File Number:

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

Applicant
(Respondent)

- and -

RUSSELL STEVEN TESSIER

Respondent
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
HER MAJESTY THE QUEEN, APPLICANT

PURSUANT TO SECTION 693(1)(B) OF THE *CRIMINAL CODE OF CANADA*
AND SECTION 40(2) OF THE *SUPREME COURT ACT*
AND RULE 25 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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MEMORANDUM OF ARGUMENT

PART I – STATEMENT OF FACTS

1. Alan Berdahl's body was found on March 16, 2007, in a ditch on a rural highway in Alberta. An autopsy would confirm the cause of death to be gunshot wounds to the head: Mr. Berdahl had been shot five times in the head, twice at close range.

2. The respondent was charged with first-degree murder in 2015, and convicted by a jury in 2018. The case against him was entirely circumstantial. Five key pieces of evidence connected the respondent to the murder: (1) Mr. Tessier had been involved in a business dispute with Mr. Berdahl in the weeks prior to his death; (2) two days before the killing, Mr. Tessier obtained his.22-calibre pistol from a shooting range, where it had been on consignment for several years (the murder weapon was not recovered, but fragments of .22-calibre bullets were recovered from Mr. Berdahl's body); (3) a DNA profile matching Mr. Tessier's was found on a discarded cigarette near the body; (4) the respondent and Mr. Berdahl were seen together around 12:30 am on March 16, in surveillance video obtained from a north Calgary convenience store; and (5) on the day the body was found, Mr. Tessier sold as salvage a blood-stained pair of shoes (that matched footprints found at the crime scene) and luggage belonging to Mr. Berdahl.

3. The Crown also tendered in evidence two statements made by Mr. Tessier to police early in the investigation.[1] In both statements, the respondent denied involvement in or knowledge of the circumstances of Mr. Berdahl's death, but made provably false statements the Crown argued were intended to deflect police suspicion.

4. Mr. Tessier was a close friend and business associate of the deceased's. Police spoke with Mr. Tessier and other individuals connected to the deceased early in the investigation. Mr. Tessier was interviewed by Staff Sergeant Alexander "Sandy" White at the RCMP detachment in Didsbury on Saturday, March 17, 2007, the day after the body was found.

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[1] Exhibit 63 (Part 1 of 2), Transcript of Statements of Accused to Police on March 17, 2007 ("Accused Statements") [Tab E].

5. The learned trial judge found Mr. Tessier was not considered a suspect at the time of the interview and was not detained. He arrived on his own at the station. He was not searched. He was not cautioned or advised of his right to counsel prior to the interview. The interview was conducted in a small interview room. The door was closed but not locked. During a break in the interview, the respondent went outside unaccompanied for a smoke and spoke with his friend, who had driven him to the detachment, before coming back inside. Police asked Mr. Tessier if he would consent to provide a DNA sample. He first responded "Why wouldn't I?" but later changed his mind after speaking with a friend. The interview was video and audio recorded and lasted approximately 90 minutes.

6. About thirty minutes after the interview ended, the respondent phoned S/Sgt White's cell phone and left a voicemail indicating he had forgotten something that happened on Wednesday.[2] He left another message thirty minutes after the first.[3] An hour later (now 5:10 pm), the respondent attended in person at the Didsbury detachment, asking to speak with S/Sgt White, since his calls had not been returned.

7. The respondent then told S/Sgt White that he had forgotten to mention he had retrieved his gun from a shooting range on Wednesday, and put it in a case in the bedroom closet of his Calgary apartment.[4] Mr. Berdahl had used that bedroom Wednesday night. He asked S/Sgt White to come to Calgary with him to make sure the firearm was still there. S/Sgt White and another officer agreed to follow the respondent in his truck.

8. At the respondent's residence, Mr. Tessier removed the gun case from the closet. The case was empty. At this point, S/Sgt White cautioned Mr. Tessier and read him his right to

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[2] Accused Statements, p. 202. [Tab E].
[3] Accused Statements, p. 203. [Tab E].
[4] Accused Statements, p. 205, ll. 25–42. [Tab E]. Police had not told the respondent that Mr. Berdahl had been shot, and it was unclear whether S/Sgt White even knew this fact at the time of the interview. The autopsy was conducted two days later, at which point the cause of death was determined to be a gunshot wound to the head.

counsel but did not place him under arrest.[5] The Crown did not seek to tender any statements made after *Charter* and caution.

9. In both interviews, Mr. Tessier denied involvement in Mr. Berdahl's death. He did make provably false statements which the Crown at trial relied on as after the fact conduct. Most significantly, the respondent told police he had last seen Mr. Berdahl around 8 pm on Thursday, March 15th. But surveillance video from a convenience store in Northeast Calgary showed the two men together around 12:30 am on the early morning of the 16th, and bank records confirmed the respondent's Visa was used there at that time. His account of retrieving the firearm was also difficult to reconcile with other evidence of his activities in the days before Mr. Berdahl was killed.

10. A blended voluntariness and *Charter voir dire* (alleging breaches of sections 9, 10(a) and 10(b) during the interview) was held before trial. The trial judge concluded the statement was voluntary and found the respondent was not detained, noting in particular:

a. S/Sgt White did not consider the respondent a suspect when he contacted him to set up the interview, and did not even know the respondent's correct name;[6]

   During the initial phone contact, S/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, S/Sgt White asked him to come to the detachment to speak further;[7] The respondent got a ride to the detachment from a friend, Ray, who waited outside during the interview.[8]

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[5] The respondent would not be charged with the murder until eight years later, following receipt of additional DNA evidence made possible by advancements in the underlying technology.

[6] Reasons for Decision on *Voir Dire*, 2018 ABQB 387, at para 24 ("*Voir Dire* Reasons"). [Tab B1]

[7] *Ibid*.

[8] *Voir Dire* Reasons at para 25. [Tab B1]

b. At the time of the interview, police had identified no suspects of persons of interest. S/Sgt White's purpose in speaking to the respondent was to obtain a biography of Mr. Bergdahl;

c. At the end of the interview, the respondent left the detachment. He invited S/Sgt White to come with him to view his truck. Although his ride was still there, the respondent asked if he could ride with S/Sgt White instead. At the truck, the respondent handed over two items belonging to Mr. Berdahl, a Tylenol bottle and a cheque;[9]

d. The second contact with police was initiated by the respondent, who called S/Sgt White twice and then attended in person at the Didsbury detachment;[10]

e. Police made no threats, promises or inducements in the course of either interview;[11]

f. Police did not present the respondent with inadmissible or fabricated evidence. S/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;[12]

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

h. There was no police misconduct amounting to an atmosphere of oppression. When the respondent asked if he could go out for a cigarette break, S/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;[13]

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[9] *Voir Dire* Reasons at para 31 [Tab B1].
[10] *Voir Dire* Reasons at para 32 [Tab B1].
[11] *Voir Dire* Reasons at para 36 [Tab B1].
[12] *Voir Dire* Reasons at para 37 [Tab B1].
[13] *Voir Dire* Reasons at paras 46-47 [Tab B1].

11. 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 police.[14] He then considered it in relation to the issue of oppression, but concluded the absence of a caution, combined with the other evidence about the conduct of the interview, was not oppressive.[15]

12. The Alberta Court of Appeal unanimously 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.[16]

13. 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,[17] 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.[18] 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.

14. The applicant respectfully submits the Alberta Court of Appeal erred in setting aside the trial judge's voluntariness analysis. 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.

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[14] *Voir Dire* Reasons at paras 38-41. [Tab B1]
[15] *Voir Dire* Reasons at paras. 42–52. [Tab B1]
[16] *R v Tessier,* 2020 ABCA 289, at paras 46–48 [Tab B5] ("ABCA Reasons").
[17] ABCA Reasons at para 34, citing ***Boudreau v The King***, [1949] SCR 262. [Tab B5]
[18] ABCA Reasons at para 39. [Tab B5]

15. With respect, the Court of Appeal's decision here has clouded the law and left police with little guidance as to what they may or may not do. 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"—it appears to be the opinion of the Court of Appeal that, absent a caution, the Crown cannot prove a "meaningful choice" to speak to police in *any* circumstances. This confusion is aggravated by the Court's decision to order a new trial without expressing any clear view on the admissibility of these statements

16. The significance of a police caution to voluntariness—particularly in the case of non-suspect interviews—has produced little certainty in the case law, and this Court should intervene to clarify the law.

PART II – QUESTIONS IN ISSUE

Question in Issue No. 1 Did the Alberta Court of Appeal err in its articulation of the common-law confessions rule?

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

PART III – ARGUMENT

Overview of the confessions rule

17. The common-law confessions rule can be stated simply: the Crown 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.[19] The rule applies to all statements made to persons in authority, whether inculpatory or (as here) exculpatory.[20]

18. 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.[21] The second is the protection of the privilege against self-incrimination.[22]

19. The common 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."[23] 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.[24]

20. 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.[25] Nonetheless, the Court outlined a list of considerations to guide trial judges in their analysis:

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

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[19] ***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.
[20] ***Piché v. R.***, [1971] SCR 23.
[21] ***Paterson***, *supra* note 19, para 14.
[22] ***Paterson,*** *supra* note 19, 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.
[23] ***R v Precourt*** (1976), 1976 CanLII 692, 18 OR (2d) 714 (CA) at 721, quoted with approval in ***Oickle***, *supra* note 19, at para 33.
[24] *Ibid.*
[25] *Ibid.*, para 47.

b. The existence of an atmosphere of oppression;

c. The operating mind doctrine; and

d. The use of tricks or deception by police.

21. 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.[26] 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.[27]

The Court of Appeal erred in articulating the test for voluntariness

22. 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*.[28]

23. The Court of Appeal's articulation of the meaning of voluntariness effectively requires the Crown to prove a 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*.

24. "Voluntariness" is rarely specifically defined in the case law. In *Horvath,* two members of this Court adopted the ordinary dictionary definition of "arising or developing in the mind without external constraint . .; of actions: performed or done of one's own free will, impulse, or choice; not constrained, prompted, or suggested by another."[29] This definition is too narrow, as

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[26] ***Oickle***, *supra* note 19, at paras 63-65. See also ***Spencer***, *supra* note 19, at para 12.
[27] ***Oickle***, *supra* note 19, at para 22.
[28] ABCA Reasons, para 54 (emphasis original). [Tab B5]
[29] ***R v Horvath***, [1979] 2 SCR 376 at 410, *per* Spence J.

the law recognizes that police may legitimately prompt and even persuade suspects to make admissions. Other decisions, including *Oickle*, have framed voluntariness almost entirely in negative terms, as requiring proof of the absence of circumstances producing *involuntariness*.

25. This focus on the circumstances of the statement, including principally 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 the voluntariness rather than the truth of the statement, and the person in authority requirement.[30] 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.[31] This Court and others have described improper state conduct as conduct that causes the "will of the subject [to be] overborne."[32]

26. The Alberta Court of Appeal appears to have adopted a 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"

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[30] ***R v Hodgson***, *supra* note 22, 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").

[31] ***Singh***, *supra* note 22, 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.") The operating mind doctrine serves a different function and includes a consideration of whether the accused has the mental capacity to understand what he or she is saying and to whom: ***R v Whittle***, [1994] 2 SCR 914; ***Oickle***, *supra* note 19, para 63; ***R v Horvath***, *supra* note 29 (statement made by 17 year-old accused in a state of "complete emotional disintegration" could not be considered voluntary).

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

test.[33] The phrase "meaningful choice" is taken from this Court's decision in *Singh*, but there the "meaningful choice" inquiry focused, again, on the presence or absence of state conduct undermining voluntariness: the well-known *Oickle* factors.[34] The Court of Appeal, by contrast, held that proof of a meaningful choice would require proof that the respondent "understood the police could use his statements to his detriment and that he was not obliged to speak to the police."[35]

27. In formulating voluntariness as 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, the Court of Appeal essentially applied the legal test for a waiver:

> … 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.*[36]

28. As a matter of principle, this Court has repeatedly rejected the suggestion that a detainee's right to silence must be expressly waived as a condition of the admissibility of an accused's statements to police. 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.[37] Because the

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[33] ABCA Reasons at para 57. [Tab B5]
[34] ***Singh***, *supra* note 22, at para 35.
[35] ABCA Reasons at para 58. [Tab B5]
[36] ***Korponay v Canada (A.G.)***, [1982] 1 SCR 41 at 49.
[37] ***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 22, 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").

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.[38]

29. Further, the Court of Appeal's decision is also inconsistent with the rationale of the person in authority requirement of the confessions rule. Canadian law has long recognized that police are entitled to use undercover operations in the investigation of crime, and statements made to undercover officers are admissible without proof of voluntariness.[39] Yet it is clear that no effective waiver can be given in circumstances where the accused does not know he is speaking to police.[40]

30. Finally, as a practical matter, proof of actual knowledge will in almost all cases require proof that a police caution was given and understood.[41] Yet, as explained below, it has long been 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. Further, a requirement to prove "meaningful choice," in the Court of Appeal's formulation, risks excluding many spontaneous admissions. Consider the facts of *R v 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.[42] 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 obviously voluntary. Yet on the test applied here by the Court of Appeal, the

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[38] It was held in ***Singh***, *supra* note 22, at para 24, that 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.

[39] ***Hodgson***, *supra* note 22, at para 39; ***R v Grandinetti***, 2005 SCC 5, [2005] 1 SCR 27 at paras 34–45.

[40] ***Hebert***, *supra* note 37, at 183-4; ***Hodgson***, *supra* note 22, at para. 25.

[41] As is, in fact, required for statements made by young persons to persons in authority: ***R v LTH,*** 2008 SCC 49, [2008] 2 SCR 739. ***LTH*** recognized this as an enhanced procedural protection not afforded to adults: para. 1.

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

Crown 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.

31. 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.[43] The decision of the Alberta Court of Appeal greatly expands the requirements of the rule, casting doubt on basic and uncontroversial police practices. The respondent asks this Court to clarify that voluntariness exists where an accused is possessed of an operating mind, and absent state conduct that effectively deprives him or her of the ability to choose whether or not to answer.

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

32. 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. There is uncertainty in the case law on the significance of a caution and the circumstances in which one is required. This Court has not addressed the significance of an absence of caution to voluntariness in the *Charter* era (indeed, not since 1956).[44] This appeal presents an opportunity to clarify the law.

Circumstances where a police caution should be given

33. The formal police caution—advising the person questioned that he or she does not have to say anything, but that anything they do say might be given in evidence against them—has its origins in the English Judges' Rules of 1912. 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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[43] ***Oickle***, *supra* note 19, at para 33; ***Singh***, *supra* note 22, at para 45; ***Paterson***, *supra* note 19, at paras 23–24.

[44] It appears to have last been at issue before this Court in ***R v Fitton***, [1956] SCR 958. As discussed further below, this Court discussed the police caution in ***Singh***, *supra* note 22, but voluntariness was conceded in that appeal.

> 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.[45]

34. 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.[46]

35. At issue in *Singh* was a suspect interrogation, in circumstances where the accused had been arrested and charged with an offence, and had been 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. It would seem to follow, however, that where police do not suspect the person being interviewed has committed an offence, there is no obligation to caution.[47]

36. Three Ontario trial-level decisions are routinely cited for proposition that police caution is required when the accused is a suspect or should reasonably be considered a suspect on the information know to police:

a. In *R v Morrison*, police responded to a call of an "unconscious female." Upon arrival, officers found a woman's body in a basement apartment with an obvious gunshot wound to the face. They advised all the occupants of the building that they were witnesses and would be transported to the police station to be

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[45] ***Boudreau v The King***, *supra* note 17, at 267 (*per* Kerwin J).
[46] ***Singh***, *supra* note 22, at para 32–33, citing René Marin, *Admissibility of Statements*, (9th ed. (loose-leaf)) at p. 2.24.2–2.24.3.
[47] ***R v Joseph***, 2020 ONCA 73 at paras 49–56.

interviewed. The accused told police that he rented the basement apartment but did not live there. Others on scene told police that in fact he did live there, and had come upstairs shortly after a gunshot was heard. Despite knowing this, police advised him that he was not a suspect, and conducted a lengthy video-recorded interview without cautioning him as to his right to silence. The statement was excluded. Trafford J. concluded that, viewed objectively, the information gathered by police prior to the interview implicated Morrison in an offence, and he ought to have been cautioned. The absence of a caution, in combination with other circumstances, raised a reasonable doubt as to the voluntariness of his statement.[48]

b. In *R v Worrall*, police investigated an apparent overdose death. They attended an apartment, where they understood the deceased had lived with his brother. There, they spoke briefly with his brother, the accused, 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. The subsequent statement was found involuntary as a result, but earlier statements made were admitted.[49]

c. In *R v Randall*, the accused reported his spouse missing to police. Police spoke with him three times over the course of a week. All three interviews took place at the police station, and the accused was not provided a caution or right to counsel

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[48] ***R v Morrison,*** 2000 CarswellOnt 5811 [Tab D1], [2000] OJ No. 5733 (SCJ)

[49] ***R v Worrall***, 2002 CarswellOnt 5171, [2002] OJ No. 2711. [Tab D3] This decision is ambiguous as to whether the first admission at the police station was admitted, but the later reasons for decision refer to it: ***R v Worrall***, 2004 CarswellOnt 669, 189 C.C.C. (3d) 79, at paras 30–31. [Tab D4]

> before any of them. O'Connor J. concluded there were no grounds to suspect the accused at the time of the first offence. He was considered only a person of interest, and police were conducting a missing person investigation with no evidence of foul play. At the time of the second and third interview, however, police had additional information raising the possibility the accused had in fact murdered his spouse. He ought to have been warned prior to those interviews, and the failure to caution him raised a doubt as to voluntariness. Specifically, O'Connor J. held that trial fairness requires that a *suspect* be apprised of the implications of lying to investigators.[50] But there was nothing to call into question the voluntariness of the first statement.

37. These decisions, including *Worrall*, which the Court of Appeal specifically endorsed here,[51] suggest that the absence of a caution will not ordinarily raise a reasonable doubt as to voluntariness unless the police *actually* consider the person being interviewed a suspect or *ought reasonably* to consider them a suspect, on the information known to police at the time. It was implicit in the reasoning of the trial judge here that the absence of a caution did not raise a reasonable doubt about voluntariness, because no caution was required.

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

38. The Court of Appeal here dismissed the trial judge's conclusion that no caution was necessary—despite purportedly endorsing the reasoning in *Worrall*—citing subsequent appellate authority rejecting the utility of the suspect/witness distinction.[52] And many courts of appeal have held, following *Boudreau*, that the presence or absence of a caution is merely a relevant factor, whether or not police consider the interviewee a suspect. But in *Bottineau* and *Pearson*, the Ontario Court of Appeal upheld findings of voluntariness, noting that the trial judges had considered all the circumstances, including the absence of a caution. The finding that the appellants in those decisions were not suspects at the time of the interview was not

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[50] ***R v Randall***, 2003 CarswellOnt 690, [2003] OJ No 718 (SCJ). [Tab D2]
[51] ABCA Reasons, paras 52–54. [Tab B5]
[52] ***R v Bottineau***, 2011 ONCA 194; ***R v Pearson***, 2017 ONCA 389; see also ***R v KF***, 2010 NSCA 45, and ***R v Joseph***, 2020 ONCA 73.

determinative, and so not necessary to address in the appeal.[53] Here, the Alberta Court of Appeal apparently found reversible error in the decision to admit the statements in the absence of a caution.

39. In the absence of greater direction from appellate courts, trial courts continue to apply the *Morrison/Worrall* framework to non-suspect interviews:

a. In *Butorac*, the British Columbia Supreme Court admitted statements made by the accused to police officers canvassing registered owners of a particular make and model of vehicle.[54] There, it was held the police investigation was at a preliminary stage, and none of the many owners of such vehicles in the Lower Mainland could be considered suspects. The Court cited *Singh* for the proposition that a police caution is especially important in assessing the voluntariness of suspect interviews, before concluding there was no other basis to doubt the voluntariness of the statement made.

b. In *Belbin*, police first encountered the accused while doing door-to-door canvassing.[55] They asked him some weeks later to attend a police station where they spoke with him for fifteen minutes and asked him to provide a DNA sample, which he did. The Court concluded police did not have information that did or should have led them to consider him a suspect at that time. Nothing else in the circumstances raised a doubt as to voluntariness, and the interview was admitted.[56]

c. In *MR*, the Alberta Court of Queen's Bench excluded statements made during a purportedly non-custodial interrogation.[57] There, police investigated the death of an infant from methamphetamine poisoning. They interviewed the accused, the child's mother (who, along with the father, were the only adults present in the

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[53] And in *Pearson*, the Court specifically found no error on the point: para. 18.
[54] ***R v Butorac***, 2010 BCSC 1173 at paras 52-69 (rev'd other grounds 2013 BCCA 421).
[55] ***R v Belbin***, 2015 ONSC 5346
[56] *Ibid*., paras 101-124.
[57] ***R v MR***, 2019 ABQB 588.

> apartment when the child died). Henderson J. found that police labeled the accused an "ordinary witness" despite in fact suspecting her involvement in the death, in order to avoid having to caution her, or to provide right to counsel.[58] 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.

40. There is good reason to treat the absence of caution differently depending on the circumstances in which police speak to the accused. First, this is consistent with *Oickle*'s direction 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. Trial judges are not wrong to weigh the absence of a caution differently in these differing circumstances.

41. Second, in the *Charter* era, the right to counsel is triggered on detention or arrest, as is greater protection under section 7 of the right to silence.[59] This Court has held that these enhanced protections address the imbalance of power between the state and the person under its control. This imbalance of power requires enhanced procedural protections to ensure the choice whether to speak to the authorities is a real one.[60] Conversely, the absence of a warning about the right not to answer questions may have less significance in assessing voluntariness for non-custodial interviews and for non-suspect interviews. 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.[61]

42. Finally, 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

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[58] *Ibid*., at paras. 68-71.
[59] ***Hebert***, *supra* note 37, at 184.
[60] ***R v Grant***, 2009 SCC 32, [2009] 2 SCR 353, at para 22; ***Singh***, *supra* note 22, 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").
[61] ***Randall***, *supra* note 50, at para 18. [Tab D2]

investigations in circumstances where police have made no demand, given no direction, and where voluntariness could not realistically be in question.[62] Yet 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.

43. Many trial and appellate decisions have found statements made during informational interviews, and without a caution, to be voluntary. The risk of coerced confessions is greatly reduced early in investigations, and there is a significant social interest in permitting police to question individuals with potential information. The trial judge considered all the circumstances here, including the fact no caution was given and the reason the police chose not to caution to 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 has ignored the standard of review, departed from precedent, and created confusion for future police investigations. This Court should intervene to clarify the law.

[62] ABCA Reasons at para 39. [Tab B5]

PART IV – SUBMISSIONS ON COSTS

44. The Applicant does not seek costs and asks that costs not be awarded against it.

PART V – ORDER SOUGHT

45. That leave to appeal against the judgment of the Alberta Court of Appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 1st day of October, 2020.

MATTHEW W. GRIENER
COUNSEL FOR THE APPLICANT

MWG/kh

PART VI - TABLE OF AUTHORITIES

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PART VII – STATUTE, REGULATION, RULE, ORDINANCE OR BY-LAW

No additional statute, regulation, etc. referred to.