File Number: 39570

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and -

NIGEL VERNON LAFRANCE

RESPONDENT
(Appellant)

FACTUM OF THE APPELLANT

PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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PART I: OVERVIEW AND STATEMENT OF FACTS

***Overview**:*

1. In 2009, after hearing argument from various parties representing the perspective of defence counsel, Crown prosecutors and a civil liberties association, this Court held a detention may crystalize (i.e. be reasonably inferred), unless, police inform the person that they are under no obligation to answer questions and is free to go.

2. The following year, again after hearing argument from various parties representing these same perspectives, this time in a series of cases, this Court held that s. 10 of the *Charter* did not include the right to (a) wait indefinitely to make contact with counsel of choice, (b) have counsel present during an interrogation, or (c) interrupt the interrogation by repeatedly contacting counsel. Indeed, the right to counsel was *prima facie* satisfied by a single consultation, as it was to be assumed advice received was correct and sufficient to inform someone of their rights and how to exercise them. As such, s. 10 contemplated a further consultation if and when there had been some kind of material change which rendered the earlier advice inadequate to the occasion, e.g. if the charge had changed. Importantly, such would not be triggered by general confusion raised after the fact, the gradual revelation of information by police, or even other considerations which might otherwise suggest the request was "reasonably justified," i.e. that there was some objective support to think the detainee may require further advice.

3. In the present matter, where there was no doubt the Respondent was responsible for the death of the victim, the Majority of the Alberta Court of Appeal overturned the Trial Judge[1] and found the Respondent had been detained by police when they took a statement from him at the station.[2] This, notwithstanding he had been told repeatedly, and in varied ways, both before leaving his home, and again prior to the statement actually commencing, that he did not have to give a statement, go or remain with police, and that the interview room was not locked and he could terminate the statement and leave the station at any time upon request; instructions about

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[1] Who, utilizing the advantageous position enjoyed by all trial judges, found the Respondent was intelligent, educated, understood what was going on and was *not credible* in his claims that he felt he had no choice but to participate or lacked understanding about his situation/rights.

[2] He was not placed under arrest on this occasion.

which he expressly acknowledged understanding and never sought to invoke. Indeed, he testified to going with police and answering questions in the hopes of allaying suspicion.

4. Likewise, notwithstanding, (a) the Respondent's s.10 rights were put to him repeatedly when he was arrested six weeks later, (b) he ultimately requested and spoke to the "free lawyer" for 15 minutes, (c) he acknowledged he understood the advice he received and his right to silence, and (d) he repeatedly testified in the *voir dire* that what he was saying at the time was that he wanted a lawyer to sit in on the interview, the Majority again overturned the Trial Judge and concluded the Respondent's request to call his father in the hopes of reaching a lawyer (Legal Aid having suggested he sit down with counsel), made just as police turned to the offence at hand, signaled that there had been a change in circumstances, and/or confusion about his rights, thus rendering his earlier consultation insufficient.

5. Furthermore, the Majority held that evidence in, and derived from, these two statements had to be excluded under 24(2) of the *Charter*, despite recognizing that police had not been reckless or negligent in their behavior *vis a vis* the Respondent's *Charter* rights.[3] A new trial, without such evidence, was ordered on second degree murder.

6. Conversely, following the principles established by this Court above, the dissenting Justice found no errors on the part of the Trial Judge. He did not comment on s. 24(2).

7. Respectfully, the Majority's decision cannot stand, in no small part because they disregarded the standard of review and recast, or outright ignored, the Trial Judge's findings of fact. Moreover, they suggested the Trial Judge had failed to employ the proper test on the issue of detention, when he had not, and found the clear instructions given by police did not alter the landscape, when they clearly do. Likewise on the issue of a second consultation with counsel, they ignored relevant principles established by this Court and, in so doing, ostensibly resurrected a dissenting opinion that had been expressly rejected and, thus, cast the net much wider than this Court intended. Finally, on both topics, the Majority misapprehended relevant evidence.

8. Clearly then, not only must the decision be overturned because the Trial Judge committed no errors but, left unchecked, the Majority's ruling would effectively require police to provide s. 10 rights to anyone to whom they spoke in a formal setting, despite clearly articulated and

[3] And with little to no argument directly on this point.

understood instructions that the subject did not have to speak to them and was free to leave. Similarly, it would require further consultation be provided in any case where it has been suggested to the offender, who otherwise has contacted counsel and is aware of their rights, that it would be in their best interest to retain a lawyer. In addition to conflicting with previous conclusions of this Court, it goes without saying the Majority decision below will inevitably be raised in support of arguments in the future, and thus must be corrected.

Facts:[4]

9. Medical evidence established Mr. Yasinski died from a stab wound to the right side of his neck which severed the carotid artery. The trajectory of the stab was essentially straight into the neck. He also had two other less serious stab wounds (to his forehead and back left side of his head near his ear) as well as superficial cuts to his hands.

10. That the Respondent was the perpetrator was not particularly in dispute. In a pretrial *voir dire*, he indicated his intent to enter a plea to manslaughter, and did so at the outset. He was tied to the crime through various pieces of evidence, starting with text messages he sent to Mr. Yasinski (shortly before the latter was discovered by a passer-by, already injured). These messages, in which he identified himself as "Nigel," set up a meeting to purchase drugs from Mr. Yasinski. Subscriber information led police to the Respondent specifically. Moreover, Mr. Yasinski's blood was found in the Respondent's residence, during a search warrant executed on March 19, 2015 (two days after the stabbing).

11. Michella Jones, the Respondent's live-in girlfriend, testified that, on the night (early morning) in question, they had made two cocaine purchases, using collateral for the second. However, when they attempted a third and Mr. Yasinski refused to front them any more drugs, the Respondent formulated and informed her of a plan to rob and kill Mr. Yasinski. He sent the aforementioned texts, gathered some fake money,[5] retrieved a knife from the nightstand, removing it from its sheath, and left in Mr. Yasinski's vehicle. Ms. Jones went for a walk, and

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[4] Only evidence (excerpts) and exhibits from the *voir dire* are reproduced in the Appellant's appeal record, as other facts mentioned herein are not contested, nor necessary to bring the appeal.

[5] Canadian tire money, which was found in Mr. Yasinski's vehicle

ended up spotting Mr. Yasinski's car. Upon returning home, she found the Respondent in his underwear. They both cried and he said he should not have done it. He destroyed two phones he had taken from Mr. Yasinski and put his bloody clothes in a plastic bag. In cross, she admitted that she initially told police the Respondent only planned to rob Mr. Yasinski. However, subsequently she advised of his intent to kill.

12. The remaining evidence came from the Respondent himself. First, in a warned, cautioned statement following his arrest on April 07, 2015,[6] he confirmed Ms. Jones' basic narrative leading up to the final meeting with Mr. Yasinski. He said he didn't mean to kill Mr. Yasinski; he pulled the knife, lunged at Mr. Yasinski (stabbing him in the neck without aiming for a particular target), and thereafter they struggled before Mr. Yasinski fled the car.[7] He described the route he took back home (which accorded with initial police investigation of the scene) and indicated where the knife had been discarded.[8] Police subsequently located the knife with Mr. Yasinski's blood on the blade, and as part of a mixed profile on the handle.

13. Second, while in remand, the Respondent sent a letter to Ms. Jones in which he said he needed her to tell police she was under the influence when questioned, and that he didn't plan on killing Mr. Yasinski, just to rob him, as the reference in her statement to a plan to kill was "*really screwing me over*."[9] He also sent two letters to Mr. Keven Foley, both of which contained messages for Ms. Jones. In the first, he offered to pay her money not to attend court, and in the second he requested that she now testify, but state that he only planned to rob Mr. Yasinski.[10]

14. Finally, aside from offering a plea to manslaughter, the Respondent testified in his own defence. Again he confirmed the basic narrative, but denied telling Ms. Jones he planned on killing Mr. Yasinski. Rather, after arriving at their destination, he pulled the knife, and a struggle ensued. Mr. Yasinski, who was larger and stronger, pulled him over, so that he was virtually on top of Mr. Yasinski. During the struggle (in which Mr. Yasinski *did not* get the knife away from

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[6] Appellant's Appeal Record ("AAR") Vol V, Tab 17

[7] *Ibid.*, p.148/2490-308/2545. He also confirmed taking and destroying 2 phones, (p. 164/2868-2869, p. 165/2876-2882), disposing of his bloody clothes (p. 169/2966) and that Mr. Yasinski had never been in his house. (p. 128/2042-2044, p. 202/ 3725-3726)

[8] *Ibid.*, pp. 177/3150-179/3199, pp. 204/ 3771-363/3805.

[9] See ***R. v. Lafrance***, 2017 ABQB at para 201-203.

[10] ***R. v. Lafrance***, *Ibid*.

him), Mr. Yasinski was stabbed. He did not intend to kill Mr. Yasinski. As to the letters, he only wanted Ms. Jones to tell the truth. The offer of money was to help her.

15. In cross he could not explain how, if in the position of being virtually on top of Mr. Yasinski, he could stab Mr. Yasinski in the right side of the neck, straight in, while he (the Respondent) was holding the knife in his right hand.

16. In light of all testimony (aside from the elements specific to first degree murder), the issues for the jury were intent, self-defence, and intoxication. A verdict of guilty of second degree murder was returned.

17. A large portion of time was devoted to a *voir dire* addressing various alleged *Charter* breaches,[11] two of which are germane to the present appeal. In brief, it was argued police detained the Respondent,[12] without providing his s. 10 rights, on March 19, 2015 when they requested, and he agreed, to give a voluntary statement.[13] Likewise, on April 07, 2015, having been arrested, given his s. 10 rights, spoken with a lawyer, and understanding he did not have to say anything, the Respondent asked (well into the statement) to speak to his father for the purpose of arranging to have a lawyer sit with him (during the interview). This was on the advice of Legal Aid who had suggested he have a lawyer sit down with him rather than just discussing matters on the phone. The Respondent claims that by denying this request, his s. 10 rights were violated.

18. The Trial Judge dismissed these allegations in a lengthy decision finding, *inter alia*, the Respondent was not credible.[14] Specific findings are discussed during the argument below. Suffice it to say, where the Respondent claimed to be unsophisticated, scared, and an unwilling participant, operating under the notion he had no choice but to give a statement on March 19, the Trial Judge found him to be educated, intelligent, calm, willing, and well and repeatedly informed that it was his choice to accompany police or give a statement at all, and he could terminate the interview at any time. Indeed, based on the Respondent's testimony in cross, the Trial Judge found he operated under his own motive of wanting to allay suspicion. Furthermore,

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[11] Prior to trial, the Respondent submitted a 63 page written argument.
[12] See paragraph 22 of this Factum for details
[13] Reference was made to s. 9, but this is subsumed in the s. 10 argument.
[14] ***R. v. Lafrance***, *supra* at note 9

even if there had been early breaches, there was not a sufficient temporal or factual connection to the subsequent warned statement such that the latter could be considered tainted. Likewise, on April 07, he was clearly and properly informed of his ability to get immediate, free legal advice, and was provided an opportunity to speak to Legal Aid, whom the Respondent had requested. Given he had spoken to counsel for 15 minutes, and clearly understood his right to silence, there was no breach by failing to allow the Respondent the opportunity to call his father in the hopes of contacting an unspecified lawyer. In sum, the Respondent's request to have a face to face consultation and/or counsel sit in on the interview represented an attempt to invoke a right he did not enjoy at law. Moreover, there were no circumstances giving rise to a need for a second consultation as contemplated in ***R. v. Sinclair***.[15]

19. On appeal,[16] these issues were re-litigated, with the Majority finding errors on both. Regarding the first encounter, it was found that the Trial Judge had failed to consider whether, based on the evidence he did accept, a detention arose on the objective test as set out in ***R. v. Grant***[17]with further specific consideration to the seven factors set out in ***R. v. Moran***.[18] Picking up on an observation by the Trial Judge, the Majority cast the Respondent as naïve, and applying the factors from ***Grant*** and ***Moran***,[19] concluded that the Respondent must have thought he had no choice but to cooperate, and that it was inconsequential the interviewing officer initially told the Respondent that he did not have to participate if he did not wish to.

20. As to the events of April 7, the Majority disagreed with the Trial Judge and found the Respondent should have been permitted the opportunity to contact his father to arrange for further consultation with counsel. In brief, the Respondent's request signaled that he was confused about his jeopardy and had further questions to ask counsel; likening the situation to

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[15] 2010 SCC 35
[16] ***R. v. Lafrance***, 2021 ABCA 51
[17] 2009 SCC 32
[18] (1987) 36 CCC (3d) 225 (ONCA)
[19] *Inter alia*, police signaled him out as a suspect, and had no others at the time, the interview occurred at a relatively advanced stage of the investigation, at the police station, lasted 3.5 hours, and police sought information to identify him as the culprit even if not directly asked. Likewise, the Respondent was (a) in police presence from the moment he woke until the interview ended, (b) was 19, aboriginal, inexperienced with the justice system and of smaller stature.

other decisions in which the offender had not consulted with counsel but rather had merely made contact and knew (as did police) that their lawyer was coming down to the station to speak with them (i.e. their consultation was not concluded.) Moreover, given the timing of the request, the Majority felt it was clear there was a change in circumstances and the initial advice he had received (acknowledged as including that he need not talk to police) was no longer sufficient in his own mind or objectively to meet the purpose of s. 10(b). Moreover, the Majority considered it relevant that he had been initially confused over the role of counsel at the custodial interview stage, the consultation was of short duration, he was young, small in stature and Indigenous, had not been informed of his rights during his prior three and a half hour interview, had no prior experience with law enforcement, was not asked if he was satisfied with the advice received and the Legal Aid lawyer to whom he had spoken, had no objective information about the circumstances of the charge and advised him to seek further and better consultation. Overall, at a minimum, the facts of this case fell into the open ended category of when further consultation would be necessary as contemplated in ***Sinclair***.

21. Conversely, the dissenting Justice held the Trial Judge had made no errors in either the selection or application of appropriate principles.

PART II: STATEMENT OF ISSUES

Did the majority of the Court of Appeal of Alberta err in finding that the trial judge erred in finding there was no breach to the Respondent's rights under s. 10 of the *Canadian Charter of Rights and Freedoms,* Part I of *The Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c11?

PART III: ARGUMENT

Psychological detention March 19, 2015

22. The Respondent's argument below relied heavily, *inter alia*, on the fact that (a) police showed up *en masse* (some in tactical gear) to execute the search warrant, (b) he was told to leave the house, (c) followed by an officer when he tried to retrieve his cat in the yard, (d) directed to Sgt. Eros, (e) transported in an unmarked police car, (f) put in an interview room (after passing through the fenced compound and locked doors of the police station), (g) told it was a secured building so he couldn't walk around without an escort, and (h) was there for three and a half

hours. Additionally he maintained he was intimidated and felt he had no choice to comply once he was in their presence, citing, *inter alia*, the fact he once was compelled to give a traffic collision statement.[20]

23. Conversely, the prosecution led evidence from the officers and, in particular, the steps they took to ensure the Respondent understood he did not have to go with them, give, or continue with a statement. The Trial Judge made several relevant findings of fact:

1) The Respondent was ***not credible:***
   a) He admitted to habitually lying when in trouble, noting for example, he lied on an affidavit sworn in support of his application for bail in the present matter.[21]
   b) Given the clearly different circumstances between his earlier compelled collision statement[22] and the present matter, his attempt to rely on the former as the basis for his alleged belief he had to comply is unreasonable and self-serving.[23]

2) Expressions of "yeah," "yup," "okay" etc. were ***not just over talk***,[24]but rather revealed an ***express understanding and agreement*** to questions and comments posed by Sgt. Eros.[25]

3) The only instruction he was given when the search team arrived was that he had to vacate the residence, not that he had to stay with police.[26]

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[20] AAR, Vol III, pp. 90/24 -95/2, pp. 97/2-31, 36-98/2, 22-37, pp. 100/1-9, 31-101/12, pp. 102/10-103/39. Although counsel argued at trial the Court should consider differences in physical size and dress of the officers and his status as a Metis, the Respondent himself did not make mention of this.

[21] ***R. v. Lafrance***, *supra* at note 9, at para 26-27 AAR Vol III, p. 189/22 p. 190/7

[22] The Respondent suggested a prior incident in which he was instructed to attend a police station and fill out a collision form led him to believe he had to comply with a request to provide a statement to police on March 19. *Ibid.*, p. 88/30-41, p. 89/2-10, 25-26, pp. 84/26-95/2, p. 96/2-11, p. 97/2-31, pp. 108/27- 109/9. In cross it came out he had a subsequent collision and simply avoided the other driver or giving a statement. *Ibid.*, pp. 194/39-195/40

[23] ***R. v. Lafrance***, *supra* at note 9, at para 28-31

[24] The Respondent suggested he was just acknowledging what speakers were saying, not conveying understanding or agreement. AAR Vol III, pp. 109/35-110 /17, pp. 128 /33-129 /12, pp. 147/36-148 /11, p. 167 /20-29

[25] ***R. v. Lafrance***, *supra* at note 9, at para 33, 76

[26] ***R. v. Lafrance***, *supra* at note 9, at para 43. It was said police presence and direction to leave the house contributed to detention.

4) Conversely, the police evidence was ***credible and accepted.*** Thus, it was found
   a) Sgt. Eros did not have reasonable grounds to arrest the Respondent on March 19.[27]
   b) He asked the Respondent if he would be willing to provide a voluntary statement (about the incident up the road), explaining that he was ***free to leave***, and it ***was up to him*** to decide whether he would accompany police or make a statement.[28]
   c) The Respondent ***agreed*** but first wanted to retrieve his phone and coffee.[29]
   d) The Respondent (theoretically) had other options[30] to get to the station but ***agreed*** to take the ride offered in the unmarked police minivan.[31]
   e) (Once at the station) the Respondent was informed at the outset that he was a suspect in the homicide. More importantly, Sgt. Eros stressed the statement was voluntary and the Respondent could leave at any time. He told the Respondent that ***he did not have to speak to police***, ***the door was not locked***, and he was ***free to leave at any time***.[32]
   f) Sgt. Eros instructed the Respondent to ***let him know*** if he (the Respondent) wanted to leave, and the Respondent had no questions about these instructions.[33]
   g) Sgt. Eros subsequently told the Respondent that his rights included the ability to leave whenever he wants to, and that he did not have to sit here and speak with police, the Respondent could end the interview at any time, and that it was absolutely not the case that the Respondent was stuck there.[34] In cross-examination, the Respondent agreed he understood police direction that he was free to leave at any time.[35]
   h) Additionally, the Respondent agreed to give a statement so that he could allay suspicions and be discounted as a suspect.[36]

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[27] ***R. v. Lafrance***, *supra* at note 9, at para 35 AAR Vol. II p. 11/8-11, pp. 14/39-15/5, 23-29

[28] ***R. v. Lafrance***, *supra* at note 9, at, para 38 AAR Vol II, pp. 22/39-23/8, 14-27, p. 105/39-41. Sgt. Eros indicated his intent was to take a "non-custodial" statement which he described as completely voluntary; the subject can agree to participate or not and may leave at any time. *Ibid.*, p. 15/9-17, 31-41, p. 16/1-4

[29] *Ibid.*, p. 23/8-10

[30] The evidence concerning transport to the police station is discussed in greater detail below.

[31] ***R. v. Lafrance***, *supra* at note 9, at para 39, AAR, Vol II, p. 23/14-27. It has no cage or silent patrolman *Ibid.*, p. 12/27-39.

[32] ***R. v. Lafrance***, *supra* at note 9, at para 47, AAR Vol IV p.64/104-12/138, pp.72/286-74/331, AAR Vol II, pp. 132/35-133/24. The Respondent acknowledged this but still felt he had to stay. p. 104 /11-27, pp. 109 /35-110 / 17

[33] ***R. v. Lafrance***, *supra* at note 9, at para 48, AAR, *Ibid*.

[34] ***R. v. Lafrance***, *supra* at note 9, at para 50, 70, AAR, *Ibid*.

[35] ***R. v. Lafrance***, *supra* at note 9 at para 74, AAR, Vol III, p. 104 /11-27, pp. 109 /35-110 /17, pp. 212 /16-213 /5

[36] ***R. v. Lafrance***, *supra* at note 9 at para 44, 70, AAR Vol III, p. 220 /8-24

5) Although the Respondent is youthful, Indigenous, and had minimal previous police exposure, his academic background and professional training demonstrated ***he is intelligent***, and though his responses were brief, they were also ***consistent with the clear and full comprehension of the questions. Overall he was not unsophisticated.***[37]

6) Throughout the process, the Respondent ***never appeared to be compelled, frightened***, or intimidated. Rather, he ***appeared to be at ease and was cooperative and friendly*** throughout. There is no indication of defensive body language.[38]

7) The questioning was focused on information gathering, and he was ***not confronted*** with evidence pointing to his guilt or accused of the offence.[39]

8) Overall, the Respondent's evidence of his psychological state and lack of understanding on March 19 ***was rejected***.[40]

9) During the statement, he was ***not subjected to any express or implied threats, promises, or inducements***. Further, the Respondent expressed at the end that he had no concerns about his treatment.[41] The manner of the interview is not oppressive. Therefore ***the statement was also voluntary***.[42]

10) The Respondent provided items during the statement ***voluntarily***. He expressed quick willingness at all times. Throughout, Sgt. Eros and the Respondent were engaged in banter.[43]

24. With respect to the Majority below, their reasons, particularly on the issue of the first interview, leaves the impression that there was little pertinent evidence[44] and the Trial Judge overlooked relevant criteria, whereas upon a full review of even the summary above, let alone the lower court decision and transcript, it is clear the opposite is true and the Majority took a narrow and distorted approach.

25. Moreover, on the issue of psychological detention, the Majority's criticism that the Trial Judge ignored relevant factors or failed to utilize an objective test is unfounded. Further, their

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[37] ***R. v. Lafrance***, *supra* at note 9 at para 79-81
[38] ***R. v. Lafrance***, *supra* at note 9 at para 73
[39] ***R. v. Lafrance***, *supra* at note 9 at para 77, the Trial Judge was also unmoved by arguments concerning the nature of the language or questions as posed. At para 76
[40] ***R. v. Lafrance***, *supra* at note 9 at para 34
[41] AAR Vol I3I, pp. 220/26 - 221/4
[42] ***R. v. Lafrance***, *supra* at note 9 at para 84-93
[43] ***R. v. Lafrance***, *supra* at note 9 at para 57-68
[44] One would not assume they omitted relevant evidence.

application of the objective test for psychological detention was incorrect for various reasons, most notably because they misapprehended the legal effect of the clear instructions given by the police.

Unfounded criticism: [45]

26. The Majority's chief complaint is set out at paragraph 27 in which they assert the Trial Judge failed to assess whether, based on the accepted evidence, the only reasonable inference was detention. More specifically, the Majority, found the Trial Judge did not apply an objective assessment to the relevant factors set out in ***Grant*** and ***Moran***[46] (notwithstanding he cited both).

27. Assuming, without conceding, ***Moran*** remains useful as a guide,[47] the notion the Trial Judge did not assess the accepted evidence against the ***Grant*** and ***Moran*** criteria[48] is simply not accurate, factually or legally.

28. Starting with the former, a plain reading of the *voir dire* ruling demonstrates the Trial Judge touched on the relevant/required facts as he went through the evidence, including police action in executing the search warrant,[49] the stage of the investigation,[50] that the Respondent was a suspect (but police did not have grounds to arrest),[51] the language used,[52] how they got to the

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[45] It is assumed this Court is well familiar with the (objective) test for psychological detention as discussed in ***R. v. Therens,*** [1985] 1 S.C.R. 613, ***Grant*** *supra* at note 17, at para 24-44, and ***R. v. Le*****,** 2019 SCC 34 at para 25-26, 115-116. Also ***R. v. Thompson*****,** 2020 ONCA 264 at para 35-37, 41

[46] *supra* at note 48

[47] It was discussed, ***but not adopted*** in ***Grant***; the majority in that case specifically sought to move away from certain ***Moran*** considerations, re: reasonable grounds / what police were thinking. The one and only test is ***Grant,*** and thus trial judges should not be faulted for not relying on ***Moran*** *per se*.

[48] 2021 ABCA 51 at para 29-30

[49] ***R. v. Lafrance*****,** *supra* at note 9 at para 37

[50] *Ibid.*, at para 35. 78

[51] *Ibid.*, at para 36-37, 47, 78

[52] i.e. making requests, asking if he would be willing, and repeating several times the Respondent had choices and did not have to participate and/or could terminate the process at any time. *Ibid.*, at para 38, 42, 47-51, 58,

station,[53] the lack of taking physical control,[54] the duration,[55] location[56] and nature of the interview itself[57], as well as, the Respondent's stature,[58] age, minority status,[59] and level of sophistication.[60] Thus, on the point of addressing all of the ***Grant*** and ***Moran*** criteria, it is clear the Trial Judge touched on each one, with the exception of the Respondent being offered a choice as to where the interview would take place.[61] It would appear, therefore, the Majority's complaint is less that the Trial Judge did not consider these matters, but rather that he did not set out, point by point, how he weighed them on the objective test. However, this reflects a problem with the Trial Judge's reasons, as opposed to his reasoning.

29. As in any case, reasons must be read as a whole and in light of the evidence and arguments. The court is not required to expressly address settled matters, nor every argument, so long as the trial judge seized and tackled the relevant issue.[62] In this case, the Trial Judge started with specific reference to the (objective) test from ***Grant***, the criteria in ***Moran***, as well as the ongoing nature of the assessment, and need to find support for claims of detention per ***R. v. Suberu***.[63]As such, it is clear the Trial Judge was well aware the task was to assess detention from an objective and ongoing basis. His subsequent reasoning must be interpreted with that in mind,[64]

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[53] *Ibid.*, at para 39-40. To repeat, the summary by the Trial Judge does not go far enough. See note 49 for evidence of the discussed options and how viable alternate transportation was etc.

[54] *Ibid.*, at para 42
[55] *Ibid.*, at para 46
[56] *Ibid.*, at para 42, 70-72,
[57] *Ibid.*, at para 64, 66-68, 75-77, 87, 90
[58] *Ibid.*, at para 73
[59] *Ibid.*, at para 79
[60] *Ibid.*, at para 79-81
[61] Although, this is subsumed by the fact police made it clear he did not have to accompany them to the police station or give a statement at all. The choice of where to conduct an interview is more relevant to situations where the existence of choice is inferred from the circumstances, and not where the choice is made abundantly clear.

[62] ***R. v. R.E.M.***, 2008 SCC 51, ***R. v. O'Brien*** 2011 SCC 29
[63] 2009 SCC 33, ***R. v. Lafrance***, *supra* at note 9 at para 14-17
[64] Where reasons are subject to interpretation, the one which is consistent with the trial judge's presumed knowledge of the applicable law (including relevant tests) must be preferred over one

particularly since he was not required to go through any relevant criteria point by point as if conducting a checklist. In sum, the lack of a separate and specific statement /conclusion regarding how a reasonable person would perceive the events, does not mean he abandoned the proper objective test. Rather, he was mindful of the required task and the meaning of "psychological detention"—a term of art under the circumstances.[65]

30. The Appellant anticipates any response to the above argument to be that the Majority's true complaint is not about reasons or overlooking factors *per se*, but rather that the Trial Judge was employing an overly subjective account of events rather than applying the true and proper objective test. However, once more, a review of the reasons demonstrates this is incorrect.

31. While assessing the matter, he spoke of the "*objective record*" which demonstrated it was clear the Respondent had been repeatedly told of his status as a suspect, warned evidence could be used against him, and the Respondent understood the statement was voluntary and that he was not required to answer questions (this latter point, *inter alia*, making the location inconsequential). Likewise he found there was no "*objective basis*" for the Respondent's physical stature to give him reason to believe he had no choice but to cooperate on the facts. Finally, the Trial Judge was not incorrect to note the Respondent's particular level of education and intelligence (and desire to throw off suspicion) overtook any general concerns about age or sophistication or even minority status. It was only *after* he reviewed these factors that he concluded the Respondent was not "psychologically detained."[66] In short, the Trial judge held the objective test firmly in mind and applied it. Once again, any remaining concerns would appear to rest in the sufficiency of reasons. However, as above, there was no requirement to go through everything point by point.

32. Respectfully, the above demonstrate the Majority's criticism of the Trial Judge was misplaced. Far from committing any errors, the Trial Judge was cognizant of the relevant facts and precedent, and properly applied the former to the latter. On this basis alone, the appeal ought to be allowed and the conviction restored. However, if necessary to continue, it is clear that, even

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which suggests an erroneous application of the law. ***R. v. C.L.Y.***, [2008] 1 S.C.R. 5 at para. 11, see also ***R. v. Nqumayo***, 2010 ABCA 100, at para 20 and 26

[65] ***R. v. Lafrance***, *supra* at note 9, at para 14-17, 82.
[66] ***R. v. Lafrance***, *supra* at note 9 at para 83

granting the Majority full power to reassess the objective test, they committed fundamental errors of fact and law.

The Majority's application of the objective test for psychological detention was incorrect for various reasons.

33. First, to adapt an earlier point,[67] it may well have been an error for the Majority to rely ***Moran*** at all, but if not an error outright, they should not have relied on criteria from ***Moran*** which conflict with the ratio in ***Grant*****.**

34. For example, the Majority placed emphasis on the nature of the investigation, noting, not just that the encounter was not random, but rather, how far police were in their investigation, and that they did not appear to have other suspects, nor were interviewing other witnesses. This may be true. However, one of the specific points on which ***Grant*** and ***Moran*** differed was that ***Grant*** sought to move away from what police were thinking, and whether they had reasonable grounds in favour of merely distinguishing between random encounters[68] and focused investigation.[69] As such, the Majority was incorrect to consider anything beyond the fact police specifically sought to speak with the Respondent, as detention is measured by how police interacted in the moment of contact, not what came before. Indeed, relying on this point improperly shifted the focus to the subjective intent of police.

35. Second, even if the above were a viable consideration, the Majority mentioned it while examining ***Grant*** and twice while looking at ***Moran*****.** In other words, they triple counted, and thus inappropriately overemphasized, this particular consideration.[70]

36. Third, and most egregiously, the Majority decision inappropriately[71] disregarded findings of fact, misapprehended (by ignoring or ignoring the effect of) other relevant evidence when conducting their analysis, and overall, misapplied the ratio of ***Grant***, particularly as it concerns

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[67] See note 77

[68] Anything that wasn't specifically targeting the subject such as providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence

[69] Which itself does not trigger detention see ***R. v. Saretzky*****,** 2020 ABCA 421 at para 45

[70] As an aside, it might be that the Majority erred in how they approached the Respondent's minority status given it was a focused, rather than spontaneous encounter.

[71] Without proper deference

the legal effect of repeated instructions that the Respondent need not go, stay with or otherwise answer questions of police.

37. Starting with the facts, this Court has affirmed that, *unless patent error exists*, the assessment of whether or not a *Charter* standard has been met (or breached as the case may be) must be conducted utilizing the facts as found.[72] As applied, the Majority's first error was in discarding the Trial Judge's finding of fact *vis-à-vis* the Respondent's intelligence and sophistication, a point related to his giving a statement for his own purposes.[73]

38. At paragraph 28, the Majority states the Trial Judge "*inferred*" the Respondent went along and participated in the interview in the hopes that his participation would counter suspicion. This is incorrect. The Trial Judge did not merely infer this; in cross examination the Respondent specifically agreed this is why he went with police and answered their questions.[74]

39. Moreover, the Majority pronounced[75] that it was inconsistent for the Trial Judge to have found the Respondent sophisticated, while also concluding he was naïve in his plan to allay police suspicion, because the latter cannot stand with the former. Respectfully, the Majority's assessment on this point is flawed as the finding of sophistication was not palpably in error for reasons explored in the next paragraph, and also because there is nothing inconsistent (in theory or fact) about these two findings – particularly when one considers all of the evidence, which the Majority clearly did not do.

40. Someone like the Respondent who (a) is educated – a high school graduate with some college courses[76], a professional certificate,[77] and made good grades,[78] (b) (according to Ms.

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[72] ***Grant*** *supra* at note 17 , at para 102, ***R. v. Keror***, 2017 ABCA 273 at para 7

[73] Also the Trial Judge's finding regarding credibility was not incorrect. As such, the Majority should not have even considered various claims as if they had not already been rejected.

[74] AAR Vol III, p. 220/8-24

[75] 2021 ABCA 51, at para 31

[76] He did not attend post-secondary, but rather studied power engineering through a program offered by the Northern Alberta Institute of Technology while in high school. This involved the study of thermodynamics. He also studied math, physics, and chemistry, as well as the usual English and Social studies etc. AAR, Vol III, p. 86/36-37, pp. 181/27-407/32, p. 185/4-9

[77] *Ibid*, p. 182/20-32, Also working as a pipe fitting apprentice until 2014. *Ibid*, p. 76/41, p. 85/16

[78] *Ibid.*, p. 185/16-19

Jones,) hatched a plan to lure the victim to a phony drug deal *with the intent* to rob and/or kill him (c) that involved arming himself and taking along false money to perpetuate the fraud, (d) after the fact, destroyed and disposed of evidence (which can have but one purpose), and (e) engaged in telling post event conduct,[79] clearly has the ability to assess situations and contemplate courses of action to his benefit.[80] That his subsequent plan to dispel suspicion by appearing to cooperate was perhaps a fool's errand, hastily concocted when police arrived at his door, does not mean it was not still consistent with intelligence, sophistication or his past behaviour.[81] Moreover, in light of the above, it was also not incorrect to find the Respondent (or someone like him) would not be intimidated regardless of other personal characteristics.[82] Simply put, the Trial Judge's conclusions about the Respondent's personal motive to accompany, appear cooperative to police, and overall sophistication were well supported, let alone not patently incorrect, and thus, not subject to reinterpretation[83] under the guise of assessing what a reasonable person would/should have believed.

41. Overall, the Majority failed to give proper effect to this evidence by ignoring it outright or as it pertains to the standard of review. Once it is properly accepted that the Respondent is, in fact, intelligent and capable of planning,[84] and decided to accompany police, give a statement

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[79] See para 14, ***R. v. Lafrance*****,** *supra* at note 9 at para 201-202. He also lied about employment on his bail application because he thought it would help him secure release. *Supra* at note 60

[80] Also, during the *voir dire*, defense wanted to ask questions about the Respondent's conversation with duty counsel. As such he asked the Respondent about waiving privilege and repeated that it was his right and he did not have to do it. At that point, the Respondent clearly understood simple instructions and how to make a choice. AAR, Vol. III p. 154/6-28

[81] Given how quickly he would have come up with this plan, it actually reinforces the Trial Judge's finding.

[82] For example, as to size, recall the Respondent killed someone reportedly larger than himself. As to age, 18 is the age at which it is recognized people reach a certain responsible status concerning contracts, wills, marriage, voting or even holding office.

[83] Particularly where based on a misapprehension of evidence.

[84] Including again, the ability to act to avoid detection or consequence.

(and was quick to turn over items when asked)[85] for a specific, subjective purpose, it places the objective test in a different light, and for reasons discussed below, a proper assessment would not support a detention.

42. By way of further example, the Majority also misapprehended relevant evidence concerning other pertinent factors, such as how the parties arrived at the police station. The evidence of the police was the Respondent himself was recorded as saying he did not have (an alternate) ride,[86] and the officer's *viva voce* evidence on this point was that they were *discussing options* (i.e. the vehicles in the driveway[87]) as *the best practice would be for the offender to go to the station themselves*.[88] Likewise the evidence of the Respondent in the *voir dire* was that (a) he did not have his driver's license,[89] (b) he *felt* his father, who was home, wouldn't drive with all the police around, and thus, didn't consider him a viable option[90] (c) admitted there were other people at his home and, although he was unsure if they left, agreed there was potentially other transportation available[91] and (d) when it came to *his* suggestion that he take the bus, he admitted he did not have any money.[92] Additionally, the evidence was that this particular van was not equipped with a silent patrolman barrier, or a firearm, or even computers. In fact, the doors did not lock from the inside.[93]

43. Respectfully, had the Majority properly considered and given effect to the *entire* evidence, it would have been clear that the ride to the station was not indicative of a detention on an objective standard, as the reality of the situation is that the Respondent had either not fully considered and/or ruled out viable alternatives. In short, police were not projecting or exploiting a

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[85] Where the police continued to use relevant language, emphasizing that it was "voluntary" and asked if he would be "willing" to turn things over, and said, *inter alia," I wanna make sure that you're aware (of the ability to recover deleted texts) cause* ***this is consensual right"*** AAR Vol. IV, p. 167/465-469, p. 174/621-625, p. 177/698, p. 179/736-740, 749-755

[86] AAR Vol. IV p. 58/71-72,
[87] Implying a choice- AAR Vol. Vol. II p. 106/10-16
[88] *Ibid.*, p. 23/14-24, p. 27/12-15, p. 106/28-38 – again indicative of choice
[89] AAR Vol. III., pp. 218/14 - 219/5, 31-31
[90] *Ibid.*, p. 214/37-38
[91] *Ibid.*, pp. 214/32-33, 40-215/8
[92] *Ibid.*, p. 94/24-25
[93] AAR Vol. II, p. 12/27-39, p. 107/24-33

power imbalance by offering a ride which he accepted, after having raised the possibility of other options.

44. These three examples demonstrate the Majority's incorrect approach to the facts, which caused them to wrongly recast key considerations about the situation and Respondent himself. Worse still, however, was how this approach led them to regard, or rather disregard, what police had told the Respondent at his home, and again at the station, regarding his choices; an error which transcends fact finding and demonstrates legal error *vis a vis* the application of ***Grant***.

45. This Court has repeatedly affirmed that not every interaction with police is a detention. Indeed this may be true even when the subject under specific investigation is questioned.[94] Detention is determined on an objective basis, so as to not be beholden to the purely subjective perception of either the subject or authorities. Rather, utilizing the criteria set forth in ***Grant,*** the question is whether a reasonable person[95] would perceive they had no choice but to comply with police.

46. Importantly, the criteria set forth in ***Grant*** reflect a fundamental truth, which is the test is designed to address "ambiguous" circumstances[96] from which a series of inferences are drawn (and thereafter, measured against a reasonable standard). However, it is plain from the ratio of ***Grant*** that the test takes on an entirely different approach when the situation is unambiguous.

47. At paragraph 32, this Court notes,

> *…To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements.* ***In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go****. (*emphasis added*)*

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[94] ***R. v Le***, 2019 SCC 34 at par 37

[95] Which has its own definition(s) – reasonable, informed (including specific knowledge or training), practical, realistic, not "very sensitive or scrupulous", familiar with the circumstances, dispassionate, sane and sober. See ***R. v. S.(R.D.),*** [1997] 3 SCR 484 at para 36, ***R. v. Collins,*** [1987], 1 SCR 265 at para 33, ***R. v. Batista,*** 2008 ONCA 804 at para 24, D. Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 2015) at p. 1253 (Final 74-B)

[96] Referred to as a "*murky line*" in ***R. v Le***, *supra* at note 93, at para 31

48. Note the majority *did not* say "in ambiguous situations, it is open to police to simply provide s. 10 rights."[97] Rather, this Court set out that *avoiding a detention* in an otherwise ambiguous situation could be achieved by clearly informing the subject they are free to leave.

49. This message is repeated at paragraph 39,

> *…The notion of psychological detention recognizes the reality that police tactics, even in the absence of exercising actual physical restraint, may be coercive enough to effectively remove the individual's choice to walk away from the police. This creates the risk that the person may reasonably feel compelled to incriminate himself or herself. Where that is the case, the police are no longer entitled simply to expect cooperation from an individual.* ***Unless, as stated earlier, the police inform the person that he or she is under no obligation to answer questions and is free to go, a detention may well crystallize*** *and, when it does, the police must provide the subject with his or her s. 10(b) rights. (*emphasis added*)*

50. It is also noteworthy that, when subsequently summarizing the factors relevant to determining whether the reasonable person would feel[98] deprived of choice, this Court did not specifically reference the above noted instructions. In the result, it is clear that such instructions are not to be weighed in the same manner as other considerations. Rather, given the subject (or reasonable person in their stead) is no longer left to wonder if they have a choice, courts *must* consider that telling a person they are free to leave and do not have to answer questions is (or at least *prima facie* will be) sufficient to counter any circumstances that came before, and undoubtedly informs all that follows, otherwise the above noted paragraphs are meaningless. Plainly, if a person is told, and understands, that they are free to refuse to begin and may leave/stop at any time, and yet chooses to go in the first place and/or stay and continue to talk[99], then in the absence of evidence of oppressive conditions to nullify these instructions,[100] it seems

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[97] This is an argument that frequently arises; to avoid problems why not give rights?
[98] i.e. infer from the circumstances
[99] As in this case, after a second warning
[100] i.e. there must be an objective/reasonable basis to believe the instructions were not genuine/ valid from the outset such as officers standing around tapping nightsticks into their hands or cracking their knuckles. At bar, there was no such evidence.

difficult, if not impossible, to establish[101] they reasonably felt they had no choice but to participate. Various cases have clearly found such instructions to be a key factor.[102]

51. In the case at bar, it is clear and accepted that Sgt. Eros unequivocally told the Respondent that they would like to speak with him, **but** that it was *voluntary, he was free to leave and it was up to him to decide whether he wanted to give a statement*.[103] Thereafter they discussed different options for how he might get to the station, and it was only after no viable alternatives were identified that police offered a ride in an unmarked car.

52. Likewise, and more importantly, before the interview started, Sgt. Eros spent several minutes repeatedly explaining that their encounter was voluntary, including, *inter alia*, noting (a) the door was not locked, (b) he was free to leave upon request at any time, (c) he was free to dictate how he wanted to move if he wanted a break, (d) that he did not have to be with police, and (e) just because he had initially agreed to speak to police, it did not mean he was stuck there – whether it was 20 minutes or two hours later, if he decided he no longer wanted to be with police, all he had to do was say so and they would stop. Of note, the Respondent had no questions and expressed no confusion over these instructions.[104]

53. When addressing this evidence, the Majority's only comments were that the Respondent "*was told he did not have to speak to police*"[105] and subsequently, the fact that officers phrased their questions as a request rather than an order, or that they "*initially*" told the Respondent "*that he did not have to participate if he did not wish to*" did not change the analytical landscape (in light of the other facts).

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[101] To the balance of probabilities

[102] ***R. v. Fash,*** 1999 ABCA 267 at para 128, 132-138, ***R. v. Saretzky***, *supra* at note 69, at para 41. In ***R. v. Rajaratnam*****,** 2006 ABCA 333, the instructions were more subtle but still sufficient. There have also been various cases where no detention was found because police had merely requested a person accompany them or answer a few questions (even without specifically telling the subject they did not have to participate). E.g. ***R. v. Dickins*****,** 2001 ABCA 51, ***R. v. Van Wissen*****,** 2018 MBCA 110, ***R. v. Seagull*****,** 2015 BCCA 164

[103] See paragraph 19 above

[104] AAR, Vol. IV pp. 64/110-66/139, p. 72/286- 75/359

[105] 2021 ABCA 51 at para 9

54. Respectfully, this finding was patently incorrect. Not only did the Majority's characterization of this evidence fall woefully short of encapsulating the repeated and varied efforts made by police to ensure the Respondent understood the matter was voluntary, but by paying little to no attention, and/or treating them as just another factor to consider, the Majority misapprehended their legal effect. To be clear, it is not suggested the Majority erred simply because they found a detention arose;[106] obviously something can start off one way and become a detention at some point. Rather, the error was failing to assess how any other concerns were impacted by these instructions, and that the interaction was *prima facie* voluntary as a result. After all, the essence of psychological detention is the actual and/or reasonably perceived[107] power imbalance between citizens and police. Providing instructions that shatter those perceptions, and ensure the power knowingly rests with the citizen, absolutely changes the analytical landscape. There are several examples of how the Majority's erroneous approach tainted their analysis.

55. To start, they nullify any inference of detention that may have preceded them as a result of police presence at his home.[108] Similarly, although the Respondent was in the presence of two officers on the way to the station, passed through a fence and led through locked doors to an interview room, since he had voluntarily agreed to give a statement *at the police station*,[109] a reasonable person would have anticipated the security features. In other words, they cannot undo what was already voluntary.

56. Once in the interview room, the Majority was also concerned that the Respondent was told that he had to ask if he wanted to use the bathroom,[110] and/or that he would need an escort to

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[106] Some cases have found that such instructions in and of themselves may not be determinative – ***R. v. Johns***, 1988 CanLII 2667 (ONCA) at para 28, ***R. v. Fash***, *supra* at note at para 129-130, ***R. v. P.T.***,, 2005 CanLII 31847 (ONCA) at para 55. (although these particular examples predate ***Grant***)

[107] Again, involves asking what reasonable conclusion can be drawn from ambiguous factors.

[108] Like an intervening act severing causation.

[109] Which too nullifies that he was not offered to have the interview somewhere else. If going to the station was a nonstarter, the Respondent had the power and choice to refuse on that basis.

[110] ***R. v. Lafrance***, *supra* at note 9 at para 29

leave.[111] Once again, such is irrelevant once it is recognized that he was told, and understood, that his requests, up to and including terminating the interview at any time, would be honoured. Rather, as the Trial Judge correctly found, the fact the Respondent was in a "secure environment" is nullified as he knew the door was not locked and he could leave the police station as a whole upon request. (At this point it should also be noted the Majority incorrectly stated that the Respondent was not told the door was unlocked.)[112]

57. Likewise, his being asked to wait in the interview room while Sgt. Eros made calls to the search team[113] did not suddenly transform a voluntary encounter into a detention. Indeed, Sgt. Eros did not tell the Respondent he was going out to make a call, but rather said he was going to get some water, and offered to get the Respondent some as well; an offer he accepted. It was only then that Sgt. Eros asked the Respondent to stay in the room (because, as he explained earlier, he could not wander around the police station).

58. For the same reasons, that the interview lasted three and a half hours is also irrelevant; a person can voluntarily agree to engage in behaviour for an extended period of time. In an encounter where the person is not told they are free to go, then perhaps the longer it goes on, the more likely a reasonable person would feel they had to stay. However, if they know they can leave literally any time, then duration is meaningless, particularly if it is going to be applied arbitrarily. After all, how long is too long? Half an hour? One hour? Three hours? Very quickly it can be seen why assessing the impact of these instructions is vital.

59. Moreover, in order to find such a *prima facie* voluntary encounter has become a detention, a court would have had to point to something during the course of the interaction which nullified the earlier instructions, specifically evidence that (a) the subject no longer wished to participate, (b) *communicated* that to the police (since they would have every reason to believe the subject was still voluntarily participating to that point)[114], *and* (c) the request was ignored or denied. Only then might it be possible to say police were changing the terms of the encounter such that a reasonable person would believe they no longer had the power to leave despite earlier

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[111] *Ibid.*
[112] ***R. v. Lafrance***, *supra* at note 9 at para 9
[113] ***R. v. Lafrance***, *supra* at note 9 at para 10
[114] Anything less would require police to be mind readers

instructions. In this case, the Majority pointed to no such circumstances because they did not exist.[115]

60. Finally, the Majority also did not consider how these instructions impacted personal characteristics.[116] In brief, even if the Respondent were to be attributed an innate sense of a power imbalance and, therefore, was *prima facie* intimidated at the beginning, the clear instructions, *inter alia*, that *he* (and not police) was free to dictate what went on, would plainly negate these concerns.[117] To find otherwise would be to impute an inherent sense of distrust, which means a detention would automatically arise, and police would be required to give s. 10 rights to every young, minority person with whom they specifically sought to speak. Such is contrary to the plain language this Court utilized in ***Grant***.

61. In conclusion, instead of employing a "notwithstanding the warning" approach, and simply weighing the other facts against it, the Majority was required to consider how those instructions impacted the objective test, by determining how they removed ambiguity, and therefore, changed a reasonable person's interpretation of subsequent events. As such, they proceeded from a completely false premise, tainting everything that followed. When combined with the circumvention of the Trial Judge's factual findings, compounded by their own misapprehension of relevant evidence, it is clear the Majority's conclusion cannot stand. Rather, a reasonable person in the Respondent's position, and of the same intelligence and ability to make choices to his benefit, and who had a motive to appear cooperative[118] would not have felt deprived of the choice to refuse. As such, the Majority decision on this point must be overturned.

Consultation with counsel –April 07, 2015

62. As before, the Majority took a different view of what occurred on April 07. However, given the facts found, it is clear the Trial Judge committed no error. To briefly review, the relevant findings were as follows:

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[115] The Trial Judge found police were polite and non-accusatory throughout, was banter between them and the Respondent confirmed he was not treated poorly. AAR Vol. III p. 211/22-34, AAR Vol V p. 210/1462-1463

[116] Including stature and race

[117] *Ibid*.

[118] Rather than exercising his known right to refuse

1. Upon arrest, the Respondent was immediately ***informed that he was under arrest and had the right to remain silent.*** Furthermore he was told, at first informally, and then shortly thereafter with the ***full s.10 rights*** (read from the standard script). In the first instance, when asked if he wanted to speak to a lawyer, he said "*oh yeah*." In the second, when asked again if he wished to call a free or any other lawyer, the Respondent responded, "*free lawyer yes*."[119]

2. The Respondent's claim he was unaware of how a lawyer would assist him before court proceedings and (therefore) that he thought a lawyer would only assist him during the process (i.e. in court) was ***contradicted by Cst. Atwood who expressly explained the Respondent had the right to immediate legal advice.***[120]

3. ***The Respondent's claim that he misunderstood the multiple police instructions about contacting counsel was rejected***. His recorded responses and testimony reveal a ***proper understanding of his right to counsel and to remain silent***.[121]

4. Furthermore, his claim is contradicted by the evidence surrounding being taken to/use of the phone room. Specifically, the Respondent had contacted counsel (seen talking on the phone for 15 minutes) and responded ***"yes" when asked if he understood the advice he was given by the lawyer.***[122]

63. These findings were unassailable. In addition, the Respondent confirmed he understood that he did not have to say anything to police or give a statement,[123] and that counsel was not coming to the station.[124]

64. As to the request to call his father, the Trial Judge found there was no new or unusual investigative procedure, change in jeopardy (or developments that would make the earlier advice inadequate). In addition, the Respondent had already contacted counsel, rather than waived his right to do so, and thus no call for a second consultation per ***Sinclair*** arose. Furthermore Sgt. Eros ***correctly*** indicated there is no right to have counsel present during the interview.[125]

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[119] ***R. v. Lafrance*** at para 111-112, AAR Vol. V p. 2-3, p.161, pp. 12/150 – 13/174, pp. 18/294 - 19/311-314
[120] ***R. v. Lafrance***, at para 113- 114, AAR Vol. III, p. 151/25-40
[121] *Ibid.*, at para 115-118.
[122] *Ibid.*, at para 123-125, AAR Vol. III pp. 15/25-16/11
[123] AAR Vol III, pp. 26/28-27/10, pp. 65/27-291/66, pp. 224/6-15, 25- 225/13-14, 26-226/36, Vol. V p. 2-3, p. 29/13-21 p. 140/2304-2309, 2316-2319
[124] AAR Vol III, pp. 26/28-27/10, Vol. V p. 2-3, p. 29/13-21
[125] ***R. v. Lafrance,*** at para 131-135

65. Just before turning to the particulars of what errors occurred below, it is telling to briefly compare the facts at bar with those of ***Sinclair*** and ***McCrimmon***[126] as they clearly lend themselves to supporting the Trial Judge's conclusions.

66. In both those cases, the detainees spoke to counsel[127] for six minutes or less. During the interviews, both said they did not wish to talk to police until they had spoken to counsel again,[128] both repeated their request at a point when police had either turned to the offence in question and/or revealed incriminating evidence, both expressed feeling vulnerable, or uncomfortable speaking without counsel,[129] and in both cases no breach was found because, not only did the facts not fall into a circumstance warranting a second consultation, but also, the record showed both were aware of their choices and right to silence.

67. The parallels to the case at bar are obvious: a consultation, an expression that could be interpreted as feeling vulnerable without further consultation, made when police turned to the issue at hand, and as in McCrimmon's case, a lack of prior experience. At the same time, the Respondent was fully apprised of his situation, there was no change in the charge, or investigative technique of police, and the facts demonstrated the Respondent was aware of his right to silence (having proclaimed his understanding). It is no wonder the Trial Judge held a second consultation was not required, and it cannot be said this conclusion was incorrect. For that reason alone, the appeal ought to be allowed.

68. Once more, however, if it is necessary to continue, it is equally clear that, in their attempt to distinguish the case at bar, the Majority fell into error through the same pattern of inappropriately overturning facts, erring in the interpretation of relevant precedent and otherwise misapprehending evidence, and drawing unsupported inferences when considering the events of April 7 and the Respondent's request to contact his father.

69. Regarding the facts, the Majority once again relied on the notion that the Respondent was naïve, as well as the brevity of contact or the Respondent's initial confusion, in support of their conclusion, without patent error by the Trial Judge, or regard to other facts as found or evidence.

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[126] 2010 SCC 36
[127] Sinclair spoke to counsel of choice, whereas McCrimmon spoke to legal aid in lieu of.
[128] McCrimmon referenced waiting for further consultation, this time with counsel of choice
[129] McCrimmon also proclaimed he was ignorant of the law

70. As to the law, the Majority misinterpreted the ratio/application of ***Sinclair*** in several ways throughout their decision. First, they overlooked the key presumption of sufficiency (discussed below) recognized by this Court. Second, they misconstrued the nature of changes which trigger the need for another consultation, ultimately conflating insufficiency with subjective desire. Third, they misapprehended evidence, and relied on irrelevant criteria to ultimately draw unsupported inferences in finding the facts fell into the open category (discussed below). Throughout, they also drew support from clearly distinguishable cases. In the result, instead of upholding or applying ***Sinclair***, they cast the net much wider than intended, effectively resurrecting the dissent of Justice Binnie.

Overlooking the presumption of sufficiency

71. This Court has repeatedly set out the rationale and importance of providing a detained person their s. 10 rights, both informational and implementational. Detained by the state and, thus, in a disadvantaged positon, an accused must get immediate advice on their rights (or obligations as the case may be) and how to best exercise them, in particular the right to silence, so they may decide whether and how to participate in the investigation. That said, s.10 does not guarantee a decision (to participate) is *wise*; nor does it guard against subjective factors that may influence the decision. Its purpose is simply to give detainees the opportunity to access legal advice relevant to that choice.[130]

72. Importantly, police are not to inquire or monitor quality of advice received from counsel. Unless the detainee indicates, diligently and reasonably, that the advice they received is inadequate, the police may assume the detainee is satisfied with the exercised right and are

[130] ***R. v. Bartle,*** [1994] 3 S.C.R. 173 at para 17, ***R. v. Sinclair,*** *supra*, at note 15, at para 24-26, 32 (citing ***R. v. Manninen,*** [1987] 1 S.C.R 1233 at para 23 and ***R. v. Hebert,*** [1990] 2 S.C.R. 151 at para 109-110), ***R. v. Willier,*** 2010 SCC 37 at para 27, ***R. v. Taylor,*** 2014 SCC 50 at para 21-22 see also ***R. v. Rafilovich,*** 2019 SCC 51 at para 131-312 dissenting reasons of Moldaver, - s 10 is focused on the time of arrest ***R. v. Poulin,*** 2019 SCC 47 at para 54 charter rights do not automatically receive the broadest interpretation.

entitled to commence with their investigative interview. Furthermore, this Court has declined to endorse that an inference should be drawn from brevity of consultation.[131]

73. Notwithstanding the fundamental importance s. 10 plays, this Court has also recognized certain limits. For example, there is no right to delay the investigation indefinitely. That is, even if an offender wishes to speak to a particular lawyer, police need only wait a reasonable amount of time before the offender must seek other counsel or the duty on police to refrain from questioning is suspended.[132] Likewise, it is now firmly established that an offender does not enjoy the right to have counsel with them during the interrogation, or to repeatedly stop an interrogation through repeated requests to speak to counsel.

74. All of the above limits are relevant to the matter at bar, as are the facts underlying the cases from which these principles arose.

75. Importantly, when setting out when a second consultation would be necessary,[133] this Court held the discussion begins with a recognition that a single, preliminary consultation is *prima facie* accepted as appropriate to fulfil s. 10. More precisely, this Court affirmed that it is to be "***assumed** the initial legal advice received **was sufficient and correct** in relation **to how** the detainee should exercise his or her rights in the context of the police investigation."* [134]

76. Such is in keeping with the presumption of competence attached to counsel,[135] and is necessary to provide meaning to the ***Brydges***[136] system.[137] Plainly stated, the Majority below failed to recognize the existence, let alone apply, this fundamental presumption to the facts before them. Much like the detention issue, the Majority should have considered how this presumption addresses confusion, and concerns about strategy, the effects of which will be discussed below.

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[131] ***R. v. Willier***, *supra* at note 129, at para 40-42
[132] ***R. v. Willier***, *supra* at note 129, at para 35, ***R. v. McCrimmon***, *supra* at note 125, at para 17
[133] Police may be free to allow multiple consolations but the issue is whether it is necessary
[134] AKA "SUFFICIENCY INFERENCE"
[135] ***R. v. G.D.B.***, 2000 SCC 22 at para 27 ***R. v. Lundrigan***, 2020 ABCA 281 at para 70
[136] [1990] 1 SCR 190
[137] Where it would be difficult if not impossible to independently corroborate or refute a detainee's claims when they speak to duty counsel.

Triggering a second consultation – change in circumstance

77. Additionally, the Majority erred in their understanding of when a second consultation will be required per ***Sinclair***. Given the recognition of the sufficiency inference, this Court determined that a "*material change*"[138] in circumstance which rendered the previous advice no longer sufficient or inadequate[139] was required to trigger the need for further consultation.[140]

78. Accepted types of material changes include the utilization of new investigative procedures beyond an interrogation,[141] new jeopardy (charges), when there is a basis to believe a detainee *who has waived his rights* did not understand s. 10,[142] or when police have undermined advice such that they have distorted or nullified it.[143]

79. In summation, this Court states,

> *We conclude that the principles and case-law do not support the view that a request, without more, is sufficient to re-trigger the s. 10(b) right to counsel and to be advised thereof. What is required is a change in circumstances that suggests that the choice faced by the accused has been significantly altered, requiring further advice on the new situation, in order to fulfill the purpose of s. 10(b) of providing the accused with legal advice relevant to the choice of whether to cooperate with the police investigation or not. Police tactics short of such a change may result in the Crown being unable to prove beyond a reasonable doubt that a subsequent statement was voluntary, rendering it inadmissible. But it does not follow that the procedural rights granted by s. 10(b) have been breached.* [144] (emphasis added)

80. Moreover, this Court also set out what circumstances *will not trigger* the need for further consultation. As above, for example, a simple request is not enough, nor will it be sufficient to assert confusion or the need for help after the fact. Rather, there must be objective indicators that further consultation was required to make a meaningful choice.[145] Additionally, the gradual revelation by police of further information does not meet the test.[146] (To this list, based on the

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[138] ***Sinclair*** *supra* at note 15, at para 47
[139] i.e. the initial advice was given about a different set of circumstances.
[140] Also where circumstances showed an offender who WAIVED his right to counsel was confused about the nature of his rights.
[141] E.g. participating in a line up or polygraph test.
[142] i.e. where it cannot be assumed initial advice addressed these topics
[143] ***Sinclair*** *supra* at note 15, at para 52
[144] ***Sinclair*** *supra* at note at para 65
[145] *Ibid.*, at para 55
[146] ***R. v. McCrimmon***, *supra* at note 125, at para 23-24

facts in ***McCrimmon,***[147] the Appellant would add that a shift in tone from building rapport to more pointed and incriminating questions would not dictate further consultation).

81. Even more importantly, in order to properly understand when a second consultation is required, it is vital to contrast the majority decision with the dissent, authored by Justice Binnie. Therein, he felt the majority's focus on change was insufficient and advocated for further consultation as the situation developed and the offender's understanding evolved. He went on to set out various relevant factors including, *inter alia,* the extent and timing of prior contact with counsel, information provided by police, and condition (mental and physical) of the detainee. [148]

82. As applied, Mr. Sinclair only had a very brief consultation, and halfway through the interrogation police falsely declared they had an overwhelming case, including DNA evidence, and suggested it would be useless to resist. To this Sinclair suggested he did not want to talk until he had consulted with his lawyer. As such, he should have been permitted a further consultation.

83. The majority of this Court expressly rejected Justice Binnie's approach, as it would require the opportunity to consult with counsel whenever there is "objective support" to think the detainee may require further legal advice. Such an approach was deemed to be not sufficiently connected to the purpose of ensuring the detainee remains properly advised about how to exercise their rights. (Given the presumption), the failure to provide additional opportunity would only constitute a breach when it becomes clear "*as a result of changed circumstances or new developments that the initial advice is no longer sufficient or correct*." The dissent "*does not, in our respectful view, capture the circumstances in which additional advice may be required*."[149]

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[147] Where the accused's request to speak further with counsel as police brought up incriminating topics, was not enough to trigger a second consultation as it was found the accused was not confused about his right to silence.

[148] *Ibid.*, at para 106

[149] *Ibid*. at para 57, see also obiter ***R. v. Poulin,*** *supra* at note 129 at para 53 - *Rather, the purpose of s. 10(b) was satisfied by a more measured reading of the right, which permits detainees under interrogation to consult counsel anew when a change of circumstances in the course of the investigation justifies consultation.*

84. As well, the majority held that Justice Binnie's approach would give a detainee an additional, vaguely described and unnecessary tool to control the investigation in that police would have to stop the interrogation, which could result in long delays.[150] Finally, the proposed test was so vague as to be impractical. Rather, on the facts, the majority determined a second consultation was not required.

85. To repeat, in the case at bar, in addition to overlooking the sufficiency inference, the Majority erroneously conflated a request for further consultation, admittedly on the advice of Legal Aid, with a change in circumstance as contemplated in ***Sinclair.***

86. From the outset their logic is flawed. Plainly, there was no change jeopardy or investigative technique. Respectfully, wanting *more* consultation (because he "*would rather have that on his side*"[151]) does not signal that the original advice was insufficient in any way. After all, *in literally every case* where the detainee says they want to speak with a lawyer again, they are suggesting they *want more* advice. However it is equally clear that they do not enjoy that right.

87. Rather, the changes contemplated by ***Sinclair*** expressly address situations where it can be concluded the initial consultation would not have touched on the new circumstance. It can be assumed someone charged with one offence would tell counsel about that charge, and no other. Equally it can be assumed counsel will address the use of an interrogation, but not necessarily a polygraph or line up, or consent DNA sample. There were no such concerns here.

88. Likewise, the Majority's suggestion that a shift in tone, from building rapport to more pointed questions, could represent a sufficient change, was incorrect.[152] This Court has recognized that offenders may be disinclined to speak to police and thus investigators are allowed to engage in a variety of tactics,[153] including building rapport, appealing to an accused's conscience or even lying about the strength of the evidence. If these tactics were meant to trigger a second consultation, this Court would have declared it so in ***Sinclair***. Moreover, this Court would have found a breach in ***McCrimmon,*** as he also tried to invoke his right to counsel once

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[150] ***R. v. McCrimmon,*** *supra* at notes 155, at para 58
[151] AAR Vol. V, page 137/2249. Or as he testified in the *voir dire*, his desire was to have counsel in the room. AAR Vol. I3I, pp. 166/40 - 167/8, 40 - 168/1, 3-10, p. 394/20-29, 31-36, p. 170/6-7
[152] 2021 ABCA 51 at para 53, 60
[153] So long as they don't shock community standards

police shifted to pointed questions, yet no breach was found. Furthermore, when one considers the innumerable number of interviews that use this technique, s. 10 breaches would become the norm regardless of whether the accused was confused about his rights or not.[154] Respectfully, it is clear a shift in tone does not, and should not, given rise to a need for further consultation.

Open category in Sinclair.

89. Of course, the Majority did not rely solely on the change in circumstance, rather they also opined the circumstances could also fall into the open ended category where consultation is necessary to fulfil the purpose of s. 10[155] In support, they cited three decisions[156] where the detainee was seeking to consult with a specific lawyer of choice, and either had failed outright, or the detainee and police were aware the lawyer in question was going to attend the station to provide the initial consultation. Furthermore, with one exception, there no evidence the detainee had received any actual advice from counsel on the phone. The Majority relied on these cases for the proposition that police could not ignore a statement by an accused that raises a reasonable prospect they have not exercised their s. 10 rights.

90. These cases are clearly distinguishable. The Respondent did not have a particular lawyer in mind, but requested and spoke to a Legal Aid lawyer.[157] He was in the phone room for 26 minutes, of which the Trial Judge found he was on the phone for fifteen. Cst. Atwood testified the Respondent signaled he was done,[158] and the Respondent confirmed he spoke to counsel, received and understood the advice that he did not have to say anything or give statements.[159]

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[154] It is noteworthy the Majority below drew support from ***R. v. Richard, (DR)* et al**, 2013 MBCA 105 which discussed the gradual release of information, not a shift in tone. Further, the MBCA ruled such did not require a second consultation. See also ***R. v. Briscoe***, 2015 ABCA 2

[155] which, to repeat is to level the legal field by receiving advice about their obligations, i.e. right to silence, and choice to participate

[156] ***Dussault c. R***, 2020 QCCA 746 leave to appeal granted 2021 CanLII 13271, ***R. v. Doonanco***, 2016 ABQB 583, ***R. v. Badgerow***, 2008 ONCA 605

[157] Not unlike the facts in ***R. v. Willier***, *supra* at note 129

[158] AAR Vol. III p. 15/27-28, p. 64/33-34.

[159] AAR Vol III., pp. 26/35-27/10. In the *voir dire* he testified that he understood that he did not have to say anything or give any statements. AAR Vol III p. 226/31-37, Vol. IV pp. 7/43-8/51 Vol III pp. 147/31-148/5

Similarly, he did not make a request to call his father or express that Legal Aid had advised him to sit down with a lawyer *at that time*. Clearly then, there was no basis to suggest that the Respondent had not exercised his right to counsel.

91. Moreover, while the Majority below found these cases were similar because there was an expectation the consultation would continue,[160] the Respondent was aware the lawyer to whom he spoke was not coming to the detachment, and thus had no such expectation.[161] At its highest, the advice from Legal Aid suggested it would be in his best interest to have a face to face consultation, not that the consultation with Legal Aid was itself insufficient.

92. Once again, given the facts of both ***Sinclair,*** and ***McCrimmon,*** it is clear the Majority confused statements which demonstrate a detainee has not consulted counsel, with those suggesting a detainee has been properly informed, but wants further consultation.

93. In fairness, the Majority also cited these decisions for the proposition that the right to seek advice from counsel is not limited to obtaining perfunctory advice to keep quiet, but rather to obtain sufficiently meaningful advice to enable him to make an informed choice. However, this too appears to be predicated on a misunderstanding of the relevant authorities, and again risks resurrecting Justice Binnie's dissent.

94. To start, it bears repeating that, having consulted counsel, the Respondent has the status of someone who, by presumption of law, was given correct *and sufficient* advice *on how* to exercise his right to silence and whether to participate. Moreover, the issue is being informed, not putting the detainee in the best possible position *vis a vis* strategy. This is reflected in various decisions of this Court, most notably ***Sinclair,*** in which it was made clear the purpose of s. 10 is

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[160] As legal aid suggested to the Respondent he speak to a lawyer face to face

[161] Nor could he have had expected a lawyer would come to the station even if he contacted his father, as he had no basis to believe one could or would be contacted, he merely hoped one would. Indeed, the Respondent testified he had not attempted to speak to a lawyer or contact legal aid between the date of his first statement and his arrest on April 07. He also said he did not know what legal aid did or how to hire a lawyer. AAR Vol. III, p. 147 / 11-29

not to ensure *wise* decisions.[162] Likewise, if ensuring best practices and strategy for an accused were enshrined protections, then this Court would have directed that police must wait for specific counsel of choice (since comfort is part and parcel of trust in their advice). Additionally, counsel would have been permitted in the room (because an accused might forget the particular advice received), or alternatively, there would be an unlimited right to interrupt the interrogation to seek further and better advice as things progressed to ensure it was fresh in the accused's mind and as accurate and up to date as possible.

95. It follows, therefore, that the Majority's effort to utilize notions of sufficiency, *vis-à-vis* strategic advice, as a bench mark for the open ended category was fundamentally incorrect. Moreover, it is unworkable as a detainee's perception of how well prepared they feel is too subjective to be measured, and would undoubtedly lead to finding more breaches than this Court intended, as, again, literally any request to speak with counsel again could be taken as proof the detainee did not subjectively feel the earlier advice was not as comprehensive as preferred.

96. Finally, the Majority listed several factors they believed were indicative of the Respondent's lack of understanding about the jeopardy, advice and choices he faced.

97. These are:

1) The Respondent expressed uncertainly of counsel's role at the interview stage;
2) His consultation was brief;
3) He was 19, small in stature and Indigenous;
4) He was interviewed for three and a half hours on a prior occasion, about the same incident, without being given his rights;
5) He had no prior experience and had never been arrested before;
6) He was not asked or indicated if he was satisfied with the advice he received;
7) The Trial Judge found him naïve;
8) He requested assistance at the stage of the interview when police sought a confession;
9) He received his initial consultation three hours earlier;
10) The Legal Aid lawyer had no objective information about the circumstances of the charge and advised him to seek further and better consultation.

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[162] 2021 ABCA 51 at para 26, see also para 30-21 where the Majority rejected the notion that s. 10 was meant to provide advice on how to deal with questions. Further, part of the Justine Binnie's dissent was predicated on the notion that the right to counsel should not just echo what police have said about the right to silence. He invoked an example of a recording where counsel would merely tell the caller to keep their mouth shut. At para 86

98. Herein they repeat the same pattern of overruling findings of fact or misapprehending evidence and drawing unsupportable inferences. Several problems are immediately evident. First, as mentioned above, in literally every case where this topic arises, there has been a request to further consult counsel in some form. However, since a second consultation is clearly not always necessary, it follows that making a request, in and of itself, cannot be taken as proof of subjective or objective insufficiency. If it were, then the request itself would be the only prerequisite, and neither the Majority nor dissent in ***Sinclair*** found that to be the case.

99. Second, the Majority again relied on the Respondent being naïve. Third, their overall approach and specifically, #2, 3, 8 and 10 are similar to the concerns and considerations set out by Justice Binnie, and rejected by this Court in both ***Sinclair***, and ***McCrimmon***

100. More to the point, on closer inspection, it is clear these factors are plainly irrelevant[163] to the issue of confusion or discontent with earlier advice (addressing them in order):

101. (1) At the outset, it must be remembered the Trial Judge heard and rejected the Respondent's claims that he was confused in light of police compliance with the informational duty. Furthermore, he informed the officers that the lawyer to whom he spoke was not coming to the detachment. These findings are subject to deference.

102. Moreover, having been corrected by police satisfying the informational duty, initial confusion has no logical relevance to the sufficiency[164] and the Respondent's understanding of the actual advice received from duty counsel, regarding his rights and choices. This is the issue at hand, not some earlier confusion. By relying on this confusion as they did, the Majority misapprehended the effect of the evidence.

103. (2) Brevity of consultation is not relevant. First, to repeat, in ***Willier***, this Court warned against imposing a duty to draw conclusions about the quality of advice from brevity.[165] Second, his consultation was not brief; he was in the telephone over 26 minutes[166] and seen talking on the

[163] In and of themselves or as a result of other facts
[164] Which of course is to be presumed.
[165] *Supra*, at note 129, at para 40
[166] AAR Vol. III p. 15/25-28

phone (the Trial Judge found) for at least 15 of those minutes. Certainly more than enough time to give advice.[167] Moreover, the Respondent was not interrupted in any way, and as the only source of information on the *voir dire* about the substance of the call, he did not explain why he terminated it when he did. Third, even if there might be some concern, consultations of much shorter duration have been found sufficient by this Court in ***Sinclair***, ***McCrimmon***. Finally, by their own logic, the Majority's categorization of this encounter as brief is arbitrary. Indeed, the Majority decision seems to work retroactively, in other words, because he was told he should consult further, it must be assumed his initial consultation was too short to be meaningful. This is both speculative, and contrary to the sufficiency inference. Moreover, given the Majority's interpretation about what it meant to be told/ask for an additional face to face meeting, the duration of his initial consultation is meaningless as a longer consultation would not have altered Legal Aid's advice on this point.

104. (3) Being young, small in stature, and Indigenous are also not relevant to whether he *understood the advice from counsel*. Furthermore, by placing weight on his personal circumstances, the Majority misapprehended, by ignoring, the other evidence about his education and intelligence. Consequently their decision would suggest any young person, *regardless of intelligence etc*, who had been arrested for the first time, exercised his right to counsel and understood their right to remain silent, should nevertheless be assumed to be in need of, and therefore entitled to, greater protections than this Court ruled would *prima facie* be satisfied with a single consultation. Respectfully, this Court did not carve out an exception for young adults or inexperienced people, nor could one exist, as only Parliament may dictate a different system.

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[167] Recall too, the applicant has the onus to establish the *Charter* breach. As applied, there is no evidence about what *else* duty counsel advised. It could very well have been 14 minutes of sage advice with a one-time recommendation that the Respondent retain a lawyer in light of the seriousness of the charge. Taken together, along with the credibility findings which carry over, it should not be at all be inferred that the advice was insufficient.

105. Alternatively, by suggesting he was confused because police seemingly overrode his request, the Majority conflated indicia of detention (which may go to voluntariness or the right to silence) with confusion.[168] This is something the court in ***Sinclair*** was clear to keep distinct. Regardless, it was agreed in ***Sinclair*** that there is no right to halt an interrogation simply by reasserting a desire to speak to counsel.[169] Likewise, in ***R. v. Singh,***[170] this Court held that continuing to question a suspect after asserting a desire not to answer any more questions is not a breach. The Majority's decision turns these principles on their head.

106. (4) The prior three and a half hour interview on March 19 is also irrelevant. The Respondent was not left to draw an inference about his current situation from ambiguous circumstances. Rather he was repeatedly told he could contact a lawyer immediately, and by so doing and receiving advice that he understood, any connection to the prior interview is severed.[171]

107. (5) The fact that he had no prior experience or arrests is irrelevant for the same reasons. Section 10 imparts an informational duty specifically so that all persons are aware of their rights to have immediate access to counsel, which in turn, provides them (further[172]) information about their right to silence.[173] Taking into account that someone has no prior experience when assessing whether there was a subsequent breach would render the informational component ineffectual.

108. (6) That he was not asked or indicated if he was satisfied with the advice he received is a catch 22, as police are not to probe the nature of the advice given.[174] At best, it can be said it is not uncommon for police to confirm the detainee is satisfied with their opportunity to contact counsel. However, notwithstanding the sympathy the Majority clearly showed to the Respondent,

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[168] ***Sinclair*** *supra* at note 15, at para 65
[169] *Ibid.*, at para 58 – the right to counsel is not to permit suspects to delay needlessly and impunity an investigation by triggering the duty to hold off electing evidence while counsel is being consulted. At para 112, dissenting reasons of Binnie J. – the proper role of s. 10 is not to give the detainee the power to unilaterally bring a halt to an interrogation.
[170] 2007 SCC 48
[171] Alternatively, it could be said the Majority misapprehended the legal effect of this evidence.
[172] Having been so cautioned by police.
[173] ***R. v. Willier,*** *supra* at note 129, at para 27-29
[174] *Ibid.*, at para 41

they overlooked that *the onus always rests on the detainee to inform police if they are having trouble or need more time to contact a lawyer*.[175] As such, the fact he did not spontaneously indicate he was not satisfied with counsel's advice cannot be laid at the feet of the Crown. The Majority decision would effectively impose upon police a duty to inquire, ostensibly to trigger detainees to speak up. More importantly, the record does not support that he was unsatisfied with the advice at all, but rather he wanted a further consultation, because he would "*rather have that on his side*", or as he said repeatedly the in the *voir dire*, (and completely ignored by the Majority) he wanted counsel to sit in on the interview because he thought he had that right.[176]

109. (7) It is irrelevant that the Trial Judge found him to be naïve, as once again, this reference was limited to his plan to provide a statement in the hopes of allaying police suspicion, and he was otherwise intelligent. Once again the Majority misapprehended the relevant evidence and/or did not show proper deference.

110. (8) The fact he requested assistance at a point where the interview became more probing is not indicative of confusion about the advice received or his rights. As discussed, changing the tone of the interview has not been recognized as an event which would justify further consultation. Indeed, it would not be uncommon for an accused person to attempt to derail an interview when it became more probing. A breach here would stymie approved interview techniques.

111. (9) The passage of time between his initial consultations is likewise irrelevant to whether he understood his advice, bearing in mind he is an educated person, etc.[177] Once again this would resurrect one of Justice Binnie's criteria and threatens to bring change in tone or revelation of information back into consideration.

112. (10) Likewise is the notion that the lawyer had no objective information about the circumstances of the charge. To start, the Majority simply has no knowledge about what information the Legal Aid lawyer had regarding the charge and thus drew an unsupported

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[175] *Ibid.*, see also ***R. v. Jones***, 2005 ABCA 289 at para 9-11. ***R. v. Top***, 1989 ABCA 98 at para 8 , ***R. v. Liew***, 1998 ABCA 98 at para 18

[176] *supra* at note 150

[177] And the facts clearly show he did not forget the advice of Legal Aid.

inference. Additionally, if the Majority meant to imply that the lawyer did not have any information from anyone other than the Respondent, then this is contrary to ***Sinclair***, which affirmed the value of an immediate, preliminary consultation. Surely this Court did not overlook that in such consultations the lawyers, often Legal Aid or duty counsel, would not have access to the police disclosure or any other witnesses by this point. Again, this is also very similar to the concern Justice Binnie expressed about counsel giving advice without knowing how police were unfolding the case.

113. Respectfully, none of the reasons offered by the Majority withstand scrutiny, and the fact that the Respondent was advised to have further consultation with a lawyer, and asked to do so when the interview became more pointed, is not indicative of confusion, or that the advice received to exercise his right to silence was in any way inadequate. Indeed the facts demonstrate the opposite.[178] Merely thinking it would be to his benefit to speak to counsel again so that he could have a lawyer "*on his side*" and/or asking for more advice because Legal Aid suggested he do so, does not override the inference (or actual) proof of sufficiency that attached to Legal Aid's advice (the *only* confusion being that he thought he could have a lawyer in the interview[179]).

114. Consequently, the Majority's conclusion, at paragraph 61, that these facts demonstrated the Respondent did not *understand his advice*[180] was is an unsupported inference or a misapprehension of evidence. Likewise, there is absolutely no basis to support the conclusion that the Respondent did not understand the serious legal jeopardy he faced. This was not a case

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[178] *Supra* at note 122.

[179] *Supra* at note 150. Moreover, providing him with further opportunity to speak to counsel to clarify this point would not change the outcome as police always retain the right to speak to an accused even after they have consulted counsel -- Detainees do not enjoy the right to not be spoken to by police. ***R. v. Singh*** *supra* at note 169, at para 28

[180] In addition to receiving his right to counsel and being advised by counsel to remain silent, he was given standard warning upon arrest that he did not have to say anything, but anything he did say could be used in evidence. The Majority decision overlooks this evidence and fails to show deference to the Trial Judge's specific findings of fact that the Respondent was so informed and understood these warnings. ***Lafrance,*** *supra* at note 9, at para 116- 117

where the charge was increased; from the outset he was charged with the murder of the victim. Indeed, the Trial Judge specifically found he was aware of his jeopardy. Additionally, the suggestion, at paragraph 62, that the Respondent was expressing that he *needed* (versus wanted) more advice is incorrect for all the reasons set out above.

115. Finally at paragraph 65, the Majority claims their conclusion is not based on his asking to have counsel in the room as the evidence shows he wanted an in person consultation before speaking. Again, this is a complete misapprehension as the Majority outright ignored the evidence of the Respondent when he amplified this statement in the *voir dire*.

116. Overall, the Majority made several errors by misapprehending the evidence and making unsupportable inferences. They assumed the worst case scenario, despite the evidence (and/or lack thereof) and onus on the Respondent, and in so doing, found that anyone to whom it is suggested they retain counsel, and requests a second consultation during the interview, must get one, under the guise of the open ended category in ***Sinclair*****.** This decision was not only incorrect on the facts, but effectively overrides this Court's decision in ***Sinclair*** in favour of the dissent. Having been expressly rejected, it cannot herein be resurrected by a haphazard attempt by the Majority to resort to a general declaration regarding the need to achieve the purposes of s. 10.

117. Properly understood, simply because it was suggested to the Respondent that he get more advice, does not mean his request to speak to counsel was more legally meaningful than any other case where an offender says they want to speak to their lawyer (again) before talking anymore.

118. For all these reasons, the Majority decision must be overruled.

Conclusion:

119. Respectfully, the Trial Judge committed no errors and, on that basis alone, the appeal ought to be allowed and the conviction restored. Where necessary to examine the decision of the Majority, it is clear they usurped the role of the Trial Judge and recast the facts. Worse still, in their effort to justify their conclusion, they ignored or otherwise misapprehended relevant evidence, while at the same time misinterpreting this Court's prior decisions on detention and s. 10. Investigators followed the advice of this Court to ensure the Respondent was aware of his

rights at all times. Endorsing the Majority decision would result in taking a positon diametrically opposed to established principles, and reintroduce the very uncertainty that this Court has already taken steps to eliminate. In sum, from the foundation to their ultimate conclusion, the decision is incorrect and cannot be left unchecked.

PART IV: COSTS

120. The Respondent does not seek and makes no submissions about costs.

PART V – NATURE OF ORDER SOUGHT

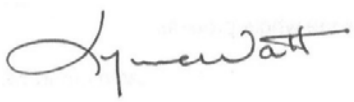
121. The Respondent respectfully requests the appeal be allowed, and the conviction restored.

PART VI: IMPACT OF SEALING ORDER OR PUBLICAITON BAN

122. There is no publication ban, sealing or confidentiality order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 5th day of May 2021, at Edmonton, Alberta



for:

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Keith A. JOYCE

Counsel for the Appellant.

PART VII: TABLE OF AUTHORITIES & STATUTORY PROVISIONS

Case	Paragraph reference
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D. Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed (Toronto: Carswell, 2015) at p. 1253 (Final 74-B)	**45**

STATUTORY PROVISIONS

	Paragraph reference
The Constitution Act, 1982 Schedule B to the **Canada Act 1982**, 1982, c. 11 (U.K.),, 1982, c. 11 Part 1, Canadian Charter of rights and Freedoms. Ss. 10 *Loi constitutionnelle* de 1867 à 1982. Ss.1 10	**2, 4, 8, 9, 17, 20, 48, 49, 60, 62, 71, 73, 75, 78, 79, 88, 89, 94, 107, 116, 119**

FINAL 74-B

SELF DEFENCE1

(GENERAL INSTRUCTION)

(CODE, s. 34)

[1] In some circumstances, a person who believes on reasonable grounds that force is being used or (its use) threatened against him/her or another person (somebody else) may do something that would otherwise be an offence, but be acting lawfully (and not be guilty of any crime)…

[8] Was (NOA)'s conduct reasonable in the circumstances?

This question relates to (NOA)'s conduct and requires you to decide whether that conduct was reasonable in the circumstances as (NOA) knew or believed them to be.

Anyone who defends or protects him/herself or another person cannot be expected to know exactly how to respond to or deal with the situation or to know how much force to use to achieve his/her purpose. What is reasonable may include several alternatives. The issue here is not whether (NOA) believed on reasonable grounds that s/he had no other course of action available to him or her, but rather whether what (NOA) did was a reasonable thing to do in the circumstances as (NOA) knew them or reasonably believed them to be.

A reasonable person is sane and sober, not exceptionally excitable, aggressive or fearful. S/he has the same powers of self-control that we expect our fellow citizens to exercise in our society today. A reasonable person has the same characteristics and experiences as (NOA) that are relevant to (NOA)'s ability to respond to (what s/he reasonably believed was) the use or threatened use of force. The reasonable person is a person of the same age, gender, physical capabilities, as well as past interaction and communication with (NOC) as (NOA). A reasonable person cannot be expected to know exactly what course of conduct or how much force is necessary in (self) defence (of another person).