**File Number: 37756**

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

BETWEEN:

**G.T.D.**

APPELLANT
(Appellant)

- and -

**HER MAJESTY THE QUEEN**

RESPONDENT
(Respondent)

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# FACTUM OF THE RESPONDENT
# ATTORNEY GENERAL OF ALBERTA

**(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

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# TABLE OF CONTENTS

**Page No.**

# Part I – Overview and Statement of Facts

## A. Overview

1. The Alberta Court of Appeal erred in finding there was a breach of the right to counsel. In the alternative, the Appellant's statement should not be excluded pursuant to s. 24(2) of the *Charter*.

2. Police responded to a sexual assault complaint. Upon arresting the Appellant they told him of his right to counsel and read him the following police caution:

> You may be charged with sexual assault and breach. You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence. Do you wish to say anything?

3. The Appellant responded:

> Yeah. Like a boss says I'm raping. I didn't do because I was thinking, like since we are in a relationship, it's okay. I didn't think it would be a raping because we our two boys together, ...

4. The alleged breach in issue arises from no more than the arresting officer faithfully following the long standing Edmonton Police Service (EPS) practice of reading its standard police caution to detainees under arrest, as it has done for decades without incident. The officer was not attempting to elicit evidence from the Appellant. He was doing his very best to discharge his obligations under *Charter* in accordance with his training.

5. At the time of the investigation, the only reported decision addressing whether reading the EPS police caution violates the duty to hold off found that it did not.[1] Another Ontario trial decision had similarly held that an analogous Ontario police caution did not violate the duty to hold off.[2] There were also other decisions that found it is only police conduct or questioning of an investigative nature seeking to elicit evidence that violates the police duty to hold off. In addition, two decisions of this Court referred to police reading a similar caution with apparent approval.[3]

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[1] ***R v Simpanzwe***, 2009 ABQB 579
[2] ***R v Charles***, 2011 ONSC 1242
[3] ***R v Manninen***, [1987] 1 SCR 1233 at para 5 and 23; ***R v Singh***, 2007 SCC 48 at para 31-33

6. Although the police duty to hold off was well settled, the question in the police caution is not the type of questioning contemplated by appellate jurisprudence addressing the right to silence or right to counsel, which deals with clear police attempts to elicit evidence. In short, police had a reasonable basis to honestly believe that the reading of the EPS caution was both lawful and in furtherance of discharging their *Charter* obligations and at the time of the investigation they had no reason to question the constitutional validity of the practice.

7. Conduct or questioning of a non-investigative nature that does not seek to elicit evidence does not violate the duty to hold off, even if it results in self-incriminating evidence.[4] To find otherwise would unduly hinder police in the fulfillment of their duties. The Alberta Court of Appeal suggests that any conduct that risks provoking an incriminating statement violates the duty to hold off. This does not strike the appropriate balance between individual rights and the need for effective law enforcement. All manner of lawful police conduct arguably risks provoking an incriminating statement from a detainee, including transporting a detainee to exercise the right to counsel or an extended period of necessary detention. Taken to its logical conclusion, the Alberta Court of Appeal's approach would require police to cease all activities and provide detainees with immediate access to counsel in order to ensure that their actions did not inadvertently "risk" prompting a self-incriminating statement.

8. Asking "do you wish to say anything?" in the context of the EPS police caution is not a question asked for an investigative purpose or an improper attempt to elicit evidence. The question is not free standing. It is read after the accused is told he has a right to call a lawyer before police engage in their investigation and immediately after the accused is told he does not have to say anything and anything he says can be used against him. Further, the question "do you wish to say anything?" is generic and not specific to the investigation or evidence. The question can be answered with a yes or no answer without any elaboration from a detainee.

9. The arresting officer did not ask the question to elicit evidence. He had been reading this caution to every detainee he arrested for the past ten years without incident. The officer had no expectation that the Appellant would say anything and he had no intention of following-up had the

[4] ***R v Dupe***, 2010 ONSC 6594; ***R v Sinclair***, 2a003 BCSC 2040; ***R v Rose***, 2004 BCCA 598; ***R v Smith***, 2008 ONCA 127; ***R v Learning***, 2010 ONSC 3816 at para 81

Appellant remained silent. After the Appellant's statement the arresting officer did not ask any follow-up questions and promptly provided the Appellant an opportunity to consult counsel.

10. The EPS caution has been in use for decades without incident and without the widespread elicitation of evidence from detainees. Having regard to all of the circumstances in which the question in the EPS caution is asked, it cannot reasonably be said to be a question asked for an investigative purpose or one asked to elicit evidence. It is thus not a breach of the duty to hold off to read the EPS police caution to detainees who wish to speak to counsel, contrary to the finding of the Alberta Court of Appeal.

11. The mere fact that the Appellant provided a self-incriminating statement following the caution does not establish that there was a breach of the duty to hold off. There are many cases in which police conduct, statements or questioning have preceded accused admissions, without courts having found a breach of the duty to hold off.[5] In cases of spontaneous voluntary utterances, very often the utterance is preceded by some police conduct. That, however, does not mean that the conduct elicited the utterance, or that it was the product of improper elicitation by the police.

12. In this case, the trial judge found that having regard to all of the circumstances the reading of the police caution did not elicit the Appellant's statement. Rather, she found that the Appellant's statement was the result of a voluntary choice to speak with police, that it was a spontaneous voluntary utterance. This is a factual finding entitled to deference.

13. Even if reading of the EPS caution did breach of the right to counsel, it does not merit the exclusion of the Appellant's statement under s. 24(2) of the *Charter*.

14. The breach is low on the scale of police culpability. The breach was inadvertent. The arresting officer was acting in good faith and attempting to faithfully discharge his *Charter* obligations. He was aware of the duty to hold off and other than reading the police caution made no attempt to elicit evidence or otherwise question the Appellant. He promptly facilitated access to counsel.

15. The breach does not arise as a result of a wilful disregard of the *Charter*. At the time of the investigation the existing jurisprudence reasonably suggested that reading the caution did not

[5] See ***R v Sinclair***, 2003 BCSC 2040; ***R v Dupe***, 2010 ONSC 6594; ***R v Rose***, 2004 BCCA 598; ***R v Smith***. 2008 ONCA 127; ***R v Learning***, 2010 ONSC 3816; ***R v Mullins***, 2015 ONSC 1552

violate the duty to hold off. Police honestly and reasonably believed that the reading of the EPS caution was lawful and in furtherance of their *Charter* obligations to the Appellant.

16. The dissenting Justice erred in finding that the breach is serious because it is systemic and one that the police should have anticipated. It does not amount to a systemic abuse. The fact that the breach occurred as a result of a ubiquitous police practice does not make it systemic abuse, when the police honestly and reasonably believe the practice was lawful. Moreover, the jurisprudence on this issue does not inescapably lead to the conclusion that reading the EPS caution violates the duty to hold off. Of four trial decisions that have addressed the issue, three have found that reading a police caution asking if a detainee wishes to say anything does not violate duty to hold off. In Alberta, both trial decisions found the EPS caution does not breach the duty to hold off.[6]

17. In effect, the dissenting Justice holds police to a higher standard than that of our learned trial judges. As observed by Justices Moldaver and Gascon in *R v Paterson*,[7] police should not be held to a standard that exceeds the wisdom and training of experienced trial and appellate judges. It is submitted that excluding evidence because the police should have anticipated a change of law that three of four trial judges similarly did not anticipate, would bring the administration of justice into disrepute.

18. The impact of the breach on the protected rights in this case was attenuated by the Appellant's general understanding that he did not have to say anything to police and the trial judge's finding that the Appellant's statement was not elicited by the caution, but was a voluntary spontaneous utterance because the Appellant voluntarily chose to speak with police.

19. The trial judge and Alberta Court of Appeal unanimously agreed that society's interest in an adjudication on the merits favoured inclusion of the Appellant's statement. The statement was reliable and the offence was serious.

20. The above factors favour the admission of the Appellant's statement under s. 24(2) of the *Charter*. As suggested by the majority, the exclusion of the Appellant's statement would be a disproportionate response to the alleged breach occasioned by police acting in utmost good faith

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[6] ***R v Simpenzwe***, 2009 ABQB 579; ***R v Cardinal***, 2015 ABPC 34
[7] 2017 SCC 15 at para 72

and on an honest and reasonable belief that their standard practice was lawful and in furtherance of protecting the Appellant's *Charter* rights. The administration of justice would be brought into disrepute if the Appellant's statement was excluded on the basis that the EPS should have foreseen a *Charter* violation that three of four trial judges similarly failed to see.

## B. Statement of Facts

### *1. The offence*

21. The Appellant did not testify. The trial judge accepted the Complainant's evidence and made the following findings of fact about the incident.

22. The Complainant and Appellant were involved in a romantic relationship. Although they were never married, they had two children together. The relationship ended sometime in 2012.

23. On November 8, 2012, after the relationship ended, the Appellant visited the Complainant's apartment to get his work clothes. He stayed for supper.

24. While the Complainant was feeding the children, the Appellant asked if they could have sex. The Complainant told the Appellant no. The Appellate said she was still his wife. The Complainant said not anymore and that they had a different relationship now.

25. The Appellant forced the Complainant to the couch. The Appellant tried to remove the Complainant's pants, but she fought to keep them on, while telling the Appellant to get off her.

26. The Appellant eventually managed to remove the Complainant's pants and tried to penetrate her, but the Complainant blocked him with her hands. The Appellant forced her hands over her head and penetrated her.

27. After the Appellant ejaculated, the Complainant told him to leave and that she did not want it to happen again. The children were present during the incident and were crying and upset afterwards. The Complainant did not report the incident until November 11, 2012.

### *2. The Appellant's arrest*

28. On November 11, 2012, Cst. Lynch spoke with the Complainant at her residence. She told him about the incident and identified the Appellant as the assailant. After some searches, Cst. Lynch learned that the Appellant was staying at the Hope Mission.

29. Cst. Lynch went to the Hope Mission. He found the Appellant in the group area and woke him. He asked the Appellant to come outside. Once outside, Cst. Lynch told the Appellant he was under arrest for sexual assault and breach of recognizance. Cst. Lynch placed the Appellant in his police vehicle.

30. Once in the police vehicle Cst. Lynch read the Appellant the following standard police *Charter* advice from a card issued to him by the EPS:

> I am arresting you for sexual assault and a breach. You have the right to retain and instruct a lawyer without delay. This means that before we proceed with our investigation, you may call any lawyer you wish or a lawyer from a free legal advice service immediately. If you want to call a lawyer from a free legal advice service, we will provide you with a telephone, and you can call a toll free number for immediate legal advice. If you wish to contact any other lawyer, a telephone and telephone books will be provided to you. If you are charged with an offence, you may apply to Legal Aid for assistance. Do you understand?

31. The Appellant said he understood.

32. Cst. Lynch then asked "do you want to call a free lawyer or any other lawyer?" The Appellant said yes.

33. Cst. Lynch then read the following police caution from a card issued to him by the EPS:

> You may be charged with sexual assault and a breach. You are not obligated to say anything unless you wish to do so, but whatever you say may be given in evidence. Do you wish to say anything?

34. The Appellant replied:

> Yeah. Like a boss says I'm raping. I didn't do because I was thinking, like since we are in a relationship, it's okay. I didn't think it would be a raping because we our two boys together, ...

35. Cst. Lynch testified that he read the standard police caution from the card he was issued by the EPS in accordance with his training, as has been his practice for the past ten years. At the time of trial, the EPS was still using the same card that he read to the Appellant at his arrest.

36. In cross-examination, Cst. Lynch identified an interview form used by the EPS during some interviews that ends the standard caution with "[d]o you understand?" There is no evidence as to why a different wording is used on some interview forms or the reason for the difference between the form and the cards.

37. Cst. Lynch agreed that once a person says they want to speak to a lawyer, police are not allowed to continue questioning them. Other than reading the standard police caution, Cst. Lynch did not question the Appellant.[8] After reading the standard police caution, Cst. Lynch promptly facilitated the Appellant's right to counsel.

### *3. Trial Judge Decision on Charter Application*

38. The trial judge found that reading the EPS caution did not breach the right to counsel. In the alternative, if it did, the Appellant's statement was nonetheless admissible under s. 24(2) of the *Charter*.

39. The trial judge found that the statement was the result of the Appellant voluntarily choosing to speak with police. She noted that there was no evidence that the Appellant did not understand he did not need to say anything to police and police did not use tricks or baiting questions and no follow-up question was asked after the police caution was read. The Appellant's statement amounted to a voluntary spontaneous utterance made because the Appellant chose to speak to police.

40. The trial judge further found that in the event she was wrong, the admission of the statement would not bring the administration of justice into disrepute.

41. The trial judge found that the breach was not serious. She rejected the argument that wording of the police caution amounts to a systemic failure to train EPS officers properly. She further found that the conduct of the investigating officer was otherwise what one would expect of an officer aware of his obligations under the *Charter*.

42. The trial judge found that the breach minimally impacted the Appellant's protected rights. The right to counsel protects the right to silence. Immediately prior to the statement the Appellant was told he did not have to speak with police if he did not want to. There is no evidence the

[8] Trial transcript 119/30-31 **[RA Tab 3P]**

Appellant did not understand this. There is nothing to suggest that his will was overborn, that he was tricked or that his statement was the result of anything other than his free choice to speak with police.

43. The trial judge ultimately found that the admission of the Appellant's statement would not bring the administration of justice into disrepute, citing other cases in which spontaneous voluntary declarations, made in similar circumstances, were admitted into evidence.

### *4. Trial Judge's Reasons for Conviction*

44. The trial judge accepted the complainant's evidence about the incident. She also accepted police evidence about Deng's statement and found that it was an admission that Deng had sex with the complainant against her will. She accordingly convicted Deng of the offence.

### *5. Alberta Court of Appeal Decision*

45. The Appellant appealed his conviction on the grounds that the trial judge erred in finding there was no breach of his right to counsel and in finding that his statement should be admitted under s. 24(2) of the *Charter*.

46. The Alberta Court of Appeal unanimously found that trial judge erred in not finding a breach of the right to counsel. However, the majority found that the statement should be admitted under s. 24(2), while the dissenting Justice found that the statement should have been excluded.

47. The court found that the EPS caution breaches the duty to hold off because, with the question "do you wish to say anything?" at the end, it risks prompting an incriminating response from a detainee before the detainee has had an opportunity to consult counsel.[9]

48. However, the majority found that the breach did not merit the exclusion of the Appellant's statement having regard to the *Grant* analysis.

49. The Majority found that the breach was not serious, being low on the scale of police culpability. The officer was acting in good faith. There was nothing unreasonable or negligent about the officer's conduct. The breach was not the product of systemic or institutional abuse. Rather, police were operating in "unknown legal territory." At the time of the investigation only two trial decisions specifically addressed the issue and they found that a police caution asking if a

[9] ***R v G.T.D.***, 2017 ABCA 274 at paras 18 and 66 **[RA Tab 1E]**

detainee wished to say anything did not breach the duty to hold off. The failure to change the wording of the caution was not a case of willful or systematic violation of clearly established *Charter* rights. Ultimately the deficiency in police training did not overshadow the good faith of the investigating officer. Further, excluding the statement would not necessarily be a proportionate response to police following a practice previously not seen as violating the *Charter*.

50. The Majority found that even though the statement was obtained in breach of the right to counsel and breaches affecting the right to silence presumptively result in the exclusion of evidence, the circumstances attenuate the impact of the breach. The Appellant was clearly informed of his choice to speak to police. Given the historical context in which the police have read similar cautions to detainees for decades, the impact of the breach can be described as minimal or even technical. There is no absolute rule that a breach of the right to silence must always result in the exclusion of evidence. The confessions rule also offers important safeguards to an accused. The Appellant conceded that the statement was made voluntarily. Excluding a voluntary, unforced statement following the good faith reading of the police caution would essentially be to find that s. 24(2) operates to always exclude statements made following a violation of s. 10(b).

51. The Majority also found that society's interest in having criminal allegations adjudicated on their merits was better served by the admission of the statement. The impugned evidence was reliable. The statement was voluntary, spontaneous and corroborated by the Complainant's evidence. It was not the result of focused or persistent police questioning. There was nothing to suggest that the statement was inaccurately recorded, misunderstood, or otherwise unreliable. The statement was not central to the Crown's case but rather merely corroborated aspects of the Complainant's testimony, which was otherwise uncontradicted and accepted by the trial judge. The offence was serious. It was a violent sexual assault in which the Appellant ignored clear verbal rejections and overcame physical resistance, in front of the parties' two young children.

52. The dissenting Justice found that the *Grant* analysis favoured the exclusion of the statement.

53. The dissenting Justice found that the police conduct viewed in isolation falls on the least serious end of the spectrum of police culpability. She accepted that the officer was doing his best to comply with the *Charter*. Neither the officer nor the EPS intended to breach the *Charter*. There was no larger pattern of *Charter* breaching conduct. The breach was not egregious, occurring as a

result an officer asking a single open-ended question. The officer was not negligent in the sense he should have known he was violating the *Charter*, as he was following his training and it was reasonable for the officer to have done so. There was some degree of legal uncertainty about whether reading the EPS caution violated the right to counsel. These factors on their own favoured the admission of the statement.

54. However, she found that it was not the individual officer's conduct that made the breach serious. Rather, it was the institutional failing of the EPS that made the breach serious. Institutional or systemic breaches are more serious that isolated instances. Generally, systemic breaches are less serious when police are acting on a mistaken understanding of the *Charter* because of uncertainty in the law. Although, there was some uncertainty in the law, police have an ongoing obligation to consider whether their practices have kept pace with *Charter* jurisprudence. Police are not entitled to simply wait for binding appellate decisions before changing their practices. Police are required to consider how courts are likely to apply settled *Charter* principles and reasonably anticipate how broad statements of law might require changes to their practices. While there are a handful of conflicting decisions on point, the law cannot be described as unsettled as it was in *R v Saeed*[10] or *R v Cole*.[11] Whether reading a caution that asks if a detainee wishes to say anything violates the duty to hold off, involves a straightforward application of binding Supreme Court of Canada jurisprudence. Police cannot choose the least onerous path when faced with a grey area of the law or uncertainty. Police should err on the side of caution. Police should have recognized that the caution was constitutionally suspect and should have selected a safer course.

55. The dissenting Justice further found that the breach had a serious impact on the Appellant's right to silence, which includes the right to make an informed decision whether to speak to police. Even though the Appellant generally understood he didn't need to say anything, the breach had a serious impact on *Charter* protected interests. The Appellant was deprived of critical advice on the right to silence when he faced significant legal vulnerability and he was in significant need of assistance.

56. The dissenting Justice found that the society's interest in an adjudication on the merits weighed in favour of the admission of the statement. The statement was reliable and the offence

[10] 2016 SCC 24
[11] 2012 SCC 53

was serious. However, because the statement was not essential to the Crown's case and there was a strong prospect of the Appellant being found guilty even without the statement, this consideration did not favour admission as strongly as it would have if the statement had been more important to the Crown's case.

57. The dissenting Justice found that there were considerations weighing towards both the inclusion and exclusion of the statement. The offence is a serious offence committed against a vulnerable victim. The statement is reliable. The exclusion of the evidence would not guarantee an acquittal at a second trial. Canadians expect courts to adjudicate matters on the merits. The arresting officer was doing his best to comply with the *Charter*. However, the breach was systemic. Even though it was only the asking of a single question, it had the effect of entirely depriving the Appellant of legal advice at a critical stage of the investigation when he was vulnerable. The breach undermined the Appellant's ability to make an informed decision whether to respond to the allegations, compromising his right against self-incrimination. Courts must focus on the long-term reputation of the administration of justice and be mindful of admitting evidence in the face of serious or systemic *Charter* breaches, as it may signal that *Charter* rights are of little actual value to citizens. On the balance the inclusion of the statement would bring the administration of justice into greater disrepute than its exclusion.

## Part II – Respondent's Position on Questions in Issue

58. The Appellant appeals on the question of whether his statement should have been excluded under s. 24(2). The Crown raises the further issue of whether police violated the Appellant's right to counsel by reading him the EPS police caution.

59. The Crown's position on these issues is that:

a) Police did not violate the Appellant's right to counsel by reading him the EPS police caution.

b) If police did violate the Appellant's right to counsel, the admission of his statement would not bring the administration of justice into disrepute and should be admitted under s. 24(2).

## Part III – Argument

### A. The reading of the police caution did not violate the right to counsel

60. Although this is an as of right appeal arising from a dissent on whether evidence should have been excluded under s. 24(2) of the *Charter*, a respondent on an as of right appeal may argue any point of law that would support the order of the court below.[12]

61. Accordingly, the Crown raises the issue of whether the Alberta Court of Appeal erred in finding that the reading of the EPS caution breached the duty to hold off contrary to s. 10(b) of the *Charter*.

#### *i. Three of the four trial decisions addressing this issue have found no breach of the duty to hold off*

62. Three of four trial courts that have specifically addressed the issue of whether a police caution that asks whether a detainee wishes to say anything breaches the duty to hold off have found that it does not.[13] These three decisions are consistent with this Court's apparent approval of the reading of such a police caution and other cases that have found that it is only police questioning or conduct of an investigative nature that attempt to elicit evidence about the offence that breaches the duty to hold off. The other decision found that any questioning during the hold off period violates the duty to hold off.

63. Two of these decisions have specifically addressed the reading of the EPS caution which says:

> You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence. Do you wish to say anything?

Both decisions found that reading the EPS caution does not violate the duty to hold off because in the context in which it the caution is read, the question do you wish to say anything is not read for an investigative purpose or to elicit evidence.

64. One Ontario decision addressed a police caution which says:

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[12] ***R v Keegstra***, [1995] 2 SCR 381 at para 25-26

[13] ***R v Simpanzwe***, 2009 ABQB 579; ***R v Charles***, 2011 ONSC 1242, ***R v Hector***, 2014 ONSC 2037; ***R v Cardinal***, 2015 ABPC 34

> Do you wish to say anything in answer to the charges? You are not obligated to say anything unless you wish to do so. But whatever you say may be given in evidence against you.

and found that reading the caution did not violate the duty to hold off. [14]

65. The other Ontario decision addressed police having asked whether the accused wished to say anything at the end of the caution and also booking questions during the hold off period. The court found that doing so breached the duty to hold off.[15] It found that any questioning by police during the hold of period violated the duty to hold off. This decision is inconsistent with existing case authority on the duty to hold off, which has found that not all questioning during the hold off period violates the duty to hold off.

66. In these cases the courts did not disagree on whether police have a duty to hold off, they disagreed on what constitutes improper questioning or an attempt to elicit evidence. While the existence of the duty to hold off is certainly well settled, the issue of what questioning or conduct violates that duty is not.

***ii. This Court has seemingly endorsed the practice of reading a police caution that contains the question whether a detainee wishes to say anything***

67. In *R v Manninen*, the seminal case on the duty to hold off, the police read the following caution to the accused:[16]

> Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence.

68. This Court did not take issue with police having done so, but instead said "police officers correctly informed the respondent of his right to remain silent …"[17] The court in *Manninen* took issue, not with the police caution, but with police employing a form of questioning meant to elicit involuntary answers about the offence.[18]

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[14] ***R v Charles***, 2011 ONSC 1242
[15] ***R v Hector***, 2014 ONSC 2037
[16] ***R v Manninen***, [1987] 1 SCR 1233 at para 5
[17] *Ibid*. at para 23
[18] *Ibid*. at para 25

69. In *R v Singh*, this Court said:[19]

> … A common form of the police caution given to a person who has been charged with an offence is the following: "You are charged with... Do you wish to say anything in answer to the charge? You are not obliged to say anything but whatever you do say may be given in evidence." Therefore, the police caution, in plain language, informs the suspect of his right to remain silent. Its importance as a factor on the question of voluntariness was noted by this Court as early as 1949 in *Boudreau*: …

70. In *R v Singh*,[20] this Court does not suggest that the caution which contains the question do you wish to say anything in answer to the charges is improper or a breach of the duty to hold off. Rather, the court goes on to say the police officers are well advised to give detainees this caution when police are prepared to arrest a detainee for an offence if he or she were to attempt to leave.[21]

### *iii. Only police questioning or conduct of an investigative nature seeking to elicit evidence about an offence violates the duty to hold off*

71. Many cases have found that it is only questioning or conduct of an investigative nature seeking to elicit evidence about an offence that violates the duty to hold off, even if it results in self-incriminating evidence. This strikes the appropriate balance between individual rights and effective police enforcement. Police should not be required to suspend all activities until a detainee exercises the right to counsel. Questioning of a non-investigative nature that is not an attempt to elicit evidence should be permitted. Once a detainee has been informed of the right to silence, such questioning should pose a minimal risk of prompting self-incriminatory statements from a detainee. This is borne out by the paucity of case authority addressing the issue of admissions made following the reading of the police caution and other non-investigative questioning.

72. The right to silence has never imposed a duty on the police to prevent detainees from making self-incriminatory statements. It only protects against involuntary self-incrimination. Not all questioning or conduct is such that a detainee reasonably requires protection from involuntary self-incrimination. The question contained in the police caution is not one that reasonably requires such protection.

73. In *R v Hebert*, the court explained:[22]

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[19] ***R v Singh***, 2007 SCC 48 at para 31
[20] *Ibid*.
[21] *Ibid*. at para 33
[22] ***R v Hebert***, [1990] 2 SCR 151 at para 80

> The essence of the right to silence is that the suspect be given a choice; the right is quite simply the freedom to choose — the freedom to speak to the authorities on the one hand, and the freedom to refuse to make a statement to them on the other.

74. The court further explained:[23]

> … [I]n the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police.

75. The court in *Hebert* also explains that the right to silence prohibits the state using its superior power to override the suspect's will and negate his or her choice to speak to the police if a detainee chooses not to make a statement:[24]

> The suspect, although placed in the superior power of the state upon detention, retains the right to choose whether or not he will make a statement to the police. To this end, the *Charter* requires that the suspect be informed of his or her right to counsel and be permitted to consult counsel without delay. If the suspect chooses to make a statement, the suspect may do so. But if the suspect chooses not to, the state is not entitled to use its superior power to override the suspect's will and negate his or her choice.

76. This has been affirmed in subsequent decisions of this Court addressing the right to counsel, which have found that the purpose of the right to counsel is to support a detainee's right to choose whether or not to cooperate with the police investigation.[25] Its predominant underlying purpose is protect against involuntary self-incrimination by ensuring the detainee is aware of the right to silence to freely choose whether to cooperate with the police investigation and assist police in the creation of evidence.[26]

77. It is for this reason that the right to silence does not require police to refrain from asking any questions during the hold off period. It only requires them to refrain from asking investigatory questions that seek to elicit evidence from the detainee. It prohibits questions or conduct that engages the state's superior power to override a suspect's will and negate his or her choice to remain silent.

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[23] *Ibid*. at para 76
[24] *Ibid*. at para 122-123
[25] ***R v Sinclair***, 2010 SCC 35 at para 32
[26] ***R v Sinclair***, *supra* note 24 at para 26; ***R v Suberu***, 2009 SCC 33 at para 40; ***R v Hebert***, [1990] 2 SCR 151 at paras 107-110; ***R v Grant***, 2009 SCC 32 at para 77

78. It is for this reason that non-investigative conduct or questioning, which is not aimed at eliciting evidence about the offence, does not violate the duty to hold off. The following cases have found this.

79. In *R v Sinclair*,[27] the accused was asked during booking, whether certain clothing and a wallet were his prior to providing an opportunity to consult counsel. He admitted they were. Police seized and analyzed some of these items and later learned they were relevant to the murder. The court found that police did not violate the duty to hold off, even though the questioning elicited incriminating evidence from the accused, because the officers were not attempting to elicit information about the offence from the accused.[28]

80. In *R v Dupe*,[29] the court similarly found that booking questions did not violate the duty to hold off because they were not investigative questions and only tangentially related to the offence.

81. In *R v Mullins*,[30] questions about what medications the accused was taking were found not to violate the duty to hold off even though the accused ultimately admitted to taking one of the drugs used to incapacitate a sexual assault complainant.

82. In *R v Learning*,[31] background questions asked for the purpose of processing were found not to breach the duty to hold off.

83. In *R v Smith*,[32] the court found that casual conversation with the accused unrelated to his investigation for the purpose of rapport building by the police officer who intended to later interview the accused violated the duty to hold off because the rapport building was intended to be in furtherance of the later police interview. The judge noted however that had other officers engaged in the same sort of conversation without the purpose of building rapport it would not have been a violation of the duty to hold off.

84. In *R v McKenzie*,[33] police took the accused to an interview room and began playing a portion of a taped conversation between the accused and an undercover officer during which the

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[27] ***R v Sinclair***, 2003 BCSC 2040
[28] *Ibid*. at para 72-76.
[29] ***R v Dupe***, 2010 ONSC 6594
[30] ***R v Mullins***, 2015 ONSC 1552
[31] ***R v Learning***, 2010 ONSC 3816
[32] ***R v Smith***, 2011 BCSC 1695
[33] ***R v McKenzie*** (2002), 162 OAC 160

accused confessed to murder resulting in the accused making a further incriminating statement. The court found that even if police do not impose direct questions to a detainee in the hopes of eliciting an incriminatory response, it will nonetheless violate the duty to hold off if it can be said to be the functional equivalent of an interrogation. Even though police in playing the prior taped interview did not ask the accused any direct questions about the murder, the playing of the tape was the equivalent of an interrogation and accordingly violated the duty to hold off.

85. In *R v Rose*,[34] police officers made small talk with the accused about his family and personal affairs prior to providing an opportunity to speak with counsel. Although the accused did not say anything incriminating, another police officer who overheard the conversation recognized the accused's voice from a prior phone conversation in which the accused had made threats. That officer decided to repeat the same words he had heard in the prior phone conversation in front of the accused, resulting in the accused saying "Oh, so my phones have been tapped." The British Columbia Court of Appeal found this was not a breach of the duty to hold off because the officer's conduct was not the equivalent of an interrogation.

86. In *R v Smith*,[35] police placed the accused and co-accused in adjacent cells and questioned the co-accused in the hopes that the accused and co-accused might talk about the offence. The court affirmed the functional equivalent to an interrogation test and found that placing the two accused in adjacent cells and trying to overhear their conversation did not violate the duty hold off.

### *iv. The test for whether there is a breach of the duty to hold off cannot be merely whether the conduct risks prompting an incriminating response*

87. The Alberta Court of Appeal found that the EPS caution violated the duty to hold off because it risks prompting an incriminating response. This approach is inconsistent with what is protected by the right to silence and would too greatly hamper police ability to perform their duties. Essentially police would have to suspend all interaction with a detainee until facilitating the right to counsel, since innumerable things that police may do in an investigation could arguably prompt a self-incriminatory response from a detainee.

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[34] ***R v Rose***, 2004 BCCA 598
[35] ***R v Smith***, 2008 ONCA 127

88. The act of driving a detainee to the police station to exercise the right to counsel could arguably prompt some detainees to make an incriminatory response as a result of being in police presence for a prolonged period of time. The same could be said of extended detentions necessary for the performance of legitimate police duties. Booking questions asking about a detainee's health or personal property would also run the risk of prompting an incriminatory response. To be absolutely safe police would have to suspend any conduct that could be argued "risked" prompting an incriminating response.

89. Police must be permitted to engage in their ordinary duties and ask routine questions to facilitate timely police investigations and to allow them to effectively discharge their obligations.

90. As described above, this sort of non-investigative police conduct is not prohibited by the right to silence or the duty to hold off.

***v. The question in the EPS caution was not asked for an investigative purpose and in the context in which it was asked was not an attempt to elicit evidence***

91. The context in which the question "do you wish to say anything?" is asked in this case is important. It was not a free standing question, but part of the standard police *Charter* advice and caution. Whether it is an attempt to elicit evidence must be measured against the fact that it is asked immediately after the accused is told he has a right to call a lawyer before police engage in their investigation, the accused does not have to say anything and that anything that is said can be used against him.

92. Further, the question "[d]o you wish to say anything?" is generic and not specific to the investigation or evidence and is read by the EPS to all detainees, regardless of the reason for detention. The question also can be answered with a yes or no, without any further elaboration from a detainee. The EPS has been using this wording for the police caution for decades and almost universally, detainees respond to with a yes or no answer and not an incriminatory statement.

93. In this context, the question "do you wish to say anything?" as it appears in the EPS caution cannot be said to be for an investigative purpose or a genuine attempt to elicit evidence.

94. Cst. Lynch did not ask the question in EPS caution for an investigative purpose. He read the caution from the card he was issued in accordance with his training in the honest belief that he should do so to discharge his obligations to the Appellant under the *Charter*. The EPS caution

typically elicits a yes or no answer and would not reasonably be expected to elicit evidence from a detainee in the context in which the question is asked. When the Appellant made the statement, Cst. Lynch did not ask any follow-up questions because he was aware of his duty to hold off. Thereafter, he promptly facilitated the Appellant's right to counsel.

95. Having regard to the above circumstances the reading of the EPS caution cannot reasonably be said to be the use of superior state power to override a detainee's will or negate the detainee's choice to remain silent. It is not a breach of the right to silence or the duty to hold off under the right to counsel.

***vi. The trial judge found that the EPS caution did not elicit the Appellant's statement***

96. The mere fact that the Appellant provided a self-incriminating statement following the caution, does not establish that it was involuntary and in breach of the right to silence or that there was a breach of the duty to hold off. There are cases in which police conduct, statements or questioning have preceded accused admissions, without courts having found a breach of the duty to hold off or breach of the right to silence. In cases of spontaneous voluntary utterances, very often the utterance is preceded by some police conduct. That, however, does not mean that the conduct elicited the utterance or that it was the product of improper elicitation on the part of the police.

97. In this case, the trial judge found that having regard to all of the circumstances the reading of the police caution did not elicit the Appellant's statement. Rather, she found that the Appellant's statement was the result of a voluntary choice to speak with police and that it was a spontaneous voluntary utterance. This is a factual finding entitled to deference. Although, not the only finding available on the evidence, it was nonetheless reasonable having regard to the circumstances in which the Appellant's statement was made.

**B. The Appellant's statement should be admitted under s. 24(2)**

98. If the reading of the EPS caution violated the right to counsel, the trial judge and majority of the Alberta Court of Appeal were correct in finding that the Appellant's statement should not be excluded under s. 24(2) of the *Charter*.

99. The breach was not serious, arising from a good faith and reasonable mistake as to the state of law having regard to the existing jurisprudence, including apparent acceptance of the practice

by this Court and the jurisprudence on the right to silence suggesting the right to silence is only violated when there is "eliciting behaviour on the part of the police." The impact of the breach on protected rights was attenuated as a result of the Appellant's understanding that he did not have to say anything to police, the lack of eliciting behaviour by the police and the trial judge's finding that the Appellant's statement was a voluntary spontaneous utterance and not elicited by the EPS caution. Finally, as found by both the majority and dissent the truth seeking function of the criminal trial process is best served by the admission of the evidence.

100. The dissenting judge errs in characterizing the seriousness of the breach and in her assessment of the impact of the breach on protected *Charter* rights. This case in very much like ***R v Fearon***,[36] where police did something they believed on reasonable grounds to be lawful and were proven wrong, after the fact by developments in the jurisprudence. As in *Fearon*, it amounts to an inadvertent and honest mistake reasonably made and not state misconduct that requires the exclusion of evidence.[37] Police had good reason to believe what they were doing was perfectly legal. This Court in *Fearon*, unanimously found that good faith police conduct and mistaken belief in the law did not merit the exclusion of evidence. This case is very different from *R v Paterson*, where there was no real dispute in the law and no real support for the officer's belief that they were acting lawfully.[38]

***i. Seriousness of the breach***

101. The trial judge and majority of the Alberta Court of Appeal were correct that the breach was minor or technical in nature and does not require the court to dissociate itself from police conduct.

102. The breach was inadvertent and not the result of wilful disregard of *Charter* rights. The breach arose from a good faith attempt to provide a caution that has a long judicial pedigree and which had been in use for decades without negative judicial comment or concern. As the trial judge found, Cst. Lynch's conduct was otherwise what one would expect of an officer aware of his obligations under the *Charter*. Cst. Lynch cannot be said to have been negligent or have acted unreasonably in reading the caution that had been given to him as appropriate to protect a

[36] 2014 SCC 77
[37] See ***R v Fearon***, 2014 SCC 77 at para 95
[38] 2017 SCC 15 at para 46

detainee's *Charter* rights. At the time of the investigation there were no decisions that found the reading of the caution was a violation of his duty to hold off. Cst. Lynch was aware of his duty to hold off and did not ask the Appellant any other questions. He promptly facilitated the Appellant's right to counsel.

103. Even the dissenting judge agreed that the conduct of the individual officer fell on the least serious end of the spectrum of police misconduct. The officer was doing his best to comply with the *Charter*.[39] Neither the officer nor the EPS intended to violate the *Charter,* nor was the EPS grossly negligent. The breach was not egregious, consisting of a single open ended question asked in the context of a police caution the officer was trained to read. The officer was not negligent in the sense that he should have known his conduct breached the *Charter*. It was reasonable for the officer to rely on his training. The dissenting judge also acknowledged that there was little case authority directly on point and at the time of the investigation the two existing decisions found that reading the EPS caution did not violate the duty to hold off.

104. However, the dissenting Justice found the breach was nevertheless serious and merited the exclusion of evidence because it was a systemic breach and the EPS ought to have recognized the wording of the caution was constitutionally suspect and selected safer wording. The dissenting Justice erred in this regard.

105. In *R v Harrison* and *R v Paterson*, this Court discusses the seriousness of infringement that is the product of systemic or institutional abuse or violations of well-established rules.[40] There was no deliberate abuse of *Charter* rights here and as discussed above there was no violation of well-established rules. The breach is not made more serious simply because it is one occasioned by a ubiquitous police practice, when the police honestly and reasonably believed that practice to be lawful. The mere fact that the impugned conduct was widespread or universal does not make that conduct systemic *Charter* abuse.

106. The dissenting Justice further suggests that because the duty to hold off is described by this Court in broad language and directs investigators to cease questioning, police ought to have recognized the potential problem with the caution.

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[39] ***R v G.T.D.***, 2017 ABCA 274 at para 81
[40] ***R v Harrison*** 2009 SCC 34 at para 25; ***R v Paterson***, 2017 SCC 15 at para 44

107. However, as described above, this Court's jurisprudence on the right to silence does not suggest that the duty to hold requires the police to cease all questioning, but rather questioning that is for an investigative purpose or an attempt to elicit evidence. Moreover, in ***R v Manninen***[41] and ***R v Singh***,[42] this Court appears to approve of the reading of a police caution containing the question "do you wish to say anything in answer to the charge?" to ensure detainees are aware of the right to silence.

108. Further, as the majority of the Alberta Court of Appeal noted the question contained in the EPS caution is not the type of questioning that has been contemplated by the case law interpreting the right to counsel. It did not involve police tactics. It was not persistent interrogation or questioning. The question was aimed more at alerting the Appellant to his options than attempting to elicit evidence. Police had no expectation that the Appellant would say anything in response to the question.

109. Moreover, as described above, the existing case law at the time of the investigation reasonably suggested that it was only questioning or conduct of an investigative nature intended to elicit evidence from a detainee that violated the duty to hold off.

110. In short, the existing jurisprudence was not so clear or well established that the conclusion the EPS caution breached the duty to hold off was inescapable or even probable. Three of the four courts specifically addressing this issue concluded that reading a police caution asking if a detainee wished to say anything does not violate the duty to hold off. This is not even a case where police were operating in a grey area or unknown legal territory at the time of the investigation, as there were no decisions that said the practice violated the *Charter* and the majority of other jurisprudence reasonably suggested that the reading of the EPS caution did not violate the *Charter*.

111. This case is very similar to *Fearon*,[43] where police honestly and reasonably believed they were acting lawfully and in accordance with their obligations under the *Charter*. The police conduct in this case does not require the court to dissociate itself from it. Rather, as the majority of the Alberta Court of Appeal suggests, excluding the statement would not be a proportionate

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[41] ***R v Manninen***, [1987] 1 SCR 1233 at para 5 and 23
[42] ***R v Singh***, 2007 SCC 48 at para 31 and 33
[43] 2014 SCC 77

response to a violation occasioned by a standard police practice, which has been previously seen as not violating the *Charter*.

112. As observed by Justices Moldaver and Gascon in *R v Paterson*, police should not be held to a standard that exceeds the wisdom and training of experienced trial and appellate judges. The question of whether the police caution breaches the right to counsel had not previously been addressed by an appellate court. At the trial level the case authority said it did not.

113. The dissenting Justice also suggests that police must adopt practices that pose the least risk of *Charter* violation and not to wait for binding court authority before changing their previously approved legal practices. However, there must be limits on the police obligation to do so. As in all *Charter* cases, there is a balancing between individual rights and the public interest and need for effective law enforcement. This balance cannot be achieved if police are perpetually required to adjust previously lawful practices in anticipation of the expansion of individual *Charter* rights.

114. It is the role of the courts and not the police to determine when existing lawful police practices need to be adjusted to accommodate new realities. There are many current police practices that could be more favourable to individuals. Police should not be required to adjust these practice to greater accommodate individual interests without the guidance of appellate courts and police cannot be faulted for not having done so. Moreover, doing so would deprive the courts the opportunity to engage in a balancing of individual and societal rights under the *Charter*, since it is unlikely that police adopting positions more favourable to individual rights will result in the Crown being able to bring an acquittal appeals.

115. For instance, prior to this Court's decision in *R v Sinclair*, the circumstances of when a detainee had a right to re-consult counsel had not been determined. Some cases had found that s. 10(b) only affords a detainee a single consultation with a lawyer. Other jurisprudence found that a detainee may have a right to further legal consultation in some circumstances. In the face of this uncertainty the safest course of action to ensure no violations of s. 10(b) would be to allow detainees to re-consult counsel upon request. However, as this Court found, doing so would not strike the appropriate balance between individual rights and effective law enforcement and an individual has a right to re-consult counsel only in limited circumstances. Yet, if police had adopted the most favourable approach and allowed all detainees to consult counsel upon request, the issue would never have come before the court and the balancing of interest could not take

place. It is unlikely that the Crown could have appealed an acquittal on the basis that an accused should not have been able to re-consult counsel.

116. The police should not be expected to change standard practices until there is clear binding authority holding that the standard practice violates the *Charter* or that it is unlawful. In this case, there was not even a trial decision that had found the reading of the EPS caution to violate the *Charter*. Further, there were two decisions of this Court implicitly suggesting that reading a caution asking a detainee if they wished to say anything was proper.

117. The dissenting Justice does not consider judicial comity and *stare decisis* in her criticism of the police. Trial courts are generally expected to follow other trial courts of concurrent jurisdiction unless there are clear articulable reasons for not doing so, to minimize inconsistency in the law until the matter is determined by an appeal court. This is so, even if the trial judge may have doubts about correctness of the other decision. As such, the police should be entitled to rely upon existing trial decisions until they are overturned by binding appellate authority. The dissenting Justice suggests that the police should have changed their practice when one of two Ontario trial decisions found that asking if a detainee wished to say anything after the police caution violated the duty to hold off. Yet that decision is not binding in Alberta and given the principle of judicial comity would not have resulted in a change in the state of the law in Alberta.

118. There is simply no basis to conclude that what is otherwise a minor or technical *Charter* breach is serious enough to merit the exclusion of evidence simply because the impugned police conduct was a ubiquitous police practice or because the police failed to anticipate this change of law. It is submitted that having regard to the jurisprudence on the right to silence, requiring police to refrain from any activity that risks prompting an incriminating statement from a detainee, represents a sea change in the state of the law, contrary to the dissenting Justice's conclusion that it does not.

### *ii. Impact of the breach*

119. The impact of the breach on the protected rights in this case was attenuated by the Appellant having had the general understanding that he did not have to say anything to police, the lack of police eliciting conduct and the trial judge's finding that the Appellant's statement was not elicited by the caution, but was a voluntary spontaneous utterance because the Appellant voluntarily chose to speak with police.

120. The secondary caution read to Appellant explained that he did not have to speak to police if he did not want to and explained the jeopardy posed by speaking to the police and accordingly reduced the impact that the breach had on the rights protected by s. 10(b).

121. In *R v Grant,* this Court explained that an accused being clearly informed of his choice to speak to counsel may attenuate the impact of a breach of the right to counsel:[44]

> … As noted, the right violated by unlawfully obtained statements is often the right to counsel under s. 10(b). The failure to advise of the right to counsel undermines the detainee's right to make a meaningful and informed choice whether to speak, the related right to silence, and, most fundamentally, the protection against testimonial self-incrimination. These rights protect the individual's interest in liberty and autonomy. Violation of these fundamental rights tends to militate in favour of excluding the statement.
>
> This said, particular circumstances may attenuate the impact of a *Charter* breach on the protected interests of the accused from whom a statement is obtained in breach of the *Charter*. For instance, if an individual is clearly informed of his or her choice to speak to the police, but compliance with s. 10(b) was technically defective at either the informational or implementational stage, the impact on the liberty and autonomy interests of the accused in making an informed choice may be reduced. Likewise, when a statement is made spontaneously following a *Charter* breach, or in the exceptional circumstances where it can confidently be said that the statement in question would have been made notwithstanding the *Charter* breach (see *R. v. Harper*, [1994] 3 S.C.R. 343 (S.C.C.)), the impact of the breach on the accused's protected interest in informed choice may be less…

122. Looking at the question "do you wish to say anything?" in the context of both the right to counsel and the standard police caution, the Appellant was clearly informed that he did not have to say anything to police, he could call a lawyer before police proceeded with their investigation and anything he said could be used against him.

123. Moreover, the trial judge found that the EPS caution did not elicit the Appellant's statement, greatly reducing the impact of the breach.

124. Further, as the majority of the Alberta Court of Appeal noted, the confessions rule also offers important safeguards to an accused. The Appellant conceded that the statement was made voluntarily. Excluding a voluntary, unforced statement following the good faith reading of the police caution would essentially be to find that s. 24(2) operates to always exclude statements made following a violation of s. 10(b).

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[44] ***R v Grant***, 2009 SCC 32 at paras 95-96

125. The trial judge and majority of the Alberta Court of Appeal were correct to find that the breach's impact on the protected right was not so great as to merit the exclusion of the Appellant's statement.

***iii. Interest in an adjudication on the merits***

126. Both the majority and dissenting Justice agreed that society's interest in an adjudication on the merits favours the admission of the Appellant's statement. The truth seeking function of the trial process is better served by the inclusion of the evidence than its exclusion.

127. The statement is reliable. It was voluntary and spontaneously given and not the result of persistent questioning or interrogation. The statement is corroborated by the uncontradicted evidence of the complainant. There was no evidence that the statement was inaccurately recorded, misunderstood or otherwise unreliable.

128. The offence was serious. It was a violent sexual assault in the face of clear verbal rejection and physical resistance, committed in front of young children.

129. Even though the Appellant's statement is not critical to the Crown's case, given the reliability of the statement, society's interest in an adjudication on the merits favours the inclusion of the Appellant's statement.

***iv. Balancing***

130. The trial judge and majority are correct that the *Grant* considerations favour the inclusion of the Appellant's statement.

131. The dissenting judge errs in her characterization of the seriousness of the breach and its impact upon protected *Charter* rights.

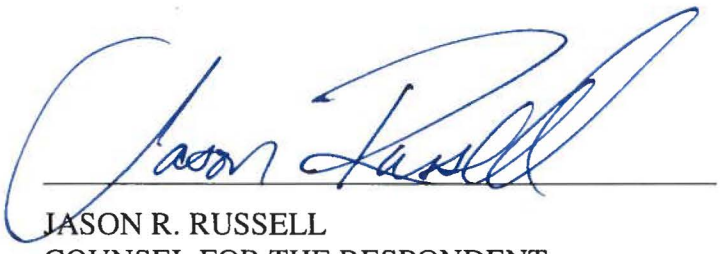
## Part IV – Submissions on costs

132. There is no basis to award costs in respect of this appeal.

## Part V – Order Sought

133. The Respondent asks that the appeal be dismissed.

All of which is respectfully submitted.



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# PART VI - Table of Authorities and Legislative Enactments

| **Case Law** | **Cited at Paragraph No.** |
|---|---|
| ***R v Cardinal***, 2015 ABPC 34 | 16, 62 |
| ***R v Charles***, 2011 ONSC 1242 | 5, 62, 64 |
| ***R v Cole***, 2012 SCC 53 | 54 |
| ***R v G.T.D.***, 2017 ABCA 274 | 47, 103 |
| ***R v Dupe***, 2010 ONSC 6594 | 7, 11, 80 |
| ***R v Fearon***, 2014 SCC 77 | 100, 111 |
| ***R v Grant***, 2009 SCC 32 | 76, 121 |
| ***R v Harrison***, 2009 SCC 34 | 105 |
| ***R v Hebert***, [1990] 2 SCR 151 | 73, 74, 75, 76 |
| ***R v Hector***, 2014 ONSC 2037 | 62, 65 |
| ***R v Keegstra***, [1995] 2 SCR 381 | 60 |
| ***R v Learning***, 2010 ONSC 3816 | 7, 11, 82 |
| ***R v Manninen***, [1987] 1 SCR 1233 | 5, 67, 68, 107 |
| ***R v McKenzie*** (2002), 162 OAC 160 | 84 |
| ***R v Mullins***, 2015 ONSC 1552 | 11, 81 |
| ***R v Paterson***, 2017 SCC 15 | 17, 100, 105, 112 |
| ***R v Rose***, 2004 BCCA 598 (sub. nom ***R v Mishra***, (2004) BCCA 598) | 7, 11, 85 |
| ***R v Saeed***, 2016 SCC 24 | 54 |
| ***R v Simpanzwe***, 2009 ABQB 579 | 5, 16, 62 |
| ***R v Sinclair***, 2003 BCSC 2040 | 7, 11, 79, 115 |
| ***R v Sinclair***, 2010 SCC 35 | 76 |