SCC File No.: 39480

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

BETWEEN:

JAMES ANDREW BEAVER

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

FACTUM OF THE APPELLANT, JAMES ANDREW BEAVER

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

[1] The appellants were convicted of manslaughter in relation to the death of their roommate, Sutton Bowers. Mr. Lambert called 911, reporting his body was in the foyer of their home. Police who cleared the residence observed no blood splatter or signs of struggle. They observed the deceased was in sock feet, positioned at the bottom of a steep set of hardwood stairs. An empty bottle of rum was observed on a table. There was blood on and around his face, which appeared related to a nosebleed.[1]

[2] The on-scene officers were unequivocal that they had no grounds to detain or arrest the appellants: the men were witnesses.[2] A Sergeant nevertheless directed that both men be detained, relying on the "Medical Examiner's Act". This Act does not exist. Cst. Husband put Mr. Beaver in the back of her police car. She said she had to read him "the legalities" before taking his statement. She tried to read a standard *Charter* and caution card, but she struggled with how to fill the gap provided for the offence under investigation. She stated, giggling: "I am investigatively [*sic*] detaining you for uh, whatever is going on in there."[3] She took a statement from him, then took him to police headquarters to speak with detectives.

[3] At headquarters, Det. Hossack was tasked with interview Mr. Beaver. She arrived at approximately 11:30 a.m., where she spoke with Cst. Husband.[4] Through that discussion, she learned Mr. Beaver had been placed "under some sort of detention," not for a *Criminal Code* offence but "possibly pursuant to the "Medical Examiner's Act'." Det. Hossack understood that Cst. Husband had "Chartered and cautioned" Mr. Beaver on the basis of that investigative detention.[5]

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[1] ***R. v. Beaver and Lambert,*** 2019 ABQB 125 ["***Voir Dire Decision***"] – Joint Record of the Appellants ["JRA"] Vol. 1, Tab 1, at paras 7, 8-10 & 12. See also: ***R. v. Beaver and Lambert,*** 2020 ABCA 203 ["***ABCA Decision***"] – JRA Vol. 1, Tab 2, at paras 2-3.
[2] ***Voir Dire Decision***, *ibid.,* at paras 12-14; ***ABCA Decision****, ibid.,* at para 6.
[3] ***Voir Dire Decision***, *ibid.,* at paras 17-24; ***ABCA Decision****, ibid.,* at paras 3 & 6.
[4] Evidence of Det. Hossack, JRA Vol 1, Tab 19, p. 183, lines 15-40.
[5] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at p. 5, para 26; Evidence of Det. Hossack , JRA Vol 1, Tab 19, at pp. 184, lines 1-22 and p. 186, line 32 - p. 187, line 25.

[4] Det. Hossack knew the "Medical Examiner's Act" was not real legislation. When Det. Hossack heard what was said to Mr. Beaver on scene, she knew it made no sense. [6] As a result, Det. Hossack spoke with the primary, informing him that "the circumstances of [Mr. Beaver's] 'Charter and caution' were not satisfactory".[7] Within moments, she was instructed to arrest him for murder and to proceed with the interview as planned.

[5] More than two hours into his unlawful detention, Mr. Beaver was escorted to an interview suite by Det. Hossack. Mr. Beaver was never informed he had a choice in this matter – that he did not have to provide a statement – or told of the consequences if he did so.[8] From the outset of their interaction, Det. Hossack fostered Mr. Beaver's state of ignorance. assuring him nothing had changed, police were just trying to figure out what happened, being arrested did not mean he would be charged, and that they *Charter* everyone "in a cautionary way." On this basis, Mr. Beaver elected not to call counsel, and Det. Hossack began her interview. The sole trial issue was the admissibility of that statement.[9]

[6] Detained for nearly 15 hours, Mr. Beaver was never provided with clear information about what was at stake. He received no information at the scene – there was none to give. His interaction with Cst. Husband was "casual," her chuckles extinguishing any remaining significance from the encounter.[10] Two hours later, Det. Hossack did nothing to clarify the situation for Mr. Beaver. Instead, she expressly downplayed his jeopardy.

[7] Despite obvious issues with Mr. Beaver's ability to make a "meaningful choice" to speak with Det. Hossack, neither lower court correctly articulated nor applied this legal concept.[11] Mr. Beaver maintains that his statement was involuntary and ought to have been excluded.

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[6] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at p. 5, para 26; Evidence of Det. Hossack, JRA Vol 1, Tab 19, p. 188, line 15 - p. 190, line 33.
[7] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at p. 5, para 26; Evidence of Det. Hossack, JRA Vol 1, Tab 19, pp. 184, line 28 - p. 185, line 9 and p. 187, lines 10-11.
[8] ***Voir Dire Decision***, JRA Vol. 1, Tab 1 at paras 24-30, 90, 191 & 207; ***ABCA Decision,*** JRA Vol. 1, Tab 2, at paras 4, 24 & 29.
[9] ***Voir Dire Decision***, *ibid.,* at paras 16-20, 25 & 28-31; ***ABCA Decision****, ibid.,* at para 4 & 6; VD-10, JRA Vol. 3, Tab 26, p. 50, line 3 – p. 54, line 23.
[10] ***Voir Dire Decision***, *ibid.,* at paras 85 & 17; ***ABCA Decision,*** *ibid.,* at para 3.
[11] ***ABCA Decision****, ibid.,* at paras 28-30.

[8] Mr. Beaver relies on the Factum filed by his co-appellant, Brian Lambert, adopting it in its entirety (including the Statement of Facts as set out therein). Where further facts are important to Mr. Beaver's specific circumstances, they have been included within his Statement of Argument.

[9] In addition to the issues addressed in Mr. Lambert's factum, Mr. Beaver also maintains that his statement was involuntary and ought to have been excluded.

PART II – POINTS IN ISSUE

Issue 1: Whether the appellate court erred in upholding the trial judge's finding the primary investigator had reasonable grounds to arrest the appellants, which includes an assessment of the proper judicial considerations for scrutinizing an officer's claim of reasonable grounds for an arrest made while the arrestee is unlawfully detained.

Issue 2: Whether the appellate court erred in upholding the trial court's finding the police statements admissible:

A. Whether a subsequent lawful arrest amounts to a "fresh start" which insulates evidence from admissibility consideration pursuant to s. 24(2) of the *Charter*; and

B. If evidence is obtained in a manner that violates the appellants' *Charter* rights, should the evidence be excluded under s. 24(2) *Grant* analysis.

Issue 3: Whether the appellate court erred in upholding the trial court's finding that Mr. Beaver's police statement was voluntary.

[10] This factum begins by addressing Issue 3, which is only raised by Mr. Beaver. It will then provide the primary submissions on Issue 2B on behalf of both appellants.

[11] Issues 1 and 2A are primarily addressed in Mr. Lambert's factum. Supplementary submissions specific to Mr. Beaver on those issues have also been outlined herein.

PART III – STATEMENT OF ARGUMENT

Issue 3: Voluntariness of Mr. Beaver's Statement

Standard of Review

[12] Appellate courts should defer to voluntariness determinations if the trial judge reached them by applying the correct legal test and having considered the relevant factors.[12] If application of voluntariness principles are tainted by an error of law, no deference is owed.[13] The same is true if it is evident or probable that the trial judge misconceived or failed to consider relevant circumstances.[14]

[13] In this review the trial judge's findings of fact should be respected absent palpable and overriding error.[15] An appellate court can elaborate upon or add precision to those facts, so long as there is basis in the record to do so.[16]

Overview of Argument

[14] The voluntariness of Mr. Beaver's statement has never been assessed against anything more than the rejected *Ibrahim* rule. Applying the correct legal framework, the necessary conclusion is that the statement was not voluntary.

[15] Mr. Beaver has maintained he was unable to make a meaningful choice to speak with police because they failed to provide him with accurate information about his jeopardy, or advise he had any choice in whether to give a statement at all. The trial judge never considered this question. Instead, he reviewed the narrow checklist of factors given as examples in *Oickle* – force, inducements, etc. – and concluded none of them were present. On that basis, he declared the statement voluntary.[17]

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[12] ***R. v. Spencer,*** 2007 SCC 11 at para 17.
[13] ***R. v. Grouse,*** 2004 NSCA 108 at paras 41 & 44.
[14] *Ibid.,* at para 45, citing Rand J. in ***R. v. Fitton,*** [1956] SCR 958 at p. 962. See also: ***R. v. Tessier,*** 2020 ABCA 289 at para 23. ["*Tessier* (ABCA)"]
[15] ***R. v. Le,*** 2019 SCC 34 at para 23.
[16] *Ibid.,* para 49.
[17] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 248. See also: ***Tessier*** (ABCA), at paras 31 & 48;
R. v. Oickle, 2000 SCC 38 at paras 41 & 71; ***R. v. Singh,*** 2007 SCC 48 at para 35.

[16] On appeal, Mr. Beaver identified errors and omissions in the trial judge's analysis. None of them were resolved by the appellate court. Instead, it observed Mr. Beaver had made "the same arguments at his trial" and described them as having been "considered and rejected by the trial judge."[18] The thrust of Mr. Beaver's ground of appeal – that the trial judge failed to identify the correct legal question, or the evidence relevant to determining that question – was not considered.[19] In sum, Mr. Beaver's voluntariness argument has yet to be correctly assessed.

[17] Earlier this year, this Court granted the application for leave to appeal in *R. v. Tessier,* a case from Alberta concerning another voluntariness determination by the same trial judge.[20] In *Tessier*, the appellate court noted that the trial judge "quoted the relevant cases," but he took from them "an impoverished understanding of the modern confessions rule."[21] Had the appellate court properly engaged with the errors identified in Mr. Beaver's case, it would have come to the same conclusion. At the trial level, both *Beaver* and *Tessier* deployed the same erroneous legal framework: approaching voluntariness as a negative right focused on the reliability of confessions, narrowly guarding against any fear of prejudice or hope of advantage.[22] The law has long rejected this narrow approach. Correctly conducted, a voluntariness assessment must also consider whether an accused has been denied their right to silence.[23] In *Tessier,* the appellate court both identified and engaged with this error.[24] In *Beaver,* it did neither.

[18] While the trial judge committed the same root errors in both *Beaver* and *Tessier,* appellate review of the cases produced starkly different judgments. The source of this difference, beyond the specific underlying errors in his case, is what Mr. Beaver asks this Court

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[18] ***ABCA Decision***, JRA Vol. 1, Tab 2, at para 29.
[19] See, for example: ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 248; ***ABCA Decision,*** JRA Vol. 1, Tab 2 at para 30. See also: ***R. v. Tessier,*** 2018 ABQB 387 at paras 17-21 ["*Tessier* (ABQB)"]; [Book of Authorities, Tab 1])"BOA"; ***Tessier*** (ABCA), at paras 31 & 48; ***Oickle,*** at paras 41 & 71; ***Singh,*** at para 35.
[20] ***R. v. Tessier,*** 2021 CanLII 15597 (SCC). [*"Tessier* (Leave)"]
[21] ***Tessier*** (ABCA), at para 46.
[22] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, para 43; ***Tessier*** (ABQB), at para 16; [BOA, Tab 1]; ***Tessier*** (ABCA), at paras 27-31 & 46-47.
[23] ***Singh,*** at paras 31-32, 34 & 36.
[24] ***Tessier*** (ABCA), at paras 26-29, 31-33 & 35-38.

to address. While the trial judge in this case erred, the appellate court's failure to correct those errors on review speaks to continued problems in this area of law.

The Impoverished Understanding of Voluntariness

[19] The trial judge's narrow understanding of voluntariness meant he ignored police conduct that fell short of an *Ibrahim*-level of inducement.[25] Through this impoverished view of voluntariness, there is no appreciation that a reasonable doubt is not exclusively found in inducements, threats or violence. Rather than asking if an accused is properly informed, it observes a firm or confident accused who has his "wits about him" and holds that to be enough.[26] This approach does not recognize that the reliability of a statement can also be undermined by violations of the right to silence and the right to counsel, even without threats or inducements.[27] It finds its answer in the ability of police to continue questioning an accused that does not wish to speak, rather than considering whether the interview was fair – whether speaking with police was the product of a legally meaningful choice by the accused.[28] In doing so, it absolves the police of their informational and implementational obligations under the *Charter.*

[20] By deploying an impoverished understanding of voluntariness, the trial judge failed to engage with terms of principled significance, like voluntary, spontaneous utterance,[29] and choosing to speak.[30] The result is legally confounding determinations such as:

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[25] ***Voir Dire Decision***, JRA Vol. 1, Tab 1 at paras 43-44; ***Tessier*** (ABQB), paras 14; [BOA, Tab 1]. See also: ***Voir Dire Decision*** at paras 82, 92, 94 & 96; ***Tessier*** (ABCA), paras 47-48; ***Oickle***, para 71; ***Singh****,* at para 36.

[26] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 43-44, 82, 92, 96, 122 & 124. See also: ***Horvath v. The Queen,*** [1979] 2 S.C.R. 376.*,* para 88; ***Oickle****,* para 57; ***R. v. Othman****,* 2018 ONCA 1073 at para 13; ***R .v. W.S.****,* 2014 ONSC 3144 at para 51.

[27] See, for example: ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 251-252.

[28] *Ibid.,* at para 97, 184 & 233-236, which demonstrate the trial judge's misunderstandings regarding the right to silence, the duty to hold off and other implementational aspects of s. 10(b). See also: ***Tessier*** (ABQB)*,* paras 43-44; [BOA, Tab 1]. See also: ***Tessier*** (ABCA), para 24; ***Singh****,* at para 34.

[29] Which implies the absence of any external cause – see, for example: ***R. v. G.T.D.****,* 2017 ABCA 274 at para 97-98 (Dissenting Reasons of Veldhuis JA), adopting description of a spontaneous

a) an accused having "provided his explanation… spontaneously" in response to an officer asking what happened, in violation of their duty to hold off;[31]
b) an accused's words being "voluntary" because they knowingly engaged in the act of speech, nobody forced them to do so;[32] and
c) statements were "voluntary" because "[w]hy would they not be? If they were true, why… not voluntarily provide [an] exculpatory narrative of what… occurred?"[33]

Other Important Principles

[21] Statements by an accused to a person in a position of authority will be inadmissible unless the Crown proves beyond a reasonable doubt that they were voluntarily made. The burden and threshold imposed on the Crown is onerous for two reasons:

a) to prevent admission of statements instigated, induced or otherwise coerced by police because they are dangerous; and
b) to guarantee "the protection of the accused's rights and fairness in the criminal process."[34]

Where there is a doubt about voluntariness, to protect the repute of the administration of justice, a statement must not be admitted.[35]

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oral statement set out in ***R. v. J.W.*** (1996), 92 O.A.C. 299. See also: ***R. v. B.H.,*** 1989 ABCA 227 at paras 12-13.

[30] See, for example: ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 175-177.
[31] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 100, 233 & 237. See also: ***R. v. Briscoe,*** 2012 ABQB 111 at para 68 and ***R. v. Simpenzwe,*** 2009 ABQB 579 at para 44; ***G.T.D.,*** para 64.
[32] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 92, 99-104, 207 & 251; ***ABCA Decision,*** JRA Vol. 1, Tab 2, para 24; ***Tessier*** (ABQB), para 53; [BOA, Tab 1]. See also: ***Tessier*** (ABCA), paras 33, 41, 53 & 57-58.
[33] ***Voir Dire Decision****, ibid.,* para 85, as well as paras 92, 207, 233, 236 & 237: "In fact, one wonders whether Charter s. 7 would be breached if the authorities prevented a person from trying to profess their innocence." See also: ***ABCA Decision****, ibid.,* paras 23-26. Note: Trial and appellate authorities have repeatedly reinforced that trial judge's ought not speculate what might have occurred had an accused's rights been respected – e.g. ***R. v. Plaha*** (2004), 189 O.A.C. 376; ***R. v. Hamilton****,* 2017 ONCA 179 at para 77.
[34] ***Oickle****,* para 69. See also: ***Singh****, ibid.,* at paras 34-35.
[35] ***Singh****, ibid.,* at para 38.

[22] To be voluntary, a statement must be the product of a meaningful choice to speak with police. The circumstances in which it was made, as well as the characteristics of the particular accused, are relevant. Where state conduct effectually denied, vitiated or otherwise subverted the accused's right to make this choice, their utterances are inadmissible.[36]

[23] An accused's knowledge of their right to silence is a "threshold question." They cannot resist a police interrogation without understanding that resisting is both legally permissible and constitutionally protected.[37] This encompasses knowledge of one's jeopardy – not only that it exists, but also its extent.[38]

[24] If police fail to inform an accused of what is at stake, a reasonable doubt about voluntariness may follow.[39] In analyzing such situations, it is the effect of police misinformation that must be considered, not the motivation behind it. Focusing on the effect of such failures recognizes that an accused needs accurate information about their potential jeopardy to make meaningful choices about calling counsel, remaining silent, or speaking with police.[40] This is why, while concepts and rights underlying s. 10(b) are distinct from those relevant to s. 7 and the confessions rule, breaches of those rules are analytically relevant to voluntariness.[41]

What the Appellate Court Overlooked

[25] Proper review of the trial judge's voluntariness analysis required the appellate court to consider whether the test applied touched on the fundamental purposes of the modern-day confessions rule. The appellate court needed to be satisfied that the trial judge identified the appropriate jurisprudence, distilled the correct principles of law, and correctly applied them to the evidence he heard. To have done so, the trial judge needed to be satisfied that Mr. Beaver

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[36] *Ibid.,* at paras 27-40 & 43-50; ***Oickle***, at paras 24-71. See also: ***R. c. Aykin,*** 2019 QCCS 1372 at paras 64 & 66.
[37] ***R. v. W.R.W.*** (1992) 17 BCAC 38 at para 52.
[38] *Ibid.,* at para 26-27.
[39] ***R. v. Fernandes***, 2016 ONCA 772 at para 30.
[40] ***Singh,*** at paras 21, 23-24, 36-37, 42-48; ***R. v. Hebert,*** [1990] 2 SCR 1551; ***Aykin,*** at para 65.
[41] ***Aykin,*** at para 67, citing ***Singh,*** para 29 and ***R. v. McCrimmon***, 2010 SCC 36 at para 26. See also: ***R. v. Suberu,*** 2009 SCC 33 at para 40; ***R. v. Sinclair,*** 2010 SCC 35 at para 25; ***R. v. Griffith,*** 2021 ONCA 302 at para 69; ***R. v. LaFrance,*** 2021 ABCA 51 at para 49 (appeal to this Court filed as of right).

received the information necessary to make a meaningful choice to speak with Det. Hossack, accurately understanding:

a. his current legal status;
b. that he was not obliged to speak with her; ***and***
c. that anything he said could be used to prosecute him for murder.[42]

[26] The appellate court's finding on the voluntariness ground instead restated the conclusions of the trial judge. Its reasons did not engage the legal errors raised: that the trial judge applied an adulterated conception of the relevant law, and that he reached his conclusions because he misunderstood the principles he was applying. This abdicated the appellate court's responsibility to scrutinize the state's ability to use Mr. Beaver's own words against him.

[27] In dismissing the appeal, the appellate court emphasized the very conclusions that were sites of error by the trial judge. The appellate court referenced, for example, the conclusion that voluntariness does not rise or fall on a caution. This is accurate, but the trial judge's reiteration of this principle was not legally relevant on appeal – it was not a principle that could be determinative of the issues raised by Mr. Beaver. Proper appellate review would have paused at the trial judge's reliance on the caution given at the scene to find Mr. Beaver had the information he needed in a new scenario, two hours later, with a complete change in jeopardy and in his relationship to the state. [43] The "legalities" recited by Cst. Husband provided no meaningful information to Mr. Beaver. This is unsurprising since, when they were read, there was no information to offer.[44]

[28] Simply restating that the trial judge held Mr. Beaver knew "exactly why" he was being interviewed did not resolve the errors identified. Rather, it left the problems with his conception of *what* Mr. Beaver needed to understand untouched. It accepted the conclusion that the accused adequately understood the content of jeopardy that did not *exist* in the minds of police at the relevant time. It overlooked a dearth of analysis about the consistent confusion

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[42] ***Tessier*** (ABQB) para 46; ***Singh,*** at para 35; ***R. v. Whittle,*** [1994] 2 S.C.R. 914*,* at pp. 939 & 941 (paras 46 & 50 - WL); ***Horvath,*** para 90.
[43] Evidence of Det. Hossack, JRA Vol. 1, Tab 19, at p. 193, lines 35-40; ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 90, 91 & 93.
[44] ***ABCA Decision***, JRA Vol. 1, Tab 2, at paras 3, 24 & 30; ***Voir Dire Decision***, *ibid.,* paras 82-85 & 90-91; Exhibit VD-8, JRA Vol. 3, Tab 25, at p. 27, line 20 – p. 31, line 3.

about Mr. Beaver's status as a witness well into his interview, and about whether his arrest and interview at headquarters was different than his initial detention and questioning on scene.[45] Perhaps most importantly, it overlooked the trial judge's failure to address that, in the interview suite, Mr. Beaver's exact words indicated he had no idea what was at stake

[29] Det. Hossack's self-styled interview strategy raised further concerns within the voluntariness rubric, relating to the reliability of the statements she obtained. When deployed against a detainee with inadequate information, her style of questioning became particularly problematic. The trial judge never considered these dangers. Instead, he focused on Det. Hossack's subjective perspective – what she had intended to achieve by her questions. Approving of Det. Hossack's overall aim - she "simply wanted Mr. Beaver to confirm the information she had received" – the trial judge took no issue with the approaches she deployed.[46] The purpose of her questioning was not the issue. Properly framed, the trial judge needed to consider the impact of her tactics *on Mr. Beaver* and the resultant concerns with the utterances she obtained. Consistent with the appellate court's overall approach, the trial judge's conclusions were simply endorsed, and the problems with his underlying analysis left unresolved.[47]

The Source of the Problem & The Missing Analysis

[30] By summarily upholding the trial judge's conclusions, the appellate court never addressed the legal errors which lead to them. As a result, neither lower court actually decided the fundamental question at the core of the voluntariness *voir dire*: did Mr. Beaver make a *meaningful choice* to speak with police?

[31] The problems which went unaddressed in this case demonstrate the need for a purpose-driven synthesis of the law of voluntariness. The relevant factors are clear, but a mere checklist of factors is insufficient and risks being applied without attending to the fundamental analysis the factors are in aid of. The influence of the *Charter* requires an integrated and purpose driven

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[45] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 14, 16-17, 19, 184, 229 & 246. See also: ***Sinclair,*** paras 24-25, 29, 31, 47-48, 51 & 53-55, 62 & 65; ***ABCA Decision***, JRA Vol. 1, Tab 2, at 24 & 29.
[46] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 97 & 248; ***ABCA Decision***, JRA Vol. 1, Tab 2, at para 30. See also: ***Tessier*** (ABCA), para 43-44 & 55-56.
[47] ***ABCA Decision,*** *ibid.,* at para 30.

approach to whether the values underlying the rule have been proven beyond a reasonable doubt.

[32] To be voluntary, the Crown needed to prove that Mr. Beaver's statement was made with an awareness of what was at stake.[48] To be satisfied with the trial judge's handling of this question, the appellate court needed to consider whether the correct legal framework was applied, to the correct factors, in service of the relevant question: whether Mr. Beaver understood he could refuse to cooperate with Det. Hossack's interview, knowing what was at stake and the adversarial context in which it was occurring.[49] Answering this question required a contextual approach, with consideration to the circumstances of this particular accused.

[33] A contextual analysis reveals Mr. Beaver was completely unaware he could refuse to provide a statement, that he had the right to remain silence or that he could maintain that right in the face of police questioning.[50] He lacked familiarity with the criminal justice system. In the interview suite, his own words make plain he had no idea what was at stake.

[34] Under the physical control of the state, Mr. Beaver was already in a comparatively disadvantaged position.[51] The risk to his right to silence was exacerbated by the arbitrariness of that detention, and the way it began. Officers at the scene and in transport saw Mr. Beaver as a witness, and conveyed this impression to him. His utterances reflect this is what he understood:

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[48] ***Tessier*** (ABCA), paras 52-53 & 56; ***Horvath*** at p. 425; ***R. v. Esposito*** (1985), 12 O.A.C. 350 at para 48.

[49] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 92.

[50] This demonstrates the problem with the trial judge's partial quotation of ***R. v. Broyles,*** [1991] 3 SCR 595 at p. 609 within the ***Voir Dire Decision,*** *ibid.,* at para 128. When reviewed in context, the passage provided *no* answer to concerns raised by Mr. Beaver. Instead, the passage quoted by the trial judge is clearly curtailed by this Court's immediate reference to ***Hebert*** thereafter – if information is volunteered to a known agent of the state in circumstances that have denied an accused the right to choose, they will have been obtained in violation of their right to silence – ***Broyles,*** p. 609, quoting ***Hebert,*** p. 184.

[51] See, for example: ***LaFrance,*** para 47, citing ***R. v. Bartle,*** [1994] 3 S.C.R. 173 at 191 and ***R. v. Suter,*** 2018 SCC 34 at para 175.

he was someone that found a dead body.[52] Finding a dead body could not have possible provided sufficient information to make "clear" to Mr. Beaver the reason for his detention and his potential legal jeopardy. Not a single responding officer had reason to even *suspect* that a crime had been committed, let alone what crime that might have been or who might have been responsible. Mr. Beaver could not have had more information than the responding officers about their intentions or beliefs about his jeopardy.[53]

[35] Taking a "casual" approach, Cst. Husband read Mr. Beaver a non-specific *Charter* and caution.[54] Her tone conveyed her belief – this just a formality she had to perform before taking his witness statement.[55] Considered alongside voluntariness, these "legalities" were meaningless for voluntariness purposes. Nothing in their delivery or content raised the spectre that Mr. Beaver was a person in legal jeopardy that needed to be on guard to protect his own interests.

[36] Once arrested for murder, Mr. Beaver's legal jeopardy drastically and indisputably changed.[56] Determining if Mr. Beaver understood this change – whether his engagement with authorities after that point was the result of an informed choice – rests on how it was communicated to him and the information he was provided. This is why Det. Hossack's failure to caution was significant: not because the caution is a magical incantation, but because its language was one potential source of information crucial to making a meaningful choice.[57]

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[52] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 28-30; Exhibit VD-8, JRA Vol. 3, Tab 25, at p. 26, lines 13-14; Exhibit VD-10, JRA Vol. 3, Tab 26, at p. 53, line 18 – p. 54, line 12.
[53] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 14, 16-17, 19 & 184 & 246. See also: ***Sinclair***, paras 24-25, 29, 31, 47-48, 51 & 53-55, 62 & 65.
[54] Exhibit VD-8, JRA Vol. 3, Tab 25, at p. 28, lines 17-19.
[55] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 83.
[56] Evidence of Det. Hossack, JRA Vol. 1, Tab 19, at p. 188, lines 5-32; p. 189, lines 4-14; p. 190, line 10 – p. 191, line 23; p. 192, line 12 – p. 193, line 33; and p. 195, line 5 – p. 196, line 11.
[57] ***Voir Dire Decision***, JRA Vol. 1, Tab 1 at para 89; ***ABCA Decision***, para 30. See also: ***R. v. Worrall***, [2002] O.J. No 2711 (ONSC) at para 106; [BOA, Tab 2];. Note: The absence of a caution explaining the stakes is a significant consideration that may make it less likely an individual made a deliberate choice – see, for example: ***R. v. Boudreau***, 2012 ONCJ 322 (CanLII), para 18; ***Singh***, para 35.

[37] It is also why Det. Hossack's steadfast assurance that nothing had changed was so pernicious. By saying she was arresting him for murder, *everything* meaningfully relevant to voluntariness had changed. When interacting with Cst. Husband, Mr. Beaver was a witness. She treated him as such, someone who needed to be read the "legalities."[58] Mr. Beaver reacted to Det. Hossack's words of arrest with surprise and an explicit attempt to understand whether the situation was the same or different: whether Det. Hossack was reading to him in the same way Cst. Husband did, or not. He was assured that it was "exactly" the same. He worried out loud that maybe he didn't understand the severity of the situation.[59] Instead of getting clarity on the reality of his jeopardy, Det. Hossack's response was deliberately casual, predicating their discussion on police simply being in the early stages of their investigation. At this point, the police needed to figure out what was going on and, "because… [he] was there… in a cautionary way [they' have to charter everyone". Right now, being arrested simply meant that he could not leave.[60] Det. Hossack knew this was not true, but Mr. Beaver did not.[61]

[38] Having lulled Mr. Beaver out of any sense that his relationship with the authorities had changed, Det. Hossack began asking questions. Little in the next 10 hours of interrogation alerted Mr. Beaver to the information that Det Hossack had knowingly elided. He was repeatedly advised he was a witness, this was routine, and that he would be leaving soon.[62] The information a caution might have conveyed never came – not in a traditional caution, or in any of the circumstances surrounding their interaction.

[39] Approximately 12 hours into the custodial interview, voluntariness concerns about reliability became a live issue. After hours of questioning, Mr. Beaver began to tentatively endorse inculpatory suggestions put forth by Detective Hossack. As the hours went on, Detective Hossack repeatedly stated his memory deficits were "bullshit." She told him they

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[58] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 14; Exhibit VD-8, JRA Vol. 3, Tab 25, at p. 28, lines 10-11.
[59] Exhibit VD-10, JRA Vol. 3, Tab 26, at p. 50, line 3 – p. 54, line 12; ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 28-30.
[60] Exhibit VD-10, *ibid.,* at p. *54,* lines 1-5; ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 88.
[61] Exhibit VD-10, JRA Vol. 3, Tab 26, at p. 51, lines 4-15; Exhibit VD-8, JRA Vol. 3, Tab 25, at p. 25, lines 4-11; ***Voir Dire Decision***, JRA Vol. 1, Tab 1 at paras 25-30. See also: ***Worrall,*** at para 106; [BOA, Tab 2].
[62] Exhibit VD-10, JRA Vol. 3, Tab 26, at p. 111, lines 16-23; p. 164, line 3 – p. 165, line 7; p. 188, lines 6-22; p. 190, line 13 – p. 191, line 4; etc.

would continue to talk until he remembered, making clear that "I don't know" and "I don't remember" was not going to cut it – they could do this all night if necessary. Det. Hossack wanted answers – yes or no answers. While she purportedly wanted "the truth of what happened," the truth of 'I can't remember, give me a polygraph' was not good enough for her.[63]

[40] Having already dismissed expert evidence offered regarding questioning that increases the risk of contaminating memories – and the impossibility of separating them from real memories once they have taken hold.[64] The way an interview is conducted can impact its reliability, rendering it involuntary. That risk rises when the defendant has inadequate information about his rights, the overall circumstances, and the process. This is a key reason for the voluntariness rule in the first place.

Conclusion

[41] The Crown needed to prove Mr. Beaver made a *meaningful choice* to speak with Det. Hossack. To have done so, he needed to know his legal jeopardy – that anything he said could be used to his detriment in a homicide prosecution. Mr. Beaver was in police custody and, in Det. Hossack's own words, could not leave. The trial judge needed to be satisfied beyond a reasonable doubt that Mr. Beaver understood he did not have to say anything, particularly

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[63] Evidence of Det. Hossack, JRA Vol 1, Tab 19, at p. 198, lines 15-38; p. 199, lines 12-33; and p. 199, line 38 – p. 200, line 13. Note: As a result of Det. Hossack's approach to this interview, unlike the statement ultimately obtained in ***LaFrance,*** there is no basis to presume Mr. Beaver's statement was reliable – see: ***LaFrance,*** paras 83-84; ***R. v. Grant,*** 2009 SCC 32 at para 80.

[64] Transcript pp. 445/33-41; 446/8-33; 448/10-41; 449/1-16; 449/28 – 450/35; 451/1-6 & 451/17-41. Note: The trial judge concluded Dr. Moore was unqualified to give expert evidence in this area despite the Crown's having unequivocally accepted he was "qualified and, frankly, eminently qualified to speak to matters of cognitive science, in particular memory." – Transcript of *Voir Dire* – Testimony of Dr. Timothy Moore (Qualification *Voir Dire*) at p. 431, lines 10-14. [Not Reproduced]

given the absence of a caution, and that, if he did, his utterances could be used to prosecute him.[65]

[42] The core of voluntariness is choice. Whether the statement at issue is inculpatory or exculpatory has been legally irrelevant for decades. That Mr. Beaver began "to speak to Det. Hossack and provide her with his *exculpatory* explanation of what happened" resolved nothing – this was what triggered the statement *voir dire* in the first place.[66] That nothing was "forced out of him" and "he did not want to tell his side of the story" fell equally wide of the mark.[67] By finding solace in such conclusions, the appellate court did too. On review, it was insufficient to simply conclude the trial judge had considered the issues raised by Mr. Beaver when his reasons failed to link them to the correct legal question.

[43] On the record before the trial judge – and his own findings of fact – the Crown's burden of proof could not be satisfied. Instead, all indications pointed to doubt. To serve the underlying purposes and principles protected by the confessions rule – including "the need for law enforcement officers themselves to obey the law" and "the overall fairness of the criminal justice system"[68] – Mr. Beaver's statement ought to have been ruled involuntary.

Issue 1: Reasonable Grounds for Arrest & Proper Judicial Scrutiny When Arrestee is Unlawfully Detained

[44] On Issue 1, Mr. Beaver adopts the facts, law and analysis as set out in Mr. Lambert's factum.

Issue 2A: Admissibility of the Appellants' Statements – "Fresh Start"

[45] On Issue 2A, Mr. Beaver adopts the facts, law and analysis in Mr. Lambert's factum. Additionally, Mr. Beaver argues that – even if the arrests directed by the primary were lawful – the circumstances of Mr. Beaver's arrest could not legally constitute a "fresh start." What Det.

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[65] ***Tessier*** (ABCA), at para 37. See also: ***R. v. Gagnon,*** 2021 ABQB 94 at paras 127-128, where the trial judge noted a list of cited authorities (including ***Tessier,*** *ibid.)* do not contain anything new. *Contra:* ***R. v. Love,*** 2020 ABQB 689, where the trial judge (in *obiter*) outlined his disagreement with the appellate court in ***Tessier*** (at paras 38-62).

[66] ***ABCA Decision*** para 24 & 29; ***Voir Dire Decision***, para 92-93 & 233-236.

[67] ***Voir Dire Decision*****,** paras 85, 91 & 95. See also: ***Aykin,*** para 68.

[68] ***Tessier*** (ABCA), para 38, cited with approval in ***R. v. Agotic,*** 2020 ABQB 609 at para 180.

Hossack executed was the opposite, expressly linking her interactions with Mr. Beaver to the *Charter*-infringing conduct of Cst. Husband and others. The execution of his arrest, particularly the assurances that nothing about his circumstances had changed, meant Mr. Beaver's interactions with police formed one continuous transaction.

[46] The violations that began on scene persisted throughout Mr. Beaver's interactions with Det. Hossack, and were exacerbated by her own informational failures under ss. 10(a) and (b). The temporal, contextual and causal connections between the impugned evidence and these breaches require its exclusion pursuant to s. 24(2).

Issue 2B: Admissibility of the Appellants' Statements – s. 24(2) *Grant* Analysis

Standard of Review

[47] An appellate court may conduct a 24(2) analysis afresh if a trial judge's approach includes fundamental errors.[69] A new assessment will also be required if a trial judge erred in determining the existence, scope or seriousness of a *Charter* breach. When doing so, the trial judge's findings of fact should generally be respected, unless they are tainted by error or are otherwise unreasonable.[70]

[48] No deference is owed to any 'in the alternative' analysis put forward by a trial judge pursuant to s. 24(2) if an appellate court comes to a different determination regarding the circumstances and constitutionality of state action.[71]

[49] The trial judge's alternative section 24(2) analysis in this case attracts no deference. In finding that the appellants' arrest constituted a "'fresh start" that "cured the pre-existing breaches", he erred in determining the existence, scope and nature of the *Charter*-infringing state conduct. In addition, his reasons further reveal that he misapprehended the legal

[69] ***Le***, at para 138-139 & 49; ***R. v. Taylor,*** 2014 SCC 50 at para 42; ***R. v. Côté***, 2011 SCC 46 at para 44; ***Grant,*** para 226; ***R. v. Loewen***, 2018 SKCA 69 at para 67.

[70] ***Côté,*** para 87; ***R. v. Cole,*** 2012 SCC 53 at para 82; ***Grant,*** para 226; ***R. v. Arnault,*** 2019 SKCA 109 at para 80; ***R. v. Lichtenwald,*** 2020 SKCA 70 at paras 22 & 25. Note: To be unreasonable, a finding of fact must have affected the result and must be plainly or clearly erroneous –***Le,*** paras 23 & 206; ***Lichtenwald,*** para 18.

[71] ***Le,*** para 138; ***Grant,*** paras 129-132; ***R. v. Paterson***, 2017 SCC 15 at para 42; ***G.T.D.***, at para 51 and 2018 SCC 7 at para 3.

significance of undisputed state conduct.[72] The appellants ask that this Court analyze s. 24(2) anew.

Relevant Legal Principles

[50] Section 24(2) is concerned with maintaining respect for, and confidence in, our criminal justice system, including the rule of law and other values underlying the *Charter.* The factors relevant to the assessment and balancing of the effect of admission on public confidence are well known from *Grant*:

a. The seriousness of the *Charter*-infringing state conduct;
b. The impact of the breach on the *Charter*-protected interests of the accused; and
c. Society's interest in an adjudication on the merits.

The branches of *Grant* must be assessed "having regard to all the circumstances."[73] The focus is qualitative and prospective, with a view to the long-term repute of the administration of justice.[74] That a *Charter* breach occurred is an injustice on its own, tarnishing the reputation of our justice system.[75] The question aims at whether "reasonable members of Canadian society might wonder whether courts take individual rights and freedoms from police misconduct seriously" if evidence obtained through such violations was admitted into evidence.[76]

[51] Whether the admission of the impugned evidence would bring the administration of justice into disrepute involves assessing the "cumulative effect of multiple constitutional breaches over the course of an investigation, including those committed in relation to third parties."[77] This is because, as "breaches accumulate, they become more serious."[78]

[52] Exclusion is mandatory where disrepute would probably follow admission.[79] The evidence excluded may include evidence obtained during the interrogation of an arrestee, or as

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[72] See, for example: ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 239, 245-246, 247-248 & 259.
[73] ***Grant***, para 85.
[74] ***Taylor,*** para 37; ***R. v. Harrison,*** [2009] 2 S.C.R. 49, 2009 SCC 34*,* para 36; ***Griffith,*** para 78; ***R. v. Reilly***, 2020 BCCA 369 at paras 115-116.
[75] ***Le***, para 140
[76] ***Le,*** para 140; ***Grant,*** para 68.
[77] ***R. v. Gill,*** 2021 BCSC 377 at paras 29-30. [Citations omitted] See also: ***Le,*** para 139; ***Taylor,*** para 42.
[78] ***Gill,*** para 145.
[79] ***Le,*** para 139. [Emphasis original]

a result of the utterances, including photographs, fingerprints, and statements of witnesses so identified.[80]

I. Seriousness of the Charter-Infringing State Conduct

[53] "Deliberate or severe" breaches are serious,[81] but so too is neglect of constitutional obligations.[82] Police conduct is serious where the police "departure from *Charter* standards was major in degree, or where [they] knew (or should have known) that their conduct was not *Charter* compliant."[83] Upon arrest or detention, "[i]t is not difficult for the police to understand their obligations and to carry them out." Failing to do so signifies, at best, officer negligence – a "clear departure" from long-standing and well-established expectations that favour exclusion. Often, it is the product of willful disregard.[84] Impunity for such behaviour jeopardizes public confidence in the rule of law.[85]

[54] Breaches are not undone by the fact other, or later, officers behaved lawfully to the defendant. That other officers complied with the law serves only to not further aggravate those breaches.[86]

[55] While state misconduct committed in "good faith," may attenuate the severity of the conduct, but mere absence of bad faith is not mitigating.[87] To be "good faith," conduct must be in line with what an officer subjectively, reasonably and non-negligently believed to be the

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[80] In ***LaFrance,*** paras 40-41, 75 & 85-86, the scope of evidence ordered excluded by the majority made explicit reference to: the statements of two witnesses identified and interviewed by police as a result of Mr. LaFrance's statement, as well as other evidence obtained through the seizure of his clothing, DNA and fingerprints during the interview."

[81] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 228.

[82] ***Le,*** paras 143 & 147-148; ***Harrison,*** para 24-25; ***Paterson,*** para 44; ***R. v. Moyles,*** 2019 SKCA 72 at paras 83-84 & 87.

[83] ***Harrison***, paras 22 and 24; ***Taylor,*** para 39; ***Le***, para 149

[84] ***Harrison,*** paras 24-25; ***R. v. Gardner,*** 2021 ONSC 3468 (SCA) at para 82 [Citations omitted]; ***Griffith,*** para 67; ***Lichtenwald,*** para 89; ***Reilly,*** paras 125-134.

[85] ***Le,*** para 141; ***R. v. McGuffie,*** 2016 ONCA 365, para 62; ***R. v. McSweeney,*** 2020 ONCA 2, 384 C.C.C. (3d) 265, paras 79-80; ***Lichtenwald,*** paras 68-71, 80 & 89; ***R. v. Hobeika,*** 2020 ONCA 750 at paras 81-82; ***LaFrance,*** paras 79-80; ***Reilly,*** paras 125-134.

[86] ***Reilly,*** paras 90-102.

[87] ***Grant,*** para 75.

law.[88] If a detainee's legal rights are violated by the recklessness or negligence of police, this is not good faith.[89] While entitled to investigate crime, they are "not empowered to undertake any and all action in the exercise of that duty"; intrusions upon individual liberty interests must not be taken lightly.[90]

[56] If left without consequence, reckless disregard for *Charter* rights and departures from well-established standards of police conduct negatively impact "public confidence in the rule of law and bring the administration of justice into disrepute".[91] As this Court explained in *Le*, "the reputation of the administration of justice requires that courts should dissociate themselves from evidence obtained as a result of police negligence in meeting *Charter* standards."[92]

Application to this Case

[57] The trial judge's own findings, when applied to the correct legal framework, demonstrate the seriousness of the *Charter*-infringing conduct in this case. The trial judge found the direction to arrest the appellants at the scene was not a "good faith" breach; it "was something more than that"; it was "reckless."[93] Since the Sergeant testified he did not have grounds to direct the appellants' arrest pursuant to the *Criminal Code*, then "he should not have detained them at all."[94] His "recklessness" left the appellants with no meaningful information about their legal status or jeopardy for more than two hours.[95]

[58] This negligent arrest left the men detained on a legal fiction without information about the true nature of their jeopardy. The state of arbitrary detention was prolonged and involved active police behaviour. The men were put into police cruisers, questioned, transported, searched and then booked into holding cells. These were serious *Charter* violations that occurred on the direction of a ranking officer with 15 years of policing experience. To describe them as gravely serious is not hyperbolic – if anything, it is inadequate.

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[88] ***Lichtenwald,*** para 88, citing ***Le,*** para 147.
[89] See, for example: ***Griffith***
[90] ***R. v. Mann,*** 2004 SCC 52 at para 35.
[91] ***Lafrance***, para 79; ***Grant***, para 74; ***Taylor,*** para 39
[92] ***Le***, paras 143 and 147-148.
[93] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 230-231.
[94] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 229.
[95] ***Sinclair,*** para 26.

[59] The officers' conduct was a significant departure from the expected standard and cannot be condoned.[96] They were not wading into "uncharted legal waters" nor were they engaged in a novel exercise of ambiguous police powers.[97] The scope and requirements of lawful detention and arrest have long been clear and well-established.[98] In the past, infringements on individual freedoms without reasonable and probable grounds has been characterized as serious conduct warranting exclusion.[99]

[60] For Mr. Lambert, these violations were heightened by Constable Taylor having "invited him to break his silence," fully cognizant he was obligated to hold off any questioning. [100] His failure to do so communicates to Mr. Lambert, and to a reasonable member of the public, that the right to counsel is meaningless.[101]

[61] For Mr. Beaver, the on-scene violations were not only left uncorrected by a senior homicide detective but capitalized upon, leaving him confused but willing to talk. Det. Hossack

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[96] ***Taylor,*** para 39.
[97] ***Le***, para 149.
[98] ***R. v. Storrey,*** [1990] 1 S.C.R. 241; Factum of the Co-Appellant, Mr. Lambert, paras 40-43.
[99] ***Harrison***.
[100] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at paras 19 & 233.
[101] ***Hamilton,*** paras 72-74; ***McSweeney,*** para 79. Note: The trial judge's further misunderstanding of relevant *Charter* jurisprudence is demonstrated by his analysis of Cst. Taylor's failure to hold off – see: ***Voir Dire Decision,*** JRA Vol. 1, Tab 1, at para 233. The trial judge characterized this breach as the officer having "invited" Mr. Lambert to break his silence. The trial judge concluded this was "not a blatant disregard for Mr. Lambert's *Charter* rights" because Cst. Taylor was not "deliberately trying to elicit incriminating information". Instead, in response to being asked what happened, Mr. Lambert simply "*chose*… to provide his exculpatory narrative of what happened… With little prompting, he *chose* to speak. The prompting was not an interrogation; it was simply asking *what happened*." [All emphasis added] The trial judge characterized the posing of this question as "negligent, but not grossly so". Emphasizing it was "innocent on its face," Cst. Taylor was "not attempting to elicit evidence" but was "simply posing a question that might further the investigation". On the basis of this erroneous legal analysis, the trial judge concluded that Cst. Taylor had asked "what happened" in "good faith."

was an eighteen-year veteran. She knew Mr. Beaver had been unlawfully detained and that the information he had been provided by Cst. Husband made no sense. She knew her duties to an arrestee and why they were important. Nonetheless, she repeatedly downplayed Mr. Beaver's jeopardy, linking their interaction back to the comments of Cst. Husband, reassuring Mr. Beaver that 'nothing had changed' and he was still just a witness.[102] Det. Hossack was unequivocally aware that *everything* had changed. This was deliberate and willful police behaviour of the clearest kind. It demands exclusion in and of itself.

[62] The seriousness of the state's *Charter*-infringing conduct is further exacerbated if this Court finds the primary officer did not have reasonable grounds to arrest the appellants. With or without that s. 9 violation, however, the seriousness of the police conduct in this case strongly favours exclusion.[103]

II. Impact on the Charter-Protected Interests of the Accused

[63] Assessing the impact of breaches upon arrest or detention focuses on the two key interests that those rights protect – regaining liberty and avoiding self-incrimination.[104] Delays in questioning do not mitigate the impact of such violations nor will the otherwise respectful treatment of an accused.[105] Held in cells, an accused is both highly vulnerable and intimately aware of the power of the state. Restricting access to counsel multiplies these pressures and can increase the likelihood of later self-incrimination. Thus, the length of time a detainee is held without access to counsel becomes "inseparable" from both key interests these rights are designed to protect.[106]

[64] Without counsel's advice, an accused can only rely on their "own judgment and assessment of circumstances in deciding how to act so as to protect himself" from self-incrimination and arbitrary detention or arrest.[107] These are protections for which time

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[102] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 29-30. See also: Factum of the Co-Appellant, Mr. Lambert, paras 104-106.
[103] ***McSweeney***, paras 79-80.
[104] ***Lichtenwald,*** para 93.
[105] ***McSweeney,*** paras 29-30, citing ***Suberu,*** para 40; ***Moyles,*** paras 80 & 89.
[106] ***McSweeney,*** para 80; ***R. v. Pino,*** 2016 ONCA 389 at para 105; ***Lichtenwald,*** paras 93-94.
[107] ***R. v. Willier***, 2010 SCC 37 at para 27; ***Gardner,*** para 83.

matters.[108] Promptly providing an accused with the information they require ensures they can meaningfully exercise their legal rights, permitting an *informed* choice about whether to cooperate with investigators by giving a statement.[109]

Application to this Case

[65] Mr. Beaver's rights were not impacted, they were completely undermined.[110] That these violations produced a statement favours its exclusion.[111]

[66] Even though Mr. Lambert was provided access to counsel after his arrest, as found in *McSweeney*, the impact of the s. 10(b) breach remains serious.[112] Det. Demarino and Sgt. Arns continued minimization of the change in circumstances. The failure of the police to inform Mr. Lambert that he was previously unlawfully detained, in violations of his *Charter* rights and freedoms, exacerbated the already significant impact on his rights to make informed choice about whether to cooperate with the investigation.

[67] It is a fundamental principle "inherent to a free society founded upon the rule of law" that government be restrained from interfering with individual liberty in the absence of lawful authority.[113] The deprivations of liberty in this case significantly intruded upon the appellants' physical and mental autonomy.[114] Should this Court conclude the appellants' arrest at headquarters was also unlawful, the seriousness of these infringements are heightened.

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[108] ***Moyles,*** paras 80 & 89.
[109] ***Sinclair,*** paras 24-28; ***Gardner,*** para 83.
[110] ***Sinclair,*** paras 24-28; ***LaFrance,*** para 82.
[111] *Grant,* paras 77, 89 & 91. Note: That these utterances were exculpatory, inculpatory or some combination thereof is irrelevant to a proper s. 24(2) analysis – ***R. v. Cook***, [1998] 2 SCR 597 at para 78; ***Plaha,*** paras 12, 54-55 & 61. It is inappropriate for a trial judge "to plumb the content and significance of the conversations" the appellants would have had with police if their rights had been respected – ***R. v. Noel,*** 2019 ONCA 860 at paras 26-27; Factum of the Co-Appellant, Mr. Lambert, para 108.
[112] ***McSweeney***, at para 81
[113] ***Le,*** para 152; see also ***Grant***, paras 54 and 55
[114] ***Le***, para 153; ***Grant,*** para 19-21; ***Harrison,*** para 31.

[68] When considering the significance of these intrusions, factors taken into account should include the long-term impact of such violations on the *Charter*-protected rights of others. Admitting the evidence obtained in this case risks future disregard for individual liberty interests, condoning the arbitrary detention of individuals without regard for their corresponding legal rights and freedoms. This factor also strongly favours exclusion.

III. Society's Interest in an Adjudication on the Merits

[69] While this inquiry is concerned with society's interest in an adjudication on the merits, the focus remains on the impact of the state misconduct on the administration of justice.[115] The truth-seeking function of our courts must "not take on disproportionate significance" because "the public also has a vital interest in a justice system that is beyond reproach."[116]

[70] In this case, compounding disregard for well-established *Charter* principles resulted in the arbitrary detention, transport, search and interrogation of the appellants. Upon realizing the error, and in the absence of grounds, both were arrested and interrogated.[117] The accumulation of breaches demonstrates a pattern of disregard that undermines the repute of the administration of justice.

[71] While the charge is serious, the significant harmful effect of such conduct weighs heavily in favour of excluding the statements. As noted in *Harrison*, "[t]o appear to condone willful and flagrant *Charter* breaches that constituted a significant incursion on the appellant's rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it."[118]

Balancing the Grant Factors

[72] Balancing the considerations identified through application of these factors is not a simple contest between the degree of the police misconduct and the seriousness of an

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[115] ***Le***, para 158; ***Grant*** para 85

[116] ***Harrison***, para 34

[117] Det. Hossack testified that she did not independently believe Mr. Beaver to be arrestable. Rather, she was relying on the direction to arrest as given by the primary – Evidence of Det. Hossack, JRA Vol. 1, Tab 19 at p. 186, lines 5-15 and p. 189, line 37.

[118] ***Harrison***, para 39.

offence.[119] Each factor must be considered and weighed qualitatively to determine whether admission of the evidence would endanger the long-term repute of our justice system. Where the first and second factors, "taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility."[120]

Application to this Case

[73] Exclusion is demanded by the seriousness of the breaches as well as their impacts.[121] At the townhouse, all attending officers were unequivocal – nobody had grounds to arrest or detain the appellants for a criminal offence. At that point, it was not even known if a crime had been committed. Despite knowing their obligations pursuant to ss. 9 and 10, officers detained the appellants anyway. That they purportedly relied on non-existent legislation to do so does not mitigate these violations; it aggravates them. Police are expected to know the law and to act within the limits of their authority.[122] The administration of justice must distance itself from such "unilateral prioritization of… preferred investigative methods over following the law."[123]

[74] The arbitrary detention, transport, holding and questioning of the appellants constituted serious state misconduct. In violation of well-established police expectations, the earlier breaches formed the foundation upon which everything else that happened was built. The severity of these breaches requires exclusion of the appellants' statements.

[75] The case for exclusion for Mr. Beaver continued beyond his arrest. Everything communicated by Detective Hossack demonstrated "either a fundamental misunderstanding of, or a cavalier disregard for" Mr. Beaver's ss. 7 and 10(b) rights.[124][125]

[76] At no point in her interview did Det. Hossack ever:

a. accurately inform Mr. Beaver of his true legal jeopardy;
b. offer him a meaningful choice about whether to call counsel;
c. advise him of his right to remain silent, that he was not required to speak with her;

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[119] ***Harrison***, paras 36-37.
[120] ***Le***, para 142. See also: ***Reilly***, paras 118-119.
[121] By analogy: ***Reilly***, para 117.
[122] ***Kosoian v. Société de transport de Montréal***, 2019 SCC 59.
[123] ***Gill***, para 141. See also: ***Le***, para 143.
[124] By analogy: ***Moyles***, para 105.
[125] As compared to: ***LaFrance***, paras 83-84. See also: ***Grant***, para 80.

d. distinguish their interaction from his previous encounter with Cst. Husband;
e. clarify that police no longer viewed him as a mere witness; or
f. permit him to make a meaningful choice about whether or not to cooperate with the investigation.

Like the violations that came before, she ran roughshod over clear and unequivocal protections afforded to Mr. Beaver by the constitution, completely undermining his most basic legal rights and freedoms. When this occurs, courts must disassociate themselves to protect the long-term repute of the administration of justice.

[77] When the long-term repute of administration of justice is kept in the foreground, society's interests demand the exclusion of evidence obtained in this manner.[126] As this Court has recognized, "while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, the public also has a vital interest in a justice system that is beyond reproach, particularly where the penal stakes for the accused are high."[127] To maintain public confidence requires condemnation of the sort of arbitrary detention that occurred in this case: holding individuals captive without lawful authority or meaningful rights as police attempted to gather sufficient grounds to arrest them.[128] Courts must disassociate themselves from such egregious police conduct.[129]

[78] Had the trial judge conducted his s. 24(2) analysis properly, "he could not reasonably have [concluded] anything other than that the admission of the evidence in question would bring the administration of justice into disrepute."[130] To reinforce the community's commitment to individual rights, Mr. Beaver's statement and all evidence obtained as a result of his utterances ought to have been excluded.[131]

Conclusion

[79] Det. Hossack elected to effect an ambiguous arrest, keeping Mr. Beaver in the dark. Her decision to assure him that nothing had change rendered any suggestion of a "fresh start" implausible. Her approach further denied Mr. Beaver the right to know the stakes, to know he

[126] ***Grant,*** para 85; ***Harrison,*** para 39; ***Le,*** para 158; ***Moyles,*** para 8.
[127] ***Harrison,*** para 34.
[128] See also: Factum of the Co-Appellant, Mr. Lambert, paras 82-83.
[129] ***Le,*** para 143.
[130] ***LaFrance,*** para 85.
[131] See, for example: ***McGuffie,*** para 83.

had any choice in speaking with her. Throughout hours upon hours of arbitrary detention, he was consistently treated as a witness from whom a statement *would* be taken – someone who had no real choice at all.

[80] Mr. Beaver could not appreciate he was in any jeopardy while simultaneously being assured he was simply a witness, taking his statement was routine, the police just needed to speak with him because he was there. Det. Hossack was telling him "exactly" the same thing as Cst. Husband. She assured Mr. Beaver that nothing had changed. Absent from the encounter was any act by any police officer to cease their ongoing violation of Mr. Beaver's *Charter* rights.[132] Antithetical to any conception of a "fresh start," Det. Hossack explicitly *linked* her interaction to Mr. Beaver's earlier detention by Cst. Husband – the very encounter that commenced the earlier breaches. In such circumstances, a "fresh start" was not only impossible, but the gateway to 24(2) wide open.[133]

[81] Properly assessed against the trial judge's own findings, Mr. Beaver would have required substantially more information from Det. Hossack to make a meaningful choice about whether to speak with her or remain silent. Det. Hossack made a tactical decision to proceed with her interview in the way that she did, fully cognizant of the significant concerns arising from his initial detention and transport.[134] The circumstances of his statement compel a finding of voluntariness. While legally unnecessary, a properly conducted *Grant* analysis only bolsters the suitability of that result.

PART IV – SUBMISSIONS REGARDING COSTS

[82] Mr. Beaver makes no submissions concerning costs.

PART V – ORDER SOUGHT

[83] Mr. Beaver asks that his appeal be allowed, his statement excluded and an acquittal substituted. In the alternative, he seeks a new trial.

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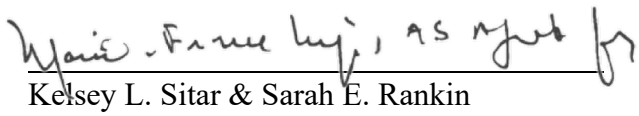
[132] See: Factum of the Co-Appellant, Mr. Lambert, paras 72-73.
[133] See: Factum of the Co-Appellant, Mr. Lambert, para 73-77; ***McSweeney,*** paras 61-65.
[134] ***Voir Dire Decision***, JRA Vol. 1, Tab 1, at para 26; Evidence of Det. Hossack, JRA Vol 1, Tab 19, pp. 184-190.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16TH DAY OF AUGUST, 2021



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