File Number: 39350

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant (on appeal)
(Respondent)

- and -

RUSSELL STEVEN TESSIER

Respondent
(Appellant)

FACTUM OF THE APPELLANT, HER MAJESTY THE QUEEN
PURSUANT TO SECTION 40(1) OF THE *SUPREME COURT ACT* AND RULE 35 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

MATTHEW W. GRIENER
Counsel for the Appellant

Alberta Crown Prosecution Service
Appeals and Specialized Prosecutions Office
3rd Floor, Bowker Building
9833-109 Street
Edmonton, AB T5K 2E8
Phone: (780) 422-5402
Fax: (780) 422-1106
Email: matthew.griener@gov.ab.ca

D. LYNNE WATT
Ottawa Agent for the Appellant

Gowling WLG (Canada) LLP
2600, 160 Elgin Street
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

PAWEL MILCZAREK
Counsel for the Respondent

Sitar & Milczarek
Barristers & Solicitors
461, 301 – 14th Street NW
Calgary, AB T2N 2A1
Phone: (403) 262-1110
Fax: (403) 262-1110
Email: pawel@yycdefence.ca

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Allan Berdahl was shot dead in the early morning hours of March 16th, 2007, his body abandoned in a ditch on a remote gravel road northeast of Calgary. The respondent was charged with first-degree murder in 2015 and convicted by a jury in 2018. The primary issue at trial was identity, and the case against the respondent was entirely circumstantial.

2. Six key pieces of evidence connected the respondent to the murder:

   a. The respondent and Mr. Berdahl were close friends, but had been in a dispute about a car in the weeks prior to the killing.

   b. Two days before the killing, the respondent retrieved his .22-calibre revolver from a shooting range, where it had been on consignment for over a year. The murder weapon was not recovered, but two .22-calibre bullets were recovered from Mr. Berdahl's skull at autopsy and a third was found at the scene.

   c. Surveillance video captured the respondent and Mr. Berdahl together around 12:30 am (eight hours before the body was found) at a convenience store in north Calgary.

   d. A DNA profile matching the respondent's was found on a discarded cigarette butt a short distance from the body.

   e. Fibre analysis and tire impressions connected the respondent's truck to the murder scene. Gunpowder residue was located on the driver's side door handle and on a pair of gloves under the driver's seat.

   f. Finally, on the day the body was found, the respondent had sold, as salvage, luggage belonging to Mr. Berdahl and a pair of Converse sneakers matching footprints found at the crime scene.

3. The Crown also tendered in evidence two statements that the respondent made to police.[1] Both statements were made on March 17th, 2007, very early in the police investigation. The respondent was not detained at the time of the statements, and he was not read his *Charter* rights or a police caution. When they spoke to the respondent, police had no suspects and were trying to speak with anyone who had information about the deceased's whereabouts and associates. In both statements, the respondent denied involvement in or knowledge of the circumstances of Mr. Berdahl's death but made a number of admissions as well as provably false statements the Crown argued were intended to deflect police suspicion.

4. The trial judge, Yamauchi J., admitted both statements as voluntary and rejected the respondent's claim that he was psychologically detained. He found no evidence of threats or inducements, no atmosphere of oppression, and no reason to doubt the respondent had an operating mind at the time of the statements. He noted the absence of police caution, but found the respondent was not a suspect or person of interest at the time of the interviews. Relying on long-established law that the police are entitled to question anyone who may have relevant information, and are not required to caution everyone with whom they speak, the trial judge found no reason to doubt the voluntariness of the statements.

5. The Alberta Court of Appeal held that the trial judge erred in applying the "overbearing the will" test for voluntariness and in failing to consider whether the respondent had made a "meaningful choice" to speak to police, knowing that he had the right to remain silent and that anything he said could be used against him in evidence. Despite the trial judge's findings that police made no threats or promises and that the conditions of the interviews were not oppressive, the Court of Appeal set aside his finding of voluntariness, quashed the conviction, and ordered a new trial.

6. The absence of a police caution was central to the Court of Appeal's analysis. That decision is at odds with the jurisprudence of this Court and other appellate courts, and with the Alberta Court of Appeal's own precedents. It should be reversed.

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[1] Statements of Accused to Police on March 17, 2007. **[A.R., Vol. 4, Tabs V and W]**

7. The Court of Appeal erred in:

a. Elevating the confessions rule to require proof beyond a reasonable doubt that the accused knew he did not have to say anything to police and that anything he did say would be taken down and could be used in evidence;

b. Requiring police to have cautioned the accused here despite the trial judge's finding that, at the time of his interview, the accused was neither detained nor suspected of committing an offence; and

c. Failing to defer to the trial judge's factual finding of voluntariness.

8. The Court of Appeal's decision has over-extended the confessions rule and risks stifling basic and uncontroversial police practices. Despite the Court's own acknowledgement that the confessions rules does not require police to caution everyone with whom they speak—and that such a requirement would be "unworkable"—the effect of the Court of Appeal's decision is that, absent a caution, the Crown cannot prove the voluntariness of statements to police in any circumstances.

B. Summary of the Evidence

i. The case for the prosecution

9. Allan Berdahl's body was found by an oilfield worker at around 8:30 am on Friday, March 16th, 2007. The body had been left in the ditch on Range Road 282, a gravel road about ten kilometres east of the QE2 highway between Edmonton and Calgary. The nearest community is the Town of Carstairs, fifteen kilometres to the west.

10. The body was found lying on its back, with the head pointed away from the road and covered in a blue fleece blanket. There was significant trauma to the head and face. The first police officers on scene made a preliminary identification of the deceased as Allan Berdahl based on a driver's licence found on the body. Officers also observed one set of tire tracks, two sets of footprints (one consistent with the boots Mr. Berdahl was wearing), and blood spatter in the otherwise undisturbed snow around the body. Two cigarette butts and a single .22 calibre bullet

were later located at the scene.[2] Forensic DNA analysis showed the presence of the respondent's DNA on one of the cigarette butts and Mr. Berdahl's on the other.[3]

11. The autopsy confirmed the cause of death to be multiple gunshot wounds to the head. Five gunshot wounds were identified:

a. A graze wound to the left forehead, within the hairline but not entering the skull;[4]

b. An entry wound to the right cheek, passing through the nasal cavity and maxillary bones and exiting near the left ear;[5]

c. An entry wound by the right ear and an associated exit wound near the left ear.[6]

d. Two more entry wounds, to the forehead and temple, which both perforated the skull and entered the brain, associated with two .22-calibre bullets recovered from the skull.[7]

12. Soot and stippling around the four entry wounds indicated that Mr. Berdahl had been shot twice at close range (between 2 cm and 2–3 feet away) and twice more with the muzzle touching or very close to the skin.[8]

13. The respondent owned a .22 calibre nine-shot revolver. He had retrieved the firearm on March 14th, two days before the murder, from a shooting range in Calgary where it had been held on consignment for over a year. As discussed below in more detail, the respondent brought police to his apartment on March 17th, where the firearm was found to be missing from its case. It was never recovered.

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[2] Evidence of Sgt. Georges Lelievre, Transcript 745/16–24; 748/12–31; 750/35–751/10; 752/18–38. **[A.R. Vol. 3, Tab P, pp. 50, 53, 55-56, 57]**
[3] Evidence of Jason Solinski, Transcript 1239/18–1241/11. **[A.R. Vol. 4, Tab S, pp. 8-10]**
[4] Evidence of Dr. Sam Andrews, Transcript 657/4–10. **[A.R. Vol. 3, Tab O, p. 30]**
[5] Evidence of Dr. Sam Andrews, Transcript 657/29–35. **[A.R. Vol 3, Tab O, p. 30]**
[6] Evidence of Dr. Sam Andrews, Transcript 662/2–10. **[A.R. Vol. 3, Tab O, p. 35]**
[7] Evidence of Dr. Sam Andrews, Transcript 657/37–658/3; 659/17–32; 662/20–30. **[A.R. Vol. 3, Tab O, p. 30]**
[8] Evidence of Dr. Sam Andrews, Transcript, 659/34–661/28. **[A.R. Vol. 3, Tab O, pp. 32-35]**

14. In the months before the murder, the respondent and Mr. Berdahl were engaged in a joint business venture, selling bulk luggage and clothing. They obtained the goods from Sharon and Bill Walton, who purchased unclaimed Greyhound luggage at auction and resold any items of value at flea markets. The Waltons gave the unsaleable leftovers to Mr. Berdahl and the respondent, who sold it to a used clothing exporter, Can-West Textiles, for five cents a pound.

15. Ms. Walton testified she had told the respondent they had a load ready for pickup on March 14th. The respondent first arranged to pick it up the following Sunday, but later changed his plans and retrieved it on Friday, March 16th.[9] He sold 794 lbs. of bulk luggage and clothing to Can-West that morning.[10] Police attended Can-West on March 18th and 19th and found, mixed in with a large amount of luggage bearing Greyhound luggage tags, two suitcases and personal items belonging to Mr. Berdahl and a pair of black Converse shoes with white rubber soles and toe cap. The seized shoes were consistent with the second set of footprints at the murder scene.

16. The Crown suggested a potential motive for the killing arose from a conflict between the respondent and Mr. Berdahl over a vintage car, a black 1968 AMC Ambassador. The precise details of this conflict were unclear. It apparently revolved around the ownership of the vehicle, which the deceased planned to take with him when he moved to Winnipeg, but which the respondent had sold without telling Mr. Berdahl. There was evidence that the two were "fighting" about the vehicle regularly, and the respondent told a friend that Mr. Berdahl had threatened him.[11]

17. Finally, surveillance video showed the respondent and Mr. Berdahl together around 6 p.m. on March 15th at a Denny's restaurant and, at 12:30 am on March 16th, at a Mac's convenience store. The Mac's video shows the respondent in black shoes with a white toe cap.

ii. The respondent's interactions with police on March 17th

18. Members of the RCMP Major Crimes Unit in Calgary assumed conduct of the investigation, with assistance from officers in Didsbury (the nearest RCMP detachment) and Red

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[9] Evidence of Sharon Walton, Transcript 453/4–41. **[A.R. Vol. 3, Tab M, p. 6]**
[10] Evidence of Naguib Tharani, Transcript 468/24–471/17. **[A.R. Vol. 3, Tab N, pp. 22-25]**
[11] Evidence of Jennifer Hirsch, Transcript 968/4–969/10 **[A.R. Vol. 3, Tab Q, pp. 94-95]**; Evidence of Robert D'Mello, 1178/27–1179/36. **[A.R. Vol. 3, Tab R, pp. 134-135]**

Deer. Officers began attempting to locate and speak with Mr. Berdahl's friends and family, and surveillance was established at his residence in Calgary.

19. Through interviews conducted March 16th, police learned that the deceased had a close friend named "Russ" or "Steve." It was not immediately clear that Russ and Steve were the same person. On the morning of March 17th, officers were tasked to locate and interview this individual or these individuals.

20. Around noon, Sgt. Alexander "Sandy" White called a phone number he understood belonged to "a Steve or a Russ."[12] He spoke to the respondent, who identified himself as "Russ." Sgt. White apparently misheard the respondent's last name, which he recorded as "Mercier" in his notebook. Sgt. White identified himself as a police officer. The respondent told Sgt. White that he was in Didsbury visiting a friend, and Sgt. White asked him to come down to the Didsbury RCMP detachment. The respondent agreed, saying he would be there in around half an hour.[13]

21. Sgt. White testified that his purpose in speaking to the respondent was to obtain a "victimology" of the deceased—information about his movements, associates, friends, and the places he frequented.[14] The respondent was not considered a suspect or person of interest.[15] Indeed, Sgt. White knew very little about the respondent at the time of the interview: only that he was the deceased's best friend, worked at Foremost Dairies, was a member of the American Motor Club, and roller skated at a local rink.[16]

22. The respondent arrived on his own at the detachment just before 1 p.m. He was driven there by a friend, Ray Punter, who remained outside during the interview. Sgt. White met him at the front counter and invited him into an interview room. The door was closed but not locked. The

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[12] Sandy White retired in 2012. At the time of his retirement, he held the rank of Staff Sergeant. For simplicity, he and other officers are referred to here by their ranks at the time of the investigation, although the trial record is somewhat inconsistent on this point.

[13] Evidence of Sgt. Sandy White (voir dire), Transcript 11/38–13/1. **[A.R. Vol. 2, Tab L, pp. 11-13]**

[14] Evidence of Sgt. Sandy White (voir dire), Transcript 11/24–27. **[A.R. Vol. 2, Tab L, p. 11]**

[15] Evidence of Sgt. Sandy White (voir dire), Transcript 14/20–28. **[A.R. Vol. 2, Tab L, p. 14]**

[16] Evidence of Sgt. Sandy White (voir dire), Transcript 11/18–22. **[A.R. Vol. 2, Tab L, p. 11]**

respondent was not searched. He was not cautioned or advised of his right to counsel prior to the interview. There were no other officers present for the interview, and Sgt. White was dressed in civilian clothes. He was not carrying a weapon.[17]

23. The initial interview was approximately ninety minutes in length. At the outset, Sgt. White advised the respondent that the interview was being recorded and that police were investigating Mr. Berdahl's death as a homicide.[18] The respondent stated that he had met Mr. Berdahl through "doing the auctions," and that they were friends.

24. The respondent gave an account of his and Mr. Berdahl's activities in the days preceding the murder. He told Sgt. White that Mr. Berdahl had been planning to move to Winnipeg. He had moved out of his former residence earlier that week and had stayed with the respondent on Tuesday and Wednesday night.[19] On Wednesday, March 14th, they had gone to an auction together and bought some items, then gone to Denny's for coffee, visited Mr. Berdahl's "Uncle Mike," and spent the evening at a pub until closing.[20] On Thursday, they went to Denny's again in the afternoon, rented some videos and returned to the apartment. Mr. Berdahl packed his things and left around 8 p.m. The respondent claimed that was the last time he had seen him.[21] The respondent told police he had stayed in that night watching movies, and fell asleep around 1:30 or 2 am.[22] The respondent suggested Mr. Berdahl had plans to see Uncle Mike again that evening but may also have been planning to see his drug dealer to buy oxycontin.

25. Sgt. White raised the possibility of the respondent providing a consent DNA sample. He described in general terms the process for obtaining consent, and specifically told the respondent it would be voluntary and the respondent would have the chance to talk to a lawyer first.[23] The respondent initially expressed his willingness to provide a DNA sample. But when Sgt. White went to retrieve the kit, the respondent went outside for a smoke. After speaking outside with

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[17] Evidence of Sgt. Sandy White (voir dire), Transcript, 13/26–14/10. **[A.R. Vol. 2, Tab L, pp. 13-14]**
[18] First Statement, 1/14–15, 5/130–133. **[A.R. Vol. 4, Tab V, pp. 98-102; Tab W, p. 178]**
[19] First Statement, 18/597–19/607. **[A.R. Vol. 4, Tab V, pp. 115-116; Tab W, p. 178]**
[20] First Statement, 36/1191–1205. **[A.R. Vol. 4, Tab V, p. 133; Tab W, p. 178]**
[21] First Statement, 6/147–7/188. **[A.R. Vol. 4, Tab V, pp. 103-104; Tab W, p. 178]**
[22] First Statement, 7/195–200. **[A.R. Vol. 4, Tab V, p. 104; Tab W, p. 178]**
[23] First Statement, 25/808–26/858. **[A.R. Vol. 4, Tab V, pp. 122-123; Tab W, p. 178]**

Mr. Punter, he changed his mind and said he would not provide a DNA sample. Sgt. White did not pursue the subject further.[24] Sgt. White asked if he could take a photo of the soles of the respondent's shoes, and the respondent agreed.[25]

26. Midway through the interview, Sgt. White asked the respondent directly if he had killed Mr. Berdahl. The respondent said he hadn't, but he was afraid the police would think he had.[26] Sgt. White testified his intention in doing so was to get a read on the respondent's reaction.[27] There was evidence that officers had asked the same question of Mr. Berdahl's other associates, including his ex-wife.[28]

27. The respondent mentioned a number of times that he had some of Mr. Berdahl's personal effects at his apartment and in his truck. At the end of the interview, the respondent asked Sgt. White to come with him to his truck, parked at Mr. Punter's house, to retrieve a void cheque with Mr. Berdahl's banking information. The respondent also offered repeatedly to let police in to his apartment in Calgary to retrieve Mr. Berdahl's personal effects, but Sgt. White demurred, saying police would have to check with the deceased's family first.[29] Fifteen minutes later, Sgt. White met the respondent at his vehicle, where the respondent handed over the cheque and a Tylenol bottle belonging to Mr. Berdahl. They chatted briefly about vintage cars with Mr. Punter, before Sgt. White left. He left his business card with the respondent, in case anything came up later. Sgt. White's first interaction with the respondent ended around 2:45 p.m.

28. Shortly after Sgt. White's departure, the respondent began trying to contact him. He left two voicemails that afternoon. In the first message, at 3:27 p.m., the respondent said he had forgotten to mention that "I did tell Al I was coming up this way."[30] In the next message, at 4:03 p.m., he asked for a call back because he "forgot something on Wednesday that totally slipped

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[24] First Statement, 32/1062–34/1123. **[A.R. Vol. 4, Tab V, pp. 129-131; Tab W, p. 178]**
[25] First Statement, 33/1116–35/1157. **[A.R. Vol. 4, Tab V, pp. 130-132; Tab W, p. 178]**
[26] First Statement, 29/980–30/891. **[A.R. Vol. 4, Tab V, pp. 126-127; Tab W, p. 178]**
[27] Evidence of Sgt. Sandy White (voir dire), Transcript, 35/13–21. **[A.R. Vol. 2, Tab L, p. 35]**
[28] Evidence of Cpl. Robert Norum (voir dire), Transcript 194/38–41. **[A.R. Vol. 2, Tab L, p. 194]**
[29] First Statement, 41/1386–1400. **[A.R. Vol. 4, Tab V, p. 138; Tab W, p. 178]**
[30] Statements, p. 51. **[A.R. Vol. 4, Tab V, p. 145; Tab W, p. 178]**

my mind."[31] An hour later, the respondent returned to the Didsbury detachment asking to speak to Sgt. White, who had not returned his calls.[32]

29. When Sgt. White attended the counter, the respondent immediately stated that he had remembered something else from Wednesday and that he wanted an officer to come to his apartment. He told Sgt. White that, on Wednesday afternoon, he had left Mr. Berdahl at Denny's to attend a shooting range, to see if they had a cheque for him. They did not, but while there he discovered his gun had been damaged, so he got a case for it from his parents and returned to pick up the gun. After retrieving the gun, he returned to Denny's to pick up Mr. Berdahl, they ran some errands and then returned home.

30. The respondent said he put the gun in the case in a bedroom closet, but had not told Mr. Berdahl about it. Mr. Berdahl had been sleeping in that bedroom on Wednesday night, so the respondent then asked Sgt. White to come with him to Calgary to make sure the gun was still there:

> Um so uh is there a possibility of someone coming with me and check and make sure that everything's okay. … I mean um, that's the main thing. I want to make sure everything is where its supposed to be cause if that turns up later and I don't know about it, that's worse for me.[33]

31. Sgt. White agreed to go with the respondent to his apartment. He asked another officer, Cpl. Norum, to accompany him, and they followed the respondent in a police vehicle. Just before the turn-off onto the highway to Calgary, the respondent pulled over onto the shoulder and exited his vehicle. He told Sgt. White he was unable to drive and asked Sgt. White to drive his truck. Sgt. White agreed and drove the respondent's truck the rest of the way to Calgary, with the respondent in the passenger seat. Cpl. Norum followed in the other vehicle.

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[31] Statements, p. 52. **[A.R. Vol. 4, Tab V, p. 146; Tab W, p. 178]**

[32] Sgt. White testified that he had not heard the voicemails by the time the respondent arrived back at the detachment, and in fact did not check his messages until three days later: Transcript, 41/14–20. **[A.R. Vol. 2, Tab L, p. 41]**

[33] Second Statement, 2/40–46. **[A.R. Vol. 4, Tab V, p. 148; Tab W, p. 178]**

32. At the respondent's residence, Mr. Tessier led the officer into the bedroom and removed the gun case from the closet. The case was empty.[34] At this point, Sgt. White cautioned Mr. Tessier and read him his right to counsel. The Crown did not seek to tender any statements made after *Charter* and caution.

33. The respondent was not charged or arrested until several years later, following receipt of additional DNA evidence made possible by advancements in the underlying technology.

C. The voir dire and the trial judge's decision to admit the statements

34. A blended voluntariness and *Charter voir dire* (alleging breaches of sections 7, 9, 10(a) and 10(b) during the interview) was held before trial. Sgt. White, Cst. Desilets, Cpl. Norum and a number of other officers gave evidence on the *voir dire*. The respondent did not testify.

i. The position of the prosecution

35. The prosecutor submitted the statements were both voluntary and that the respondent was not detained.[35] The information known to police at the outset of the interview was only that the respondent was a close friend of the deceased. In the course of the interview, the respondent disclosed having last seen the deceased some twelve hours before the discovery of the body. Other officers made a cursory visual inspection of the tires on the respondent's truck while the first interview was taking place and formed the opinion they were a possible match. Sgt. White spoke to the respondent very early in the investigation, while other officers were continuing to locate and interview others of the deceased's associates and family members. Police did not suspect or have reasonable grounds to suspect the respondent of involvement in the murder prior to the discovery of the empty gun case, and therefore were not required to caution him.

36. The prosecutor submitted nothing else in the circumstances of the interview should give a reasonable doubt as to voluntariness. There were no threats or promises made, and nothing oppressive about the conditions of the interviews. The video showed the respondent to be well

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[34] Evidence of Sgt. Sandy White (voir dire), Transcript, 57/12–38. **[A.R. Vol. 2, Tab L, p. 57]**

[35] Transcript 230–256. **[A.R. Vol. 2, Tab L, pp. 230-256]**

aware that he was speaking to police; there was, accordingly, nothing in the evidence to suggest the respondent lacked an operating mind.

ii. The position of the defence

37. Defence counsel suggested the central factors were the absence of a caution, whether the respondent was a suspect at the time of the interview, and whether he was detained.[36] He argued voluntariness requires proof of a meaningful choice, and this should imply that the accused has an awareness of his jeopardy before making that decision. Counsel argued, following *R v Worrall*,[37] that a caution must be given when a reasonably competent investigator would be alerted to a realistic prospect the interviewee was connected to the crime under investigation. Counsel contended that threshold was crossed here when the respondent admitted being with the deceased at 8 p.m. on Wednesday evening. Further, he argued Sgt. White did in fact suspect the respondent of the murder. Therefore, he suggested the failure to caution should render the statement involuntary.

iii. The decision of the trial judge

38. Yamauchi J. concluded the statement was voluntary and found the respondent was not detained, noting in particular the following:

a. Sgt. White did not consider the respondent a suspect when he contacted him to set up the interview, and was uncertain even as to the respondent's name;[38]

b. During the initial phone contact, Sgt. White identified himself and told the respondent he was seeking information about Mr. Berdahl. When the respondent advised he was in the Didsbury area, Sgt. White asked him to come to the detachment to speak further;[39]

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[36] Transcript, 257–71. **[A.R. Vol. 2, Tab L, p. 257-271]**
[37] ***R v Worrall***, 2002 CarswellOnt 5171, [2002] OJ No. 2711 (S.C.J.). **[Tab 1]**
[38] Reasons for Decision on *Voir Dire*, 2018 ABQB 387, at para 24 ("*Voir Dire* Reasons"). **[A.R. Vol. 1, Tab B, p. 17]**
[39] *Ibid*.

c. The respondent got a ride to the detachment from a friend, Ray Punter, who waited outside during the interview;[40]

d. At the end of the interview, the respondent left the detachment. He invited Sgt. White to come with him to view his truck. Although his ride was still there, the respondent asked if he could ride with Sgt. White instead. At the truck, the respondent handed over Mr. Berdahl's Tylenol bottle and void cheque;[41]

e. The second contact with police was initiated by the respondent, who called Sgt. White twice and then attended in person at the Didsbury detachment;[42]

f. Police made no threats, promises or inducements in the course of either interview;[43]

g. Police did not present the respondent with inadmissible or fabricated evidence. Sgt. White was not required to disclose what he knew about the cause of death, which in any event had not yet been confirmed at autopsy;[44]

h. Mr. Tessier was not intoxicated and suffered from no mental disability. He possessed an operating mind;

i. There was no atmosphere of oppression. When the respondent asked if he could go out for a cigarette break, Sgt. White did not even accompany him. While some questions were quite pointed, neither the questions themselves not the way they were posed was aggressive or intimidating;[45]

39. The trial judge discussed at length the absence of a police caution. He first considered the absence of a caution in relation to the operating mind doctrine, but concluded proof of operating mind requires only proof of the limited mental capacity to appreciate that one is speaking to

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[40] *Voir Dire* Reasons at para 25. **[A.R. Vol. 1, Tab B, p. 18]**
[41] *Voir Dire* Reasons at para 31. **[A.R. Vol. 1, Tab B, p. 18]**
[42] *Voir Dire* Reasons at para 32. **[A.R. Vol. 1, Tab B, p. 18]**
[43] *Voir Dire* Reasons at para 36. **[A.R. Vol. 1, Tab B, p. 19]**
[44] *Voir Dire* Reasons at para 37. **[A.R. Vol. 1, Tab B, p. 19]**
[45] *Voir Dire* Reasons at paras 46-47. **[A.R. Vol. 1, Tab B, p. 22]**

police.[46] He then considered it in relation to the issue of oppression, but concluded the absence of a caution, when combined with the other evidence about the conduct of the interview, was not oppressive.[47]

iv. Use of the statement at trial

40. The prosecution tendered both statements near the close of its case. In her closing address to the jury, the prosecutor referred to a number of admissions consistent with other evidence: that the respondent had picked up the salvaged luggage from the Waltons and sold it on Friday;[48] that the deceased had with him two suitcases similar to those recovered from Can West Textiles;[49] that he left the deceased at Denny's on the Wednesday afternoon to pick up his gun from the Shooting Edge;[50] and that the gun was operable.[51]

41. Three portions of the interviews were of particular significance to the prosecution's case. First, the respondent became suddenly pre-occupied with the firearm, despite not having been told Mr. Berdahl's cause of death. Second, he claimed to have last seen Mr. Berdahl at 8 p.m. on Thursday evening, a detail contradicted by the convenience store video and the respondent's bank records, which showed them together around 12:30 am the next day.[52] Third, the respondent had admitted having some dealings with the deceased over the 1968 Ambassador, but denied any hard feelings. This was contradicted by evidence that the respondent and Mr. Berdahl had fought over the car, and that the respondent told a friend that Mr. Berdahl had threatened him over it.[53]

42. Finally, the prosecutor noted that the respondent was very willing to offer Sgt. White information about the deceased's cellphone, knowing he had given the phone to a friend to get rid of the day before.[54] Similarly, he offered up his shoes to Sgt. White, knowing he had disposed of

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[46] *Voir Dire* Reasons at paras 38-41. **[A.R. Vol. 1, Tab B, pp. 19-20]**
[47] *Voir Dire* Reasons at paras. 42–52. **[A.R. Vol. 1, Tab B, pp. 20-23]**
[48] Transcript 1432/29–38. **[A.R. Vol. 4, Tab T, p. 24]**
[49] Transcript 1433/21–32. **[A.R. Vol. 4, Tab T, p. 25]**
[50] Transcript 1434/38–1435/29. **[A.R. Vol. 4, Tab T, pp. 26-27]**
[51] Transcript, 1437/8–11. **[A.R. Vol. 4, Tab T, p. 29]**
[52] Transcript, 1437/18–1441/23. **[A.R. Vol. 4, Tab T, pp. 29-33]**
[53] Transcript, 1441/25–1444/3. **[A.R. Vol. 4, Tab T, pp. 33-36]**
[54] Transcript, 1445/39–1446/28. **[A.R. Vol. 4, Tab T, p. 38]**

the shoes he wore at the time of the murder.[55] The respondent's conduct in the interview was calculated to divert suspicion.

43. The respondent did not testify at trial and called no other evidence. Defence counsel's closing address suggested the police statement was a "pure" version given within a day of Mr. Berdahl's death. Counsel noted the respondent was cooperative with police, providing a significant amount of personal information, and offering to have police search his truck and residence.[56] Counsel noted that much of the information in the statement was corroborated at trial, and invited the jury to accept the respondent's evidence that he last saw the deceased alive at 8 p.m., and to acquit on that basis.

44. The jury convicted the respondent of first-degree murder.

D. The decision of the Alberta Court of Appeal

45. The Court of Appeal allowed the respondent's appeal and ordered a new trial. While the Court acknowledged the trial judge considered the entirety of the evidence, the Court faulted him for using the *Oickle* factors as a "checklist" or as "discrete inquiries," without considering whether the respondent had made a "meaningful choice" to speak to police.[57]

46. The Court's main specific criticism related to the trial judge's treatment of the absence of a police caution. The Court acknowledged that the presence of absence of a caution is not determinative of the voluntariness inquiry,[58] and noted it would be "unworkable" to require police to caution every individual at the start of every interaction, on the chance he or she says something inculpatory.[59] But the Court held that the trial judge erred in failing to properly assess the absence of a caution here, and this error undermined his broader conclusion on voluntariness.

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[55] Transcript, 1449/35–36. **[A.R. Vol. 4, Tab T, p. 41]**
[56] Transcript, 1466/17–23. **[A.R. Vol. 4, Tab T, p. 58]**
[57] *R v Tessier*, 2020 ABCA 289, at paras 46–48 ("ABCA Reasons"). **[A.R. Vol. 1, Tab F, pp. 58-59]**
[58] ABCA Reasons at para 34, **[A.R. Vol. 1, Tab F, p. 56]** citing ***Boudreau v The King***, [1949] SCR 262.
[59] ABCA Reasons at para 39. **[A.R. Vol. 1, Tab F, p. 57]**

PART II – QUESTIONS IN ISSUE

47. This appeal raises the following issues:

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

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

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

48. The trial judge correctly held that the confessions rule requires proof that the accused possessed an operating mind and that his or her will was not overborne by police threats, inducements, or an atmosphere of oppression. The Alberta Court of Appeal erred in applying a waiver standard to voluntariness, finding the absence of caution to be fatal here, and failing to defer to the trial judge's assessment of all the circumstances of the case.

PART III – STATEMENT OF ARGUMENT

A. Overview of the confessions rule

49. The common-law confessions rule can be stated simply: the prosecution may not use at trial a statement made by an accused to a person in authority unless it proves beyond a reasonable doubt that the statement was voluntary.[60] The rule applies to all statements made to persons in authority, whether inculpatory or exculpatory.[61]

50. The confessions rule is rooted in two concerns. First, the rule protects against the danger of wrongful convictions founded on unreliable confessions; statements obtained by force, threats or promises are inherently unreliable.[62] The second is the protection of the privilege against self-incrimination.[63]

51. Canadian law also recognizes, however, that police could not investigate crime without speaking to individuals who may have relevant information: "Properly conducted police questioning is a legitimate and effective aid to criminal investigation."[64] The confessions rule balances the twin goals of protecting the rights of the accused while not unduly limiting society's need to investigate and solve crimes.[65]

52. In *Oickle*, this Court confirmed that voluntariness is a broad concept and requires a contextual analysis. Any attempt at bright line rules risks over- or under-inclusion.[66] Nonetheless, the Court outlined a list of considerations to guide trial judges in their analysis:

a. The presence of threats, promises, or inducements;

b. The existence of an atmosphere of oppression;

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[60] ***R v Oickle***, 2000 SCC 38, [2000] 2 SCR 3; ***R v Spencer***, 2007 SCC 11, [2007] 1 SCR 500; ***R v Paterson***, 2017 SCC 15, [2017] 1 SCR 202, at paras 14-15.
[61] ***Piché v. R.***, [1971] SCR 23.
[62] ***Paterson***, *supra* note 60, para 14.
[63] ***Paterson,*** *supra* note 60, para 14. See also ***R v Hodgson***, [1998] 2 SCR 449 at para 18, and ***R v Singh***, 2007 SCC 48, [2007] 3 SCR 405 at para 21.
[64] ***R v Precourt*** (1976), 1976 CanLII 692, 18 OR (2d) 714 (CA) at 721, quoted with approval in ***Oickle***, *supra* note 60, at para 33.
[65] *Ibid*.
[66] *Ibid.*, para 47.

c. The operating mind doctrine; and

d. The use of tricks or deception by police.

53. The first three of these are to be considered together, while the consideration of police trickery is a distinct inquiry focused on protecting the integrity of the criminal justice system.[67] Ultimately, however, the analysis is contextual and a trial judge must consider all the relevant factors. Where a trial judge properly considers the relevant factors, the ultimate decision on voluntariness is entitled to deference on appeal.[68]

B. The Court of Appeal erred in requiring proof of waiver of the right to silence

54. In setting aside the trial judge's finding that the respondent's two statements to police were voluntary, the Court of Appeal suggested his analysis lost sight of the real issue:

> But that finding [that the respondent had an operating mind] does not conclude the analysis on voluntariness because it does not address whether he 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*.[69]

55. Respectfully, this is inconsistent with this Court's decision in *R v Whittle*. There, having extensively reviewed the authorities, Sopinka J. concluded that the operating mind test "requires that the accused possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused."[70] This Court specifically rejected the contention that the accused must be aware of the consequences of making the particular statement in his or her particular circumstances.

56. Where the accused possesses an operating mind, the focus of the rule shifts to the external circumstances of the statement and, in particular, to the conduct of police. This focus on state action is consistent with the rationale of the rule, which is aimed at restraining police misconduct. In *Hodgson*, Cory J. noted this rationale explains two central features of the rule: the emphasis on

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[67] ***Oickle***, *supra* note 60, at paras 63-65. See also ***Spencer***, *supra* note 60, at para 12.
[68] ***Oickle***, *supra* note 60, at para 22.
[69] ABCA Reasons, para 54 (emphasis original). **[A.R. Vol. 1, Tab F, p. 60]**
[70] ***R v Whittle***, [1994] 2 SCR 914 at 939.

the voluntariness rather than the truth of the statement, and the person in authority requirement.[71] Accordingly, the voluntariness inquiry looks to whether the conduct of state actors deprived the accused of the choice whether or not to speak to the authorities.[72] This Court and others have described improper state conduct as that which causes the "will of the subject [to be] overborne."[73]

57. The Alberta Court of Appeal adopted a much broader understanding of voluntariness, requiring proof of a "meaningful choice" about whether or not to speak to state authorities. Indeed, the Court criticized the trial judge for applying the "overbearing the will" test.[74] The phrase "meaningful choice" derives from this Court's decisions in *Singh* and *Hebert*, but there the "meaningful choice" inquiry focuses on the presence or absence of state conduct undermining voluntariness. In *Hebert*, McLachlin J. (as she then was) held that "meaningful choice" was assessed objectively:

> In keeping with the approach inaugurated by the *Charter*, our courts must adopt an approach to pre-trial interrogation which emphasizes the right of the detained person to make a meaningful choice and permits the rejection of statements which have been obtained unfairly in circumstances that violate that right of choice.
>
> The right to choose whether or not to speak to the authorities is defined objectively rather than subjectively. The basic requirement that the suspect possess an operating mind has a subjective element. But this established, the focus under the *Charter* shifts to the conduct of the authorities *vis-à-vis* the suspect. Was the suspect accorded the right to consult counsel? Was there other police conduct which

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[71] ***R v Hodgson***, *supra* note 63, at para 20 ("voluntariness allows a court to analyse the circumstances surrounding the statement and effectively acts as a check on the abuse of state power.") and para 24 ("the deterrent effect [of the rule] is properly focused upon the prosecutorial authority of the state, not the personal authority of private individuals").

[72] ***Singh***, *supra* note 63, at para 36 ("On the question of voluntariness, as under any distinct s. 7 review based on an alleged breach of the right to silence, the focus is on the conduct of the police and its effect on the suspect's ability to exercise his or her free will.")

[73] ***Oickle***, *supra* note 60, at para 57 (with respect to improper inducements); see also ***Spencer***, *supra* note 60, at para 19 (voluntariness "focusses on whether the accused had an effective choice and whether his or her will was overborne").

[74] ABCA Reasons at para 57. **[A.R. Vol. 1, Tab F, p. 60]**

> effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities or not? [75]

58. Similarly in *Singh*, this Court explained that the meaningful choice analysis is not distinct from the well-known *Oickle* factors. Rather, that analysis requires a consideration of all the circumstances, including the presence of inducements, oppression, operating mind and police trickery.[76] The analysis remains an objective one focused "on the conduct of the police and its effect on the suspect's ability to exercise his or her free will."[77]

59. The Court of Appeal, by contrast, held that proof of a meaningful choice would require proof that the respondent *subjectively* "understood the police could use his statements to his detriment and that he was not obliged to speak to the police."[78] That articulation of the meaning of voluntariness effectively imports proof of waiver as a condition of admissibility of the statement. This is unsupported by authority and inconsistent with this Court's interpretation of both the confessions rule and the residual constitutional protection of the right to silence conferred by section 7 of the *Charter*.

60. The legal test for waiver is well-known:

> … the validity of […] any waiver is dependent upon it being *clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.*[79]

61. In the appellant's submission, the Court of Appeal effectively applied this test in requiring proof of actual knowledge that the respondent was not obligated to say anything, and that anything he did say could be used in evidence against him. That was an error.

62. The confessions rule has never required proof of a waiver of the right to silence. And this Court has repeatedly rejected the suggestion that a detainee's right to silence must be expressly

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[75] ***R v Hebert***, [1990] 2 SCR 151, at 181-2.
[76] ***Singh***, *supra* note 63, at para 35.
[77] *Ibid*, para 36.
[78] ABCA Reasons at para 58. **[A.R. Vol. 1, Tab F, pp. 60-61]**
[79] ***Korponay v Canada (A.G.)***, [1982] 1 SCR 41 at 49.

waived as a condition of the admissibility of an accused's statements to police.[80] In defining the contours of the right to silence and related rights, this Court has rightly sought to balance both the rights of the accused *and* the societal interest in the effective investigation of crimes, and has held that an absolute right to silence capable of discharge only by waiver would unduly hamper legitimate investigative measures. Because the protection afforded by the confessions rule is essentially the same as the s. 7 right to silence, the confessions rule should not be interpreted to require what the *Charter* does not.[81]

63. A waiver requirement is also inconsistent with the person in authority requirement of the confessions rule. Police are entitled to use undercover operations in the investigation of crime, and statements made to undercover officers are admissible without proof of voluntariness.[82] Yet it is clear that no effective waiver can be given in circumstances where the accused does not know he is speaking to police.[83]

64. Finally, as a practical matter, proof of actual knowledge will in almost all cases require proof that a police caution was given and understood.[84] Yet, as explained below, it has long been

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[80] ***R v Hebert***, [1990] 2 SCR 151 at 183 (Admissions made by detained accused to undercover police officers are admissible if not actively elicited); ***Singh***, *supra* note 63, at paras 42-48 (Police are not required to stop questioning a detainee who asserts his or her right to silence, absent a signed waiver); see also ***R v Sinclair***, 2010 SCC 35, [2010] 2 SCR 310 at para 63 ("…a rule that would require the police to automatically retreat upon a detainee stating that he or she has nothing to say, in our respectful view, would not strike the proper balance between the public interest in the investigation of crimes and the suspect's interest in being left alone").

[81] The common law right to silence and the confessions rule are "functionally equivalent" in the context of police interrogations of a person in detention. The rules do not entirely overlap in other factual circumstances, but both tests ask whether the statement is the product of a free will to speak to the authorities: ***Singh***, *supra* note 63, at para 24.

[82] ***Hodgson***, *supra* note 63, at para 39; ***R v Grandinetti***, 2005 SCC 5, [2005] 1 SCR 27 at paras 34–45.

[83] ***Hebert***, *supra* note 75, at 183-4; ***Hodgson***, *supra* note 63, at para 25.

[84] As is, in fact, required for some statements made by young persons to persons in authority: *Youth Criminal Justice Act*, SC 2002, c 1, s 146(2). In ***R v LTH,*** 2008 SCC 49, [2008] 2 SCR

the law in Canada that the presence or absence of a police caution is relevant to, but not determinative of, voluntariness. The rule articulated here by the Court of Appeal would require police to caution virtually everyone with whom they speak, just in case that person admits an offence.

65. Such a requirement would exclude evidence of 911 calls and other spontaneous and unanticipated admissions. Consider the facts of *Turcotte,* where the accused attended a police station and asked that officers be sent to the ranch where he lived, where three bodies were located.[85] While this Court confirmed no inference could be drawn from his refusal to answer further questions, there was no dispute that his initial statements were voluntary. Yet on the test applied here by the Court of Appeal, the prosecution would have to prove, despite the lack of any prior interaction between Mr. Turcotte and police, that he knew he did not have to ask that officers be sent to his ranch, and that the prosecution might use his statement in evidence against him. In the appellant's submission, this result would do nothing to advance the rationale of the confessions rule and undermines society's interest in the detection and investigation of serious crime.

66. This Court has cautioned against over-extending the confessions rule, due to the risk of stifling legitimate police practices—which include the questioning of potential witnesses and suspects.[86] The decision of the Alberta Court of Appeal greatly expands the requirements of the rule, casting doubt on basic and uncontroversial police practices. The appellant asks this Court to clarify that voluntariness exists where an accused is possessed of an operating mind, and absent state conduct that deprives him or her of the ability to choose whether or not to answer.

C. The Alberta Court of Appeal erred in requiring a police caution here

67. Having decided the trial judge erred in failing to consider the respondent's actual knowledge of his right to silence and the consequences of speaking to police, the absence of a police caution took a central role in the Court of Appeal's analysis. Although the Court of Appeal

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739 at para 1, the Court recognized this as an enhanced procedural protection not afforded to adults.

[85] ***R v Turcotte***, 2005 SCC 50, [2005] 2 SCR 519.

[86] ***Oickle***, *supra* note 60, at para 33; ***Singh***, *supra* note 63, at para 45; ***Paterson***, *supra* note 60, at paras 23–24.

stated that neither the police caution, nor whether police suspect the person being interviewed of on offence, are determinative of voluntariness, it found reversible error here solely in the trial judge's purported failure to consider the police caution.

68. In fact the trial judge did consider the absence of a caution, but gave it limited weight because he found the respondent was not considered a suspect and could not reasonably have been considered a suspect based on the information known to police at the time of the interviews. Nothing else in the circumstances raised a reasonable doubt that the respondent's statements to police were not an exercise of his free will. That decision was entitled to deference.

i. The history of the police caution and voluntariness

69. The formal police caution advises the person questioned that he or she is not obliged to say anything and that anything they do say might be given in evidence against them. It has its origins in the English Judges' Rules of 1912. In their original formulation, the Judges' Rules directed that:

> 2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions or further questions, as the case may be.
>
> 3. Persons in custody should not be questioned without the usual caution being first administered. [87]

70. In *Boudreau v The King*, this Court held that the presence or absence of a caution was relevant to but not determinative of voluntariness:

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[87] T E St Johnston, "Judges' Rules and Police Interrogation in England Today" (1966) 57:1 J Crim L Criminology & Police Sci 85. **[Tab 2]** In 1964, the English Judges' Rules were amended to require the caution be given "as soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence": *Practice Note (Judges' Rules)*, [1964] 1 WLR 152 at 153. **[Tab 3]** The Judges' Rules have since been superseded in the United Kingdom by the *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60 *Code C Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*. **[Tab 4]** Code C preserves the reasonable grounds to suspect standard: s. 10.

> The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one.[88]

71. The same rule was applied in *The Queen v Fitton*.[89] There, Rand J. noted that the Judges' Rules had no legal force in Canada, but possessed an "innate good sense […] as considerations to be kept in mind in weighing the total circumstances."[90] The only legal requirement was that the prosecution prove the statement to be voluntary (voluntariness then having the narrower *Ibrahim* sense of not having been induced by threats or promises).

72. This Court last addressed the police caution, and the circumstances in which one should be given, in *Singh*. There, Charron J. endorsed the proposition that:

> The warning should be given when there are reasonable grounds to suspect that the person being interviewed has committed an offence. An easy yardstick to determine when the warning should be given is for a police officer to consider the question of what he or she would do if the person attempted to leave the questioning room or leave the presence of the officer where a communication or exchange is taking place. If the answer is arrest (or detain) the person, then the warning should be given.[91]

73. At issue in *Singh* was a suspect interrogation, in circumstances where the accused had been arrested, told he would be charged with an offence, cautioned and given his s. 10(b) right to counsel. And so while advising police to formally caution suspects, this Court had no need to address police interviews with other witnesses. Moreover, voluntariness was conceded on appeal in *Singh*, so this Court was not required to address the consequence of a failure to caution on voluntariness.

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[88] ***Boudreau v The King***, [1949] SCR 262 at 267 (*per* Kerwin J).
[89] ***The Queen v. Fitton***, 1956 CanLII 28 (SCC), [1956] SCR 958.
[90] ***Fitton***, *supra* at 964.
[91] ***Singh***, *supra* note 63, at para 32–33, citing René Marin, *Admissibility of Statements*, (9th ed. (loose-leaf)) at p. 2.24.2–2.24.3. **[Tab 5]**

74. The Alberta Court of Appeal here specifically endorsed the reasoning in *R v Worrall*, a trial-level decision on the circumstances where a caution should be given.[92] In that case, police were called to investigate an apparent overdose death. They attended an apartment, where they understood the deceased had lived with his brother, the accused. They spoke briefly with the brother at the scene and asked him to accompany them to the police station to speak further. At the station, the accused mentioned to one officer that he had "given" his brother heroin and suggested he might have given him "too much." Some time later, police conducted a forty-five minute video interview. The accused was not cautioned at any point. Watt J. (as he then was) held that, once the accused admitted giving the deceased heroin, "any reasonably competent investigator" would have been alerted to the possibility that the death may have resulted from the accused's unlawful act.

75. Watt J. concluded that the absence of a caution was fatal to voluntariness because "Voluntariness implies an awareness about what is at stake in speaking to persons in authority, or declining to assist them."[93] The failure to caution created an "informational deficit" which disadvantaged the accused and raised a reasonable doubt as to voluntariness.

76. In the appellant's submission, a bright-line rule premised on the reasoning in *Worrall* is inconsistent with the contextual inquiry required by the confessions rule and should not be followed.

77. **First**, the *Worrall* test is premised on the subjective test rejected in *Hebert*, *Whittle* and *Oickle*. *Worrall* suggests that voluntariness encompasses an examination of the accused's subjective understanding of the risks in speaking to police. As discussed above, however, the voluntariness inquiry is objective, focused on the effect of police conduct on the suspect's ability to exercise his or her free will.[94]

78. **Second**, the *Worrall* test is inconsistent with this Court's advice in *Singh* that the caution should be given where there are reasonable grounds to suspect the person being interviewed has

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[92] ***R v Worrall***, 2002 CarswellOnt 5171, [2002] OJ No. 2711. **[Tab 1]**

[93] *Ibid*., para 106.

[94] ***Singh***, *supra* note 63 at para 36.

committed an offence.[95] It follows that where police do not suspect the person being interviewed has committed an offence, there is no obligation to caution.[96] *Worrall* sets a much lower threshold, requiring a caution wherever the facts suggest the person being interviewed "may have been associated" with the offence under investigation.[97]

79. **Third**, the *Charter*'s enhanced protections of the right to silence and right to counsel are triggered on detention or arrest, not on the mere existence of grounds to suspect the commission of an offence.[98] These enhanced protections address the imbalance of power between the state and the person under its control. This imbalance has rightly been seen as relevant to voluntariness, because the fact of detention itself may create a pressure to speak.[99] The *Charter*'s enhanced procedural protections seek to ensure the choice whether to speak to the authorities is a real one.[100] But these pressures are greatly reduced in a non-custodial interview, especially where police view the person being interviewed as merely a potential witness. This context should also inform the requirements of the confessions rule.

80. **Finally**, the contextual analysis called for in *Oickle*—and applied by the trial judge here—is sufficient to prevent the admission of statements where the lack of a caution has unfairly misled the accused about his or her jeopardy. For example, in *R v MR* the Alberta Court of Queen's Bench excluded statements made during a purportedly non-custodial interrogation.[101] Police in that case were investigating the death of an infant from methamphetamine poisoning and interviewed the child's mother (who, along with the father, were the only adults present in the apartment when the child died). Henderson J. found that police labeled her an "ordinary witness" despite in fact suspecting her involvement in the death, in order to avoid having to caution her, or to provide right

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[95] ***Singh***, *supra* note 63 at para 32–33.
[96] ***R v Joseph***, 2020 ONCA 73 at paras 49–56.
[97] ***Worrall***, *supra* note 93 at para 104.
[98] ***Hebert***, *supra* note 75 at para 184.
[99] ***Singh***, *supra* note 63 at para 32.
[100] ***R v Grant***, 2009 SCC 32, [2009] 2 SCR 353, at para 22; ***Singh***, *supra* note 63, at para 45 ("the fact of detention unquestionably triggers the need for additional checks on police interrogation techniques because of the greater vulnerability of the detainee").
[101] ***R v MR***, 2019 ABQB 588.

to counsel.[102] That suspicion was objectively reasonable on the information then known to police. The absence of a caution, in combination with other circumstances, raised a reasonable doubt as to voluntariness, and her statement was excluded.

81. For these reasons, appellate authority has consistently rejected *both* the utility of the suspect/witness distinction *and* the argument that an un-cautioned statement, even from a suspect, is for that reason inadmissible, focusing instead on the broader issue of voluntariness in all the circumstances.[103] Indeed, the Alberta Court of Appeal itself dismissed a similar claim, premised on the absence of a sufficient caution only four months before its decision in this case.[104]

ii. The significance of a lack of police caution for non-suspect interviews

82. While a bright-line rule should be rejected, there is good reason to treat the absence of caution differently depending on the circumstances in which police speak to the accused. *Worrall* itself held that the un-cautioned statements given *before* police had reasonable grounds to suspect the accused of involvement in his brother's death were voluntary.[105] The trial judge assessed the absence of caution here in the context of his factual findings that the respondent was not detained,

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[102] *Ibid*., at paras. 68-71.

[103] ***R v Anthony***, 2007 ONCA 609 at paras 7–28 (Upholding a finding of voluntariness where police interviewed the accused for an hour without caution after he reported the death of a woman in his apartment); ***R v Bottineau***, 2011 ONCA 194 at paras 84-96 ("Even where a person is a suspect, the absence of the standard caution is only one factor to be considered in the voluntariness analysis – just as the presence of such a caution does not automatically lead to the conclusion that a statement is voluntary."); ***R v Pearson***, 2017 ONCA 389 at paras 14–22 (Upholding a finding of voluntariness of an un-cautioned statement where police had reason to believe the accused was "linked in some fashion" to a murder but no grounds to arrest); see also ***R v KF***, 2010 NSCA 45 at paras 19–43 (per Beveridge JA), and ***R v Joseph***, 2020 ONCA 73.

[104] ***R v Beaver***, 2020 ABCA 203 at paras. 28–31.

[105] See also ***R v Randall***, 2003 CanLII 2205 (ON SC) (first interview with accused during investigation into the disappearance of his spouse was voluntary despite the absence of a caution).

and that police did not consider him a suspect until discovery of the missing gun. The Alberta Court of Appeal was wrong to intervene in that assessment.

83. *Oickle* requires that the voluntariness test must be applied in a flexible and contextual manner. The voluntariness rule is concerned with the coercive power of the state, and that power is directly targeted at suspects and detainees, but not at ordinary witnesses. As O'Connor J. noted in *Randall*,

> Mere witnesses, who have no likelihood of becoming accused persons have no need for the protections afforded by the rule. They are in no jeopardy of prosecution and thus of providing evidence against themselves.[106]

84. The broader context of the interview, including the stage of the investigation and the information known to police, are relevant to the impact of a caution (or lack of caution) on voluntariness. The trial judge here was entitled to find the absence of a caution weighed less heavily because Sgt. White did not suspect the respondent of involvement in the death, still less have grounds to arrest.

85. And as the Court of Appeal noted here, police are not expected to caution everyone with whom they speak. This could needlessly alarm members of the public and hinder police investigations in circumstances where police have made no demand, given no direction, and where voluntariness could not realistically be in question.[107] Despite this holding, the Court of Appeal dismissed the trial judge's conclusion that no caution was necessary here and ordered a new trial for his failure to "properly" consider the absence of a caution. On the approach taken by the Court of Appeal here, statements may be excluded for failure to caution even when received early in investigations where it may be unclear who is a suspect, and even whether a crime has been committed.

86. The risk of coerced confessions is greatly reduced in non-custodial, information-gathering interviews with potential witnesses, and there is a significant societal interest in permitting police to obtain information from anyone who may have it. The trial judge considered all the circumstances here, including the fact no caution was given and the reason the police chose not to

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[106] ***Randall***, *supra* note 106, at para 18.
[107] ABCA Reasons at para 39. **[A.R. Vol. 1, Tab F, p. 57]**

caution the respondent. In setting aside the trial judge's voluntariness finding for his supposed failure to assign greater weight to the absence of a caution here, the Alberta Court of Appeal wrongly departed from precedent and created confusion for future police investigations. Its decision should be reversed.

D. The respondent's statements were voluntary

87. No serious argument was made at trial that anything other than the absence of a caution rendered these statements involuntary. Neither Sgt. White nor any other police officer made any threats, promises or other inducements in the course of either interview. There was no evidence the respondent was intoxicated or otherwise lacked an operating mind at the time of the statements.

88. While the respondent said he was nervous, Sgt. White was not aggressive or intimidating. As this Court held in *Hobbins*, "an accused's own timidity or subjective fear of the police will not avail to avoid the admissibility of a statement or confession unless there are external circumstances brought about by the conduct of the police that can be said to cast doubt on the voluntariness of a statement or confession by the accused."[108]

89. Sgt. White's dealings with the respondent were not oppressive or coercive. Indeed, both interactions were conducted in a fairly relaxed manner. The respondent arrived on his own at the detachment and left for a cigarette midway through the first interview, unaccompanied by police. He invited Sgt. White to accompany him to his vehicle at the end of that interview to retrieve some of the deceased's property. His return to the detachment at 5 p.m. was unprompted by police, and he spent the drive to Calgary making unrelated phone calls and casually discussing vintage cars with Sgt. White. The respondent was not arrested or detained at the end of either interview.

90. Further, even on the meaningful choice test articulated by the Court of Appeal, there was ample evidence here to support the trial judge's finding of voluntariness. The respondent was well aware he was speaking to police and that police were investigating Mr. Berdahl's death as a homicide. Sgt. White asked him for full names, addresses and birth dates very early in the interview, telling the respondent "we have to check all this out as you're well aware."[109] The

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[108] ***Hobbins v R***, [1982] 1 SCR 553 at 556–7.
[109] First Statement, 8/232–3. **[A.R. Vol. 4, Tab V, p. 105; Tab W, p. 178]**

respondent confirmed again near the end of the first interview that he knew police would be seeking to confirm the information he provided.[110]

91. Further, the respondent told Sgt. White that he had discussed with Ray Punter whether or not he should speak to police:

> I mean this is – this is something I was talking to Ray and Fae about. I'm going there, you know, and he's going well don't paint yourself into a corner here, you know. He goes, that's just uh that's just the way it is. You know, and he goes, they try to you know find out, there's gonna be charges and whatever else there – find out what position they're putting you in.[111]

The respondent returned to this concern about being "painted into a corner" in declining to provide a consent DNA sample.[112] Finally, he returned to speak to Sgt. White about the firearm out of a belief that it would be "worse" if police learned of the gun on their own. It was clear that the respondent was concerned about his jeopardy but still chose to speak to police.

92. Indeed, the respondent was deliberate in the particular information he chose to provide. He declined to provide the DNA sample after speaking with Mr. Punter, but he was willing to provide his shoes for inspection, believing that he had disposed of the shoes worn at the crime scene. He suggested repeatedly there would be information on the deceased's cellphone, believing Mr. D'Mello had gotten rid of it. And he staged a discovery of the missing firearm, apparently to suggest the deceased had possession of it, despite never being told Mr. Berdahl's cause of death. These were free choices calculated to divert suspicion, not signs of a will overborne by police.

93. There was no reason to doubt the voluntariness of the respondent's statements to police, and the trial judge was right to admit the statements in evidence. The Court of Appeal erred in failing to defer to his essentially factual assessment.

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[110] First Statement, 39/1323–25. **[A.R. Vol. 4, Tab V, p. 136; Tab W, p. 178]**
[111] First Statement, 29/969–73. **[A.R. Vol. 4, Tab V, p. 126; Tab W, p. 178]**
[112] First Statement, 33/1094–1113. **[A.R. Vol. 4, Tab V, p. 130; Tab W, p. 178]**

E. The trial judge correctly found no *Charter* breaches here

94. The appellant anticipates the respondent will argue the appeal should be dismissed because the trial judge erred in not finding him to be detained at the time of the interviews. That submission should be rejected.

95. First, the trial judge correctly applied the *Grant* test for psychological detention and specifically referred to the objective nature of the test.[113] Indeed, in the absence of any evidence of the respondent's subjective perception of the interview, the trial judge's analysis focused solely on the effect the police conduct would have on a reasonable person in the respondent's position.

96. Second, the trial judge carefully considered all of the circumstances before concluding the respondent was not psychologically detained. Those circumstances include the following:

a. The respondent attended the Didsbury detachment voluntarily. He was not brought to the station by police, and he was not searched or handcuffed prior to the interview.[114] During the initial interview, he left the detachment for a cigarette, unaccompanied by police, and returned voluntarily.

b. At the conclusion of the interview, the respondent invited Sgt. White to come with him to retrieve some of the deceased's personal effects. The respondent asked Sgt. White for a ride, even though he could have driven out with the friend who had brought him to the detachment.[115]

c. The respondent persisted in attempting to contact Sgt. White after the initial interview, ultimately returning to the detachment to offer additional information about his firearm.

d. At the time of the interview, Sgt. White was engaged in information-gathering in relation to the death of Mr. Berdahl.[116] The respondent was not considered a

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[113] *Voir Dire* Reasons, para 57 (quoting ***R v Suberu***, 2009 SCC 33, [2009] 2 SCR 460), at paras 58-60 (quoting ***R v Grant***, 2009 SCC 32, [2009] 2 SCR 353); **[A.R. Vol. 1, Tab B, pp. 24-26]**
[114] *Voir Dire* Reasons, paras 69–70. **[A.R. Vol. 1, Tab B, pp. 27-28]**
[115] *Voir Dire* Reasons, para 71. **[A.R. Vol. 1, Tab B, p. 28]**
[116] *Voir Dire* Reasons, paras. 73–79. **[A.R. Vol. 1, Tab B, pp. 28-29]**

suspect, and police had no grounds to consider the respondent a suspect until the firearm was discovered missing later that evening (at which time he was read the *Charter* right to counsel and police caution).[117]

e. The Respondent was 40 years old at the time of the interview. He was employed full-time. There was no evidence that he was unsophisticated or of low intelligence.[118]

97. This Court's decision in *Le* does not affect the *Grant* analysis here.[119] *Le* confirmed the *Grant* framework, and none of the specific factors found to result in psychological detention there—the entry of three uniformed officers into a private yard, focused questioning of the five young racialized men gathered in the yard, including a request to produce identification documents, and directions to keep their hands visible—are present in this case.

98. The trial judge properly applied the *Grant* test for psychological detention, and his rejection of the s. 10(b) claim is amply supported on this record. The appeal should be allowed, and the conviction restored.

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[117] *Voir Dire* Reasons, paras. 80–81. **[A.R. Vol. 1, Tab B, p. 29]**
[118] *Voir Dire* Reasons, para. 87. **[A.R. Vol. 1, Tab B, p. 30]**
[119] ***R v Le***, 2019 SCC 34.

PART IV – COSTS

99. The Appellant does not seek costs and asks that costs not be awarded against it.

PART V – ORDER SOUGHT

100. The appellant asks this Court to allow the appeal, set aside the order of the Alberta Court of Appeal, and restore the respondent's conviction for first-degree murder.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

101. There is no publication ban, sealing order, or other restriction on public access to information in this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 27th day of May, 2021.

Matthew W. Griener
Agent of the Attorney General of Alberta

MWG/kh

PART VII – TABLE OF AUTHORITIES, SECONDARY SOURCES AND LEGISLATION

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