACTS

1. The voluntariness of a statement is dependent on the internal motivation of the accused. While much judicial ink has been spilled over threats, promises, oppression, operating mind, and police trickery, these are merely ***factors*** that may impact an accused's decision to speak to police. To prove a statement voluntary, demonstrating the absence of these factors will be insufficient. Consideration must also be given to their presupposition – that the accused knows they may choose not to say anything, that their silence *cannot* be pointed to in any future trial as an indication of guilt ***but*** if they choose to speak, their words may be used to prosecute them.

2. In this way, voluntariness must be kept conceptually distinct from other rights-based arguments available to an accused to exclude evidence at trial. Grounded in the common-law confessions rule, voluntariness is not concerned with the legal status of the accused at the time they spoke to police. Rather, its fundamental aim is to prevent the state from using the words of an accused to prosecute them *unless* the Crown can demonstrate ***beyond a reasonable doubt*** that the accused made a ***meaningful choice*** to speak with police. To have made a meaningful choice, the accused needed to know ***at the time the utterances were made*** that they could choose not to speak with the police and that silence could not be used against them, but anything they did say would be available as evidence for the Crown. In determining voluntariness, trial courts consider if the accused possessed sufficient knowledge to make a meaningful choice. The source of that knowledge is irrelevant. However, in practice, this knowledge often comes from the standard police caution – particularly for those without prior experience with the criminal justice system.

3. Once satisfied the accused possessed this prerequisite, a proper voluntariness analysis considers the oft-cited factors listed above. The question becomes, having been properly positioned to make a meaningful choice, whether any of those factors potentially influenced an accused's ability or capacity to remain silent.

4. In voluntariness determinations, jurists often discuss the status of the accused based on the subjective assessment of police officers at the time of the interview (i.e. were they a suspect, person of interest, or mere witness?). Such considerations have fueled *obiter* advice or guidance to police about when they should formally caution an interviewee. These suggestions have not altered the modified objective test that ultimately determines voluntariness. Irrespective of an individual's status in the minds of police at the time they were interviewed, any subsequent voluntariness analysis must consider the presence or absence of a police caution in determining whether the accused made a meaningful choice to speak to police. This is because a meaningful choice ***requires*** some basic legal understanding of the legal jeopardy facing the accused at the time of the statement to police. This understanding is normally gained from the police caution, but case law has recognized it can come from other sources.

5. On August 4, 2020, the Alberta Court of Appeal ordered a new trial for the Respondent, Mr. Tessier, finding the Trial Justice erred by converting this Honourable Court's advice to police in *Singh* about when to caution an interviewee into a precondition for relevancy of the presence or absence of a police caution.[1] This erroneous understanding of the interplay between the police caution and voluntariness led the Trial Judge to conclude that, because the interrogator did not subjectively perceive the Respondent to be a suspect, the absence of a caution was understandable,

[1] *R v Tessier*, 2020 ABCA 289 [*Tessier*] at para 56.

excusable and – for voluntariness purposes – legally irrelevant.[2] In framing his voluntariness analysis in this fashion, the Trial Justice missed the forest for the trees. While he searched the record for indicators of the Respondent's broken will, he should have searched for evidence that the Respondent made a ***meaningful choice*** to speak to the police.[3] Contrary to the suggestion of the Crown Applicant, the Trial Judge did not consider the absence of a caution but assign it lesser weight. The Trial Judge's reasons show the police caution was viewed as something to which there is no "right." As the Respondent did not have the "right" to a caution, its absence was rendered *legally irrelevant*. In ordering a new trial, the Court of Appeal recognized this error by the Trial Judge and correctly articulated the common law confessions rule.

6. Through prior jurisprudence, this Honourable Court has already resolved the legal issues raised by the Applicant. There is no issue of public importance in reiterating these principles. Furthermore, the Respondent argues that the Court of Appeal decision should also be upheld in light of the Trial Judge's erroneous detention analysis, which underpinned his rejection of Mr. Tessier's s. 10(b) application.[4]

Summary of the Relevant Facts

7. At the time of his testimony, Sgt. White was retired. He had been an RCMP officer from 1977 to 2012.[5] At the time he interviewed Mr. Tessier, he had been with the RCMP Major Crimes Unit in Calgary for five years.[6] He had been involved in 100 previous homicide investigations and had conducted 25 suspect interviews.[7] Sgt. White testified that, when interviewing a suspect, he "[tries]

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[2] *Tessier* at para 55.
[3] *Tessier* at para 57.
[4] *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11., s. 10(b).
[5] T10 L39.
[6] T11 L4-5, T78 L29.
[7] T78 L32-36., T79 L3-10. Note: Sgt. White indicated both figures were approximations.

to get an admission of guilt."[8] He admitted that reading people their rights makes them less comfortable, which makes getting a confession more difficult.[9]

8. On March 17, 2007, Sgt. White interviewed Mr. Tessier from 12:55 pm to 3:05 pm. That evening, Mr. Tessier re-attended for another interview which started at 5:10 pm. This second interview involved a trip to Mr. Tessier's home with Sgt. White to check on a firearm he had recently retrieved from a shooting range. When Sgt. White found the firearm was missing, he advised Mr. Tessier of his right to counsel and read him a police caution. At trial, the Crown did not seek to rely on any utterances made by Mr. Tessier after this point. This second interview ended at Mr. Tessier's home just after 10 pm.

9. Prior to the interview, Sgt. White knew he was investigating a homicide where Mr. Berdahl ("the deceased") was found on the shoulder of a rural road with "severe trauma" to his head.[10] He knew tire tracks, foot prints, cigarette butts and blood spatter had been located nearby.[11] He knew the deceased and Mr. Tessier were best friends and spent a lot of time together.[12] He also knew about a conflict between them involving a car and that the deceased had planned to leave for Winnipeg.[13] He knew Mr. Tessier was the last person to see the deceased alive – if not before, then very early on in the first interview.[14]

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[8] T86 L6.
[9] T86 L8-24.
[10] T12 L8-13, T69 L15-18, T97 L12-19.
[11] *Ibid.*
[12] T12 L20, T94 L35-39.
[13] T113 L15-17, T27 L11-13, L36 – 41, T95 L23-25, T209 L17-33.
[14] Applicant's Materials p160 L168 [Exhibit 63 – *March 17, 2007 – 12:55PM Statement*, p6]
Note: Initially Sgt. White acknowledged under oath that, before the first interview, he knew Mr. Tessier was the last person to see the deceased alive. However, Sgt. White attempted to backtrack on this admission during re-examination – T93 L34-40, T35 L38, T97 L39 – 98 L5, T138 L35-40.

10. Mr. Tessier had been asked to come to the police station two or three times before he ultimately attended.[15] When he did, he was extremely nervous.[16] He did not consult with counsel before either interview. There was no evidence he had any prior experience with the criminal justice system.

11. At no point during the first interview 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.[17] He was not given an opportunity to consult with counsel and no waiver of that right was sought from him.[18] When a caution was finally given, Sgt. White erroneously suggested his utterances up to that point could not be used against him.[19] Mr. Tessier sought further explanation, appearing to not understand that what he had already said could be used against him in court.[20]

12. Very early in the first interview, Sgt White noticed Mr. Tessier's nervousness.[21] This led Sgt. White to ask Mr. Tessier questions calculated to yield a confession.[22] Early on, Sgt. White claimed he was trying to see if Mr. Tessier was "in a position to provide inculpatory evidence about the crime."[23] He asked Mr. Tessier to comment on why police would find his DNA at the scene of the murder.[24] Sgt. White attempted to get admissions of knowledge of the deceased's clothing, including one item Sgt. White thought would have been a good holdback item.[25] He asked cross-examination-style questions to force Mr. Tessier into admissions or provable lies regarding his

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[15] T23 L2-4, T26 L14, T32 L39 – 33 L11; Note: Cst. Desilets did not recall whether he told Mr. Tessier the nature of the investigation (T23 L16), T13 L2-3, T86 L41 – 87 L5.
[16] T14 L18.
[17] T89 L15-39.
[18] T89 L41 – 90 L5. [Note: He was informed of a right to speak with counsel if he was going to provide his DNA (T91 L19-20)]
[19] T134 L40 – 135 L1
[20] Evidence of Sgt. White: T132 L7 – 133 L25.
[21] T14 L17-28.
[22] T39 L28-30, T99 L1-2, T125 L40-41.
[23] T35 L13-29.
[24] T100 L3-17.
[25] T107 L21-22, T108 L14-41, T110 L36-37, T111 L1-3, T111 L21-27.

DNA being left on cigarettes at the scene.[26] He checked Mr. Tessier's shoes to see if they matched the impressions observed near the deceased while other officers located Mr. Tessier's truck to see if his tires matched the impressions at the scene.[27] Before the first interview concluded, the police were aware Mr. Tessier's tires were a possible match.[28]

13. On a number of occasions during the first interview, Sgt. White insinuated and outright told Mr. Tessier he was the murderer to see if he reacted like the person who killed the deceased.[29] Sgt. White admitted to appealing to Mr. Tessier's conscience to get a confession.[30] Finally, Sgt. White asked Mr. Tessier to prove he did not commit the murder and told Mr. Tessier he did not believe his denials.[31] Sgt. White claimed Mr. Tessier was not a suspect at the end of the first police interview but advised the police wanted to "confirm his alibi" and "eliminate him."[32]

14. During the first interview, Mr. Tessier asked for permission to leave the room for a cigarette and only left once that permission was granted.[33] Prior to taking police to his vehicle at the end of the first interview, Mr. Tessier asked if police wanted him to travel with them.[34] Near the end of the interview, Mr. Tessier again sought permission to leave: "I'm free to go, am I?"[35] Despite these repeated requests for permission, Mr. Tessier was never advised he could leave anytime he wanted.[36]

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[26] T115 L33 – 117 L9.
[27] T37 L5-8, T105 L22-34, T102 L14-40, T150 L35-38
[28] T151 L31-39.
[29] T117 L18-31, T118 L2-4, T119 L7-16, T119 L24-40, *Applicant's Materials – March 17, 2007 – 12:45PM* Statement, p12 L376, p13 L392-394, p20 L651-653.
[30] T120 L7-12, *Applicant's Materials – March 17, 2007 – 12:55PM*, p661.
[31] T121 L33 – T123 L14, *Applicant's Materials – March 17, 2007 – 12:55PM Statement*, L985 – 1003.
[32] T39 L15, T40 L3-7.
[33] T91 L25-27.
[34] T91 L33-39.
[35] *Applicant's Materials* p196 L1410 [Exhibit 63 – *March 17, 2007 – 12:55PM Statement* - p42]
[36] T92 L27-32.

15. The second interview began when Mr. Tessier returned to see Sgt. White at 5:10 pm. Sgt. White thought Mr. Tessier was still nervous.[37] When the interview moved to Mr. Tessier's home, police followed his vehicle. During that drive, Mr. Tessier became so nervous and agitated that he stopped driving and asked Sgt. White to drive his truck for him.[38] Before entering Mr. Tessier's vehicle, Sgt. White "had him take off his jacket" (Mr. Tessier submitted to this demand) and undergo a pat-down search for weapons.[39]

16. Sgt. White's subjective assessment of Mr. Tessier's status seemed to follow the introduction of Mr. Tessier's gun into the interviews. By 5:39pm of the day before the first interview, at the police briefing, officers were advised that the cause of death may have been from a gunshot wound.[40] At the beginning of the second interview when Mr. Tessier disclosed he had recently picked up a firearm from the shooting range, Sgt. White classified him as a "person of interest."[41] When he opened the empty gun case at his house where that gun should have been according to Mr. Tessier, Sgt. White classified him as a *suspect.*[42] At a point shortly after this he conferred the contents of a police caution (with the abovementioned error) and read Mr. Tessier his rights to counsel.[43]

The Trial Judge's Decision on Voluntariness and Detention

17. In considering the absence of a police caution, the Trial Judge's analysis focused purely on Sgt. White's perception of the situation. The Trial Judge advised that the law was articulated in *Higham,*[44] namely: a voluntariness caution must be given unless the investigator reasonably believes, on the evidence before him at the time of the interrogation, that the person giving the

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[37] T43 L12.
[38] T45 L10-17.
[39] T45 L21-22, T128 L38 – T129 L12.
[40] T170 L34 – 171 L8.
[41] T63 L28-30.
[42] T61 L36 – 62 L1, T62 L4-8, T126 L24-25.
[43] T126 L24-41.
[44] *R v Higham*, [2007] OJ No 2147 (SC) at para 7 [*Higham*]

statement was not culpably involved in the event under investigation.[45] After listing a number of facts known to Sgt. White at the time of the first interview, the Trial Judge found his "belief was objectively reasonable."[46] He then returned to assessing whether the Respondent's "will [had] been broken" without any further reference to the absence of a police caution.[47] He did not articulate any consideration of what Mr. Tessier knew about his jeopardy or the right to silence during the interview.

18. The Trial Judge concluded that a number of Mr. Tessier's actions *after* the first interview were "purely voluntary" in the sense that "no one forced him" to do them. These actions included leaving voicemails for Sgt. White and returning to the detachment to begin a discussion about the gun case, assessed to have been "voluntary" in a dictionary sense of the term.[48] Without ever returning to the presence or absence of the police caution, the Trial Judge concluded both statements were voluntary.[49]

19. The Trial Judge recognized this Court's test for psychological detention in *R v Grant*.[50] He acknowledged this test requires a determination of "whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice."[51] However, when analysing whether Mr. Tessier was detained, the Trial Judge used *Moran* to guide his analysis, concluding the *"Grant* factors are, to some extent, subsumed into the [*Moran*] factors."[52] Assessing the police conduct as against the *Moran* factors, the Trial Judge

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[45] *Reasons for Judgement* - F19 at para 49.
[46] *Reasons for Judgement* - F20 at paras 50-51. [Note: there was no overt finding of what that belief was in the reasons.]
[47] *Reasons for Judgement* - F20 at para 52
[48] *Reasons for Judgement* - F20 at para 53.
[49] *Reasons for Judgement* - F20 at para 54.
[50] *R v Grant*, 2009 SCC 32 [*Grant*], *Reasons for Judgement* - F22 at para 60.
[51] *Reasons for Judgement* - F22 at para 60, *Grant* at para 44.
[52] *Reasons for Judgement* - F22 at para 62, citing *R v Moran*, [1987] OJ No 794 (ONCA) at para 82. [*Moran*]

concluded Mr. Tessier was not detained during the first or second interview.[53] In reaching this determination, the Trial Judge never referenced what a reasonable person in the circumstances of *Mr. Tessier* would have concluded based on the police actions described. Instead, he focused on what could be inferred as Mr. Tessier's "subjective belief from his actions and statements" during the interviews.[54] On this basis, the Trial Judge concluded that Mr. Tessier did not "subjectively" feel he was being detained.[55]

The Reasons of the Alberta Court of Appeal

20. The Court of Appeal's voluntariness analysis was rooted in *Singh* and this Honourable Court's conception of a *meaningful choice*.[56] As the Court of Appeal explained, "an operating mind is not the only mental element required for a statement to be voluntary."[57] Since *Boudreau*, the "presence or absence of a caution" has remained an important factor. Applying the contextual approached endorsed in *Oickle*,[58] 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.[59] 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."[60]

21. 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

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[53] *Reasons for Judgement* - F28 at para 89.
[54] *Reasons for Judgement* – F27 at para 85.
[55] *Reasons for Judgement* – F27 at para 88.
[56] *R v Singh*, 2007 SCC 48, *Tessier* at para 24.
[57] *Tessier* at para 29.
[58] *Tessier* at para 34.
[59] *Tessier* at para 35.
[60] *Tessier* at para 37.

say anything to the police.[61] The root of the error was that the Trial Judge focused on the perspective of Sgt. White, not Mr. Tessier. While the Trial Judge concluded Sgt. White did not subjectively perceive Mr. Tessier as a suspect, it did not follow that the absence of a caution did not impact voluntariness.[62] By focusing on this Court's advice about when police officers should caution a suspect, the Trial Judge erred by ignoring the impact of its absence on the voluntariness of Mr. Tessier's statements.[63] The Court of Appeal noted that, while there are a number of cases where statements are ruled voluntary despite the absence of a caution, they normally involve defendants who already knew the bulk of the information it would have contained.[64] The same could not be said for Mr. Tessier.

22. The Court of Appeal declined to determine Mr. Tessier's detention ground but offered a comment: it is not necessarily an error for trial courts to consider the *Moran* factors, but a "full consideration" of the *Grant* factors is still required. Reinforcing *Grant,* the ultimate question to be determined remains*:* "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?"[65]

PART II – QUESTIONS IN ISSUE

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

> **Applicant's Question in Issue No. 1:** Did the Alberta Court of Appeal err in its articulation of the common-law confessions rule?

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[61] *Tessier* at para 46.
[62] *Tessier* at para 55.
[63] *Tessier* at para 55-56.
[64] *Tessier* at para 59.
[65] *Tessier* at para 69.

Response: The Alberta Court of Appeal repeated this Court's position since *Boudreau v the King* – the presence or absence of a police caution is an important contextual factor in the analysis of voluntariness. There is no question of law needing further refinement.

Applicant's Question in Issue No. 2: Did the Alberta Court of Appeal err in requiring a mere witness be formally cautioned as a condition of proving voluntariness?

Response: The Alberta Court of Appeal found that the presence or absence of a police caution remained a factor in a voluntariness assessment regardless of how police officers have subjectively classified the accused (i.e. as a witness, suspect, person of interest, or otherwise). The Applicant's question misstates the conclusion of the Court of Appeal. There is no question of law needing further refinement.

24. Instead, consideration should be given to the following Questions, their responses demonstrating why the Applicant's request for leave should be denied:

Reframed Question in Issue No. 1: Does this leave application raise an issue of public importance warranting consideration by this Honourable Court?

Response: Leave to appeal should not be granted. The issues raised reveal no questions of law, no errors in need of correction, and no issues of national or public importance.

Reframed Question in Issue No. 2: Should leave be denied on the basis that the judgement of the Court of Appeal can be upheld because the Trial Justice also erred in the application of the legal test for detention?

Response: Leave to appeal should not be granted. The order for a new trial should be upheld on the basis that the Trial Judge applied an incorrect test to determine detention for the purpose of s.10(b) of the *Charter*.

PART III – STATEMENT OF ARGUMENT

Issue of Public Importance

25. The Crown Applicant concedes that appellate courts have considered the presence or absence of a caution to be a factor relevant to voluntariness, irrespective of whether the police considered the accused a suspect.[66] In essence, they suggest the Alberta Court of Appeal's decision deviates

[66] *Leave Application Memorandum* at para 38.

from those other authorities because a reversible error was found on this basis.[67] The Respondent submits this is precisely the sort of jurisprudential distinction expected where a proper legal analysis is contextually conducted on a modified objective standard. All Canadian Courts of Appeal have accepted the presence or absence of a caution is a relevant factor to this analysis. That the Alberta Court of Appeal found this factor had an impact in Mr. Tessier's case does not demonstrate any incongruence in the law.

26. Next, the Applicant points to three trial court decisions to suggest there is national confusion on the caution factor. However, two of the decisions cited suggest quite the opposite. In *Belbin*, the clear question for determination was whether the accused knew the contents of a caution even though he did not receive one.[68] Despite analyzing the police conduct on the *Morrison/Worrall* framework, in determining whether his statement was voluntary, the trial court carefully analyzed whether Mr. Belbin otherwise possessed the knowledge contained therein.[69] As such, *Belbin* supports the Respondent's submission – and the Court of Appeal's conclusion – that the question to be determined is whether the accused made a meaningful choice to speak on the basis of knowledge of their right to silence and the use to which their statements can be put.

27. The decision in *MR* offers even stronger support for the Court of Appeal's determination of this case.[70] Therein, the trial court specifically noted, despite going through the *Morrison/Worrall* framework, that the absence of a caution or warning is only one factor and is not a condition precedent to admissibility.[71] In that case it was an important factor as the court found that police

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[67] *Leave Application Memorandum* at para 38.
[68] *R v Belbin*, 2015 ONSC 5346 at para 414 – *Applicant's Materials*
[69] *Ibid.* at paras 421 to 423.
[70] *R v MR*, 2019 ABQB 588 [*MR*] – *Applicant's Materials.*
[71] *MR* at para 81.

deliberately "labelled" the accused as an ordinary witness to facilitate their investigation.[72] Further, like the Alberta Court of Appeal, the trial court endorsed Justice Watt's statement that "voluntariness implies an awareness about what is at stake in speaking to [a] person in authority, or declining to assist them."[73] Ultimately, while no one factor lead to the resulting finding of involuntariness, the lack of police caution played an important role in the contextual analysis just as it should have for the Trial Judge in this matter.[74]

28. To the extent the Crown Applicant points to *Butorac* to suggestion an issue of national importance, the Respondent submits the answer is simpler. It simply exemplifies one other trial judge making the same error as occurred in this case – an error that ought to have been evident on the available appellate authorities at the time. By allowing the *Morrison/Worrall* framework to become a legal test for whether a lack of caution should be considered in a voluntariness analysis, the trial judge in *Butorac* ultimately reduced the mental element of voluntariness (beyond trickery, offers and threats) to whether the accused had an operating mind.[75] In doing so, he failed to consider whether Mr. Butorac was aware of his right to silence and whether he knew his statements could be used against him in court. However, two trial judges making the same error does not amount to an issue of public importance. Canadian Courts of Appeal are in agreement on the matter. Where trial judges make mistakes, they can apply existing jurisprudence to correct those errors – as the Court of Appeal did in Mr. Tessier's case.

The Result Below Should be Upheld – Trial Judge's Error in Assessing Detention

29. Pursuant to Rule 29(3), the Respondent submits that the Court of Appeal's overturning of the trial decision should be upheld because the Trial Judge erred in his analysis of whether Mr. Tessier

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[72] *Ibid.* at para 71.
[73] *Ibid.* at para 105. [Citing *R v Worrall* at para 106]
[74] *Ibid.* at paras 98, 118-119.
[75] *R v Butorac*, 2010 BCSC 1173 at para 62-63 – *Applicant's Materials.*

was detained. Specifically, the Trial Judge erred by failing to apply the modified-objective test set out in *Grant*. He was required to assess whether "a reasonable person [would] conclude that he or she was not free to go and had to comply with the police direction or demand."[76] Instead, the Trial Judge focused on the actions of the police without considering what a reasonable person with the characteristics of Mr. Tessier would conclude from those actions.[77] After listing the actions taken by police, the Trial Judge turned to determining Mr. Tessier's personal subjective belief inference from his conduct.[78]

30. In *Le*, this Court was unanimous that a detainee's subjective assessment of their ability to leave cannot overwhelm this modified-objective analysis.[79] The same must hold true for police perceptions of detention, which are equally indeterminate.[80] However, the Trial Judge's analysis focused primarily on the perspective of the police, without any consideration of the modified-objective standard imposed in *Grant*.

31. When the proper standard is applied, it is difficult to see how a reasonable person would not feel detained when they comply with a police officer's request for their shoes, handing them over in the cold of March.[81] It is equally difficult to reconcile how a reasonable person could submit to a pat-down search of their person on request and still not feel detained.[82] These questions, amongst others, were never considered by the Trial Judge, as he failed to consider the modified-objective test at all.[83] While the Court of Appeal found that it was not an error to consider the *Moran* factors, this came with a caveat – namely, that "full consideration is given to the *Grant* factors in answering the

[76] *Grant* at para 31.
[77] *Reasons for Judgement* – F23 para 62 – F27 para 85.
[78] *Reasons for Judgement* – F27 paras 86-88.
[79] *R v Le*, 2019 SCC 34 at paras 114, 116, and 264.
[80] *R v Johns*, [1998] OJ No 455 (CA) at para 27.

ultimate question …: 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?"[84] This overarching question remains the ultimate requirement of a proper detention analysis. It is also precisely what the Trial Judge failed to do.

32. The Respondent submits this error also demands a new trial.

33. On this basis, the Respondent submits, the ordering of a new trial could be upheld on the basis of the Trial Judge's erroneous determination of detention. It is also for this reason that leave should be refused.

Did the Alberta Court of Appeal err in its articulation of the common-law confessions rule?

No Effective Waiver Requirement

34. The Crown Applicant argues that the Alberta Court of Appeal's definition of voluntariness "effectively requires the Crown to prove a waiver as a condition of admissibility of the statement."[85] A fulsome analysis of the decision reveals that this is plainly wrong.

35. The Court of Appeal accepted that *Boudreau* changed the law in Canada, rendering the absence of a police caution no longer determinative of voluntariness, although it remained an important factor.[86] The Court of Appeal listed (with approval) various decisions where no caution was given but statements were voluntary because the defendants knew the bulk of the information without receiving one.[87] Plainly, the Court of Appeal was not suggesting the caution or a waiver was a precondition for voluntariness. Reinforcing *Singh*, the Court of Appeal properly queried whether Mr. Tessier had made a meaningful choice to speak with the police. This required appreciation of

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[85] *Leave Application Memorandum* at para 23.
[86] *Tessier* at para 34.
[87] *Tessier* at para 59

his right to remain silence and that anything he said could be used against him in court. While the Crown in the listed cases was able to point to something else – such as prior involvement in the criminal justice system – to demonstrate the accused possessed this knowledge, they had been unable to do so in Mr. Tessier's case. It is for this reason – a contextual analysis of Mr. Tessier's circumstances, not some fundamental shift in the law of voluntariness – that a new trial was required.

Not a Matter of Limited Weight but of No Consideration Whatsoever

36. The Crown Applicant suggests the Trial Judge merely gave limited weight to the absence of a caution in his Reasons for Judgement. This is incorrect.[88] After applying the *Morrison/Worral* framework to determine Sgt. White did not have to caution Mr. Tessier,[89] the Trial Judge never returned to the lack of caution or the impact of its absence on Mr. Tessier. ***This*** is the core reason for the Court of Appeal's judgement: as a consequence of his determination that the police did not have to give Mr. Tessier a caution, the Trial Judge concluded its absence was also irrelevant for voluntariness purposes.[90] The Applicant has provided no pinpoint citation for their contention that the lack of caution was assigned limited weight because this did not occur. After concluding Sgt. White was not required to give a caution, the Trial Judge never – expressly or inferentially – considered the matter again.

"Meaningful Choice" Has Not Broadened the Law of Voluntariness

37. The Applicant characterizes the Court of Appeal's adoption of the "meaningful choice" terminology as a broader understanding of voluntariness than presently exists in law. This is also

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[88] *Leave Application Memorandum* at para 14.
[89] *Reasons for Judgement* – F20 at para 51.
[90] *Tessier* at para 56.

incorrect. In *Singh*, this Court reinforced a "modern expansive view of the confessions rule which … clearly includes the right of the detained person to make *a meaningful choice* whether or not to speak to state authorities…"[91] An analysis of whether a meaningful choice occurred is contextual, with consideration of all relevant factors.[92] One such factor is the presence of absence of a police caution.[93] This Court has repeatedly accepted the continued importance of this factor – one that "becomes all the more important… in answering the ultimate question of voluntariness" where (as here) the accused has not consulted with counsel.[94]

38. The Court of Appeal's review of the Trial Judge's determination reveals no error – or expansion – of law. Their conclusion that the Trial Judge's anlaysis failed to address "whether [the Respondent] made a meaningful choice to speak to the police *knowing* that *he was not required* to answer police questions, or that *anything* he did say would be taken down and *could be used in evidence*" is unassailable. Simply put, the absence of a caution was an important factor to which he failed to turn his mind. According to well-established precedent from this Honourable Court, it was a factor he was required to consider.

Fears of Broad-Reaching Impacts are Unfounded

39. The Crown Application appears to be driven by a fear that this decision will require police to "caution virtually everyone with whom they speak, just in case that person admits an offence."[95] Surely, this is a gross overstatement. Since its inception, the confessions rule has not depended upon

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[91] *R v Singh*, 2007 SCC 48 at para 35 [Note: There is no suggestion that a person who is not detained, is not entitled to make a meaningful choice. The confessions rule applies whether or not the suspect is in detention (See paragraph 32)]
[92] *Ibid.* at para 35.
[93] *Singh* at para 31 [citing: *R v Boudreau*, [1949] S.C.R. 262
[94] *Singh* at para 33.
[95] *Leave Application Memorandum* at para 30.

the status of the accused in the minds of police.[96] Thus, there has always been some risk that police might unwittingly receive a confession prior to delivering a caution. This decision does not change the law – police still need not caution everyone, just those they believe *might* provide inculpatory evidence. The advice offered by Justice Watt in *Worrall* is a good foundation – the appropriate point for a caution is where a *reasonably competent investigator* would be alerted to the *realistic prospect* that the crime under investigation is *connected* to the interviewee.[97] The risk is managed quite simply by giving a caution. It is not an onerous or time-consuming exercise.

40. The Applicant points to *Turcotte* as an example of what is likely to occur if a suspect arrived at a police station and started confessing out of the blue. In such a circumstance, the Respondent submits a dispute regarding the voluntariness of such a statement would be unlikely. As expressed by the Alberta Court of Appeal in the decision below, the caution remains only one factor to be considered. Its consideration would not overwhelm the rest of the analysis – particularly when an individual arrives at a police station without a request to do so and spontaneously utters his confession to whomever will listen. Such circumstances bear no resemblance to what occurred with Mr. Tessier.

41. The Court of Appeal articulated a voluntariness test which included the presence or absence of a police caution as an important factor. This was legally correct and revealed no question of law needing further refinement. The Respondent submits the application for leave should be dismissed.

Did the Alberta Court of Appeal err in requiring a mere witness be formally cautioned as a condition of proving voluntariness?

42. First, the Alberta Court of Appeal did not require that Mr. Tessier be cautioned as a *precondition* for voluntariness. The Court merely required that, in assessing the voluntariness of Mr.

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[96] *R v Pearson*, 2017 ONCA 389 at para 19.
[97] *R v Worall*, [2002] OJ No 2711 (ONSC) at paras 104 & 106. [Emphasis added]

Tessier's statements to police, any trial judge must ***consider*** as a relevant factor the presence or absence of such a caution.[98] In its absence, the only way to do so is to consider whether Mr. Tessier had – in some other way – the knowledge the caution normally conveys. To conduct a proper and complete voluntariness analysis at Mr. Tessier's new trial, these would be matters requiring consideration.

43. Second, by framing their question in this fashion, it is the Applicant that seeks to convert this Court's advice in *Singh* into the test for voluntariness in cases of this nature. Justice Charron's statement in *Singh* – a "warning should be given when there are reasonable grounds to suspect that the person being interview has committed and offence"[99] – was merely offered as guidance. If it was law, this Court would have had to reverse *Boudreau*.[100] Instead, this Court reinforced that the caution reflected a broad-based notion of voluntariness which has long included the common law principle that a person is not obliged to give information to the police or to answer questions.[101]

44. Under the present voluntariness test, the flexibility the Applicant claims to seek for statements by "mere witnesses" who turn out to be the accused is already available. A number of factors can be pointed to by Crown counsel as rendering the caution more or less important. For example, the absence of consultation with counsel makes the caution *more* important[102] as does an accused's status as a detainee.[103] Such factors are connected to the overall modified-objective test, focused on police conduct that can impact upon the suspect's ability to exercise his or her free will.[104]

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[98] *Tessier* at para 59-60.
[99] *Singh*, at para 32-33.
[100] *Boudreau v The King*, [1949] S.C.R. 262 [As cited in *Singh* at para 31]
[101] *Singh*, at para 31.
[102] *Singh* at para 33.
[103] *Singh* at para 32.
[104] *Singh* at para 36.

45. The Applicant's effort to make a voluntariness factor out of information solely in the mind of an interviewing police officer should be rejected. An accused's status as suspect, person of interest, or mere witness is subjective and *solely in the mind of the police officer*. By its nature, it does not accord with an accused's exercise of free will. An individual's status in the mind of a police officer can only be the basis upon which they exercise their common sense in determining whether to give the police caution. It cannot rise to a legal yardstick by which the voluntariness of an utterance is measured.

CONCLUSION

46. This Application for Leave to Appeal does not raise any issue of public importance which has not already been dealt with by this Court in prior jurisprudence. The Applicant has presented no compelling reason to reconsider that jurisprudence. The common law confessions rule is well-known, is the subject of agreement by appellate courts across the country and was correctly applied by the Alberta Court of Appeal in overturning the Trial Judge in this case. There is no compelling reason to add a caveat to the police caution factor as requested by the Applicant. The applicable standard already requires a flexible, contextual analysis that takes into account the concerns expressed by the Crown Applicant.

PART IV – SUBMISSIONS REGARDING COSTS

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

PART V - ORDER SOUGHT

48. The Respondent requests that leave to appeal be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11 DAY OF NOVEMBER, 2020.

Pawel Milczarek
Counsel for the Respondent, Steven Russell Tessier

PART VI – TABLE OF AUTHORITIES

Authority	Paragraph Cited
R v Belbin, 2015 ONSC 5346	414, 421, 423
Boudreau v The King, [1949] S.C.R. 262	31
R v Butorac, 2010 BCSC 1173	62-63
R v Grant, 2009 SCC 32	60, 44 31
R v Higham, [2007] OJ No 2147 (SC)	7
R v Johns, [1998] OJ No 455 (CA)	27
R v Le, 2019 SCC 34	114, 116, 264
R v Moran, [1987] OJ No 794 (ONCA)	82
R v MR, 2019 ABQB 588	81, 71, 105, 98, 118-119,
R v Pearson, 2017 ONCA 389	19
R v Singh, 2007 SCC 48	32, 31, 33, 36
R v Tessier, 2020 ABCA 289	24, 29, 34, 35, 37, 46, 55, 56, 57, 59, 60, 69
R v Worrall, [2002] OJ No 2711 (ONSC)	104, 106

PART VII – LEGISLATION

Legislation
Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11