SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Gillis*, 2018 NSSC 20

Date: 2018-01-26
Docket: CRH No. 458699
Registry: Halifax

Between:

Her Majesty the Queen

v.

Benjamin Joshua Gillis

Restriction on Publication: Section 486.5 Criminal Code

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	November 7, 8, 9, December 11 and 13, 2017, in Halifax, Nova Scotia
Final Written Submissions:	December 12 and 15, 2017
Written Decision:	January 26, 2018
Counsel:	Christine Driscoll and Kimberly McOnie, for the Crown Peter Planetta, for the Defence

By the Court:

Introduction

[1] Mr. Gillis is charged with the 2nd degree murder of Blaine Clothier. The Crown wishes to introduce into evidence at his trial, statements he made, while under arrest March 2 – 3, 2016 when:

1. He was initially questioned by police officers [videotape 1];
2. In a cell for the night, to an under-cover police officer posing as an imprisoned arrestee; and
3. He was next questioned by police officers [videotape 2].

[2] The Crown has the burden to prove beyond a reasonable doubt that his statements to the police officers were made freely and voluntarily-*R. v. Oickle*, 2000 SCC 38; *R. v. Spencer*, 2007 SCC 11; *R. v. Singh*, 2007 SCC 48 and more recently in *R. v. Calnen*, 2017 NSCA 49, at paras. 20 and 137-39 (under appeal, SCC 37707, but not on this point-hearing February 12, 2018). The defendant has the burden to prove it more likely than not that his Section 7 Charter of Rights (his right to silence) was violated before he gave any statements to the undercover police officer-*R v Hebert*,[1990] 2 SCR 151; *R. v. Broyles*, [1991] 3 SCR 595; *R. v. Liew*, [1999] 3 SCR 227. Counsel agreed to the court hearing this matter as one blended *voir dire* regarding the three statements.

Background

[3] In general, the facts are not disputed. Mr. Gillis was arrested at his residence at 1:54 p.m. on March 2, 2016. Constables Jardine and Shannon transported him to Halifax Regional Police headquarters at 1975 Gottingen Street. He was provided with all his Section 10 Charter informational and implementational constitutional advisements and protections. He spoke to counsel, Roger Burrill, for 75 minutes.

[4] He was then questioned over approximately 7 hours (between 5:00 p.m. and 12:00 a.m. midnight) by Constables Jardine and Blencowe. Thereafter, he was placed in cells to sleep. In the early morning of March 3, he made statements to an under-cover police officer in the adjacent cell (s. 184.2 *Criminal Code*). Next, he received breakfast as well as his daily dose of methadone. He was then questioned by Constables Blencowe and Buell over a three hour period, which ended sometime before 1:30 p.m. on March 3, 2016.

The applicable principles regarding the “voluntariness” of Mr. Gillis’s statements to police officers

As I stated in *R. v. MHB*, 2016 NSSC 129:

> 13 There is a general obligation on the Crown to present to the *voir dire* judge evidence of all the circumstances surrounding the taking of a statement so that the judge may decide whether the statement should be admitted -- this includes presenting all persons in authority who have had any material dealings with the detained/accused person, and ensuring there is a sufficient record of the interaction between the suspect and the police, or providing an adequate explanation for not having done so -- *R. v. Brooks*, (1968) 28 CCC (3d) 441 (BCCA) leave to appeal denied (1987) 86 NR 239n, [1987] S.C.C.A. No. 90 -- a case where the accused was interrogated seven times for approximately 11 hours over a 72 hour period and some of the tape recordings thereof were lost and not available at trial [majority at paragraphs 113 - 114]; *R. v. Thiffault*, (1933) 60 CCC 97(SCC*);)* *R. v. Kacherowski*, (1978) 37 CCC (2d) 257 (Alta CA) at paras. 17 - 18; *R. v. Moore-McFarlane* (2001), 160 C.C.C. (3d) 493 at paras. 64-67 per Charron J.A., as she then was.
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> 14 In *R. v. MacDonald--Pelerine*, 2014 NSCA 6, the appellant argued that the existence of significant concerns about the accuracy and reliability of her statements which were recorded in writing to an auditor investigating fraud committed during employment, made them inadmissible, and the trial judge erred in admitting them. In response, Justice Beveridge stated at paragraph 41:
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>> 41. With respect, I am not persuaded that there is any substance to the argument by the appellant. The Crown is required to prove beyond a reasonable doubt that putative statements by an accused to a person in authority were voluntary. To state the obvious: if the Crown's evidence about the circumstances surrounding the taking of the statement is marred by a lack of accuracy as to what was said to, and by, an accused, the Crown is at substantial risk of being unable to meet its burden on the issue of voluntariness or ultimate admissibility.
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>> 42. However, if a trial judge, applying the correct legal principles, and absent palpable and overriding error, determines that he or she is satisfied beyond a reasonable doubt that putative statements by an accused were made voluntarily, then disputes about the accuracy and existence of an utterance by an accused is generally for the trier of fact in the trial proper.
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>> 43. These principles were succinctly summarized by Hill J. in *R. v. Menzes*; Charron J.A. in *Moore-McFarlane* at paras. 58-60. Code J. in *R. v. Learning*, 2010 ONSC 3816, after referring to these, and other authorities, wrote of the distinction between accuracy and completeness and of notes or a statement on a *voir dire*, as opposed to at trial as follows:

> 62 Accordingly, the current state of the law is that accuracy and completeness of the record of a voluntary statement is an issue of weight that is determined at trial. However, the accuracy and completeness of the record of the circumstances surrounding the making of the statement can relate to proof of voluntariness on the *voir dire*. This is not an easy distinction to apply, especially in a case like the one at bar where no evidence is called by the defence on the *voir dire*. It may be unclear in such a case whether the defence is raising issues of voluntariness or issues of accuracy.

…

18 Both counsel agree that the governing law regarding this issue emanates from the principles enunciated in *R. v. Oickle*, 2000 SCC 38. Our Court of Appeal has recently referred to these principles in *R. v. Toope*, 2016 NSCA 32 at para. 22 per Hamilton J.A.; and *R. v. MacDonald-Pelrine*, 2014 NSCA 6 at paras. 34 - 35 per Beveridge J.A. There were also extensively commented on by Justice Charron, as she then was, in *R. v. Moore-McFarlane*, (2001) 152 O.A.C. 120 at paras. 53 - 60.

19 In *R. v. WHA*, 2011 NSSC 157, I have previously summarized those general principles:

> 42 The seminal case regarding the common law confessions rule is *R. v. Oickle* 2000 SCC 38, [2000] 2 S.C.R. 3.
>
> 43 There Iacobucci, J. felt it "important to restate the rule ..." -- para. 32. He summarized the contemporary confessions rule as follows:
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> The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not always) be unreliable. The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession. -- para. 47.
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> 44 He then went on to examine the following categories of concern:
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> 1. Threats or Promises;
> 2. Oppression;
> 3. Operating Mind;
> 4. Other police trickery
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> 45 The "threats or promises" category is at the core of the confessions rule and derives from the decision of the Privy Council in *Ibrahim v. R.* [1914] A.C. 599 where the Court stated at p. 609:

> It is long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

46 Justice Iacobucci concluded: "The most important consideration in all cases is to look for a *quid pro quo*". He elaborated:

> In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. **This becomes improper only when the inducements**, whether standing alone or in combination with other factors, **are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne**. On this point I found the following passage from *R. v. Rennie* (1981), 74 Cr. App. R. 207 (C.A.), at p. 212, particularly apt:
>
> **Very few confessions are inspired solely by remorse**. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. **If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated**. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the [page 38] confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession. [Emphasis added]

47 When "oppression" is under consideration, the concern as with threats or promises (para. 57), is that the suspect's will will be overborne to a point where the statement is not voluntary (para. 58):

> Without trying to indicate all the factors that can create an atmosphere of oppression, such factors include depriving the suspect of food, clothing, water, sleep, or medical attention;

> denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time.-- para. 60.

48 Regarding "operating mind", the Court refers back to its decision in *Whittle* [1994] 2 S.C.R. 914 in which Sopinka, J. "explained that the operating mind requirement "does not imply a higher degree of awareness and knowledge of what the accused is saying than that he is saying it to police officers who can use it to his detriment" -- para. 63.

49 Regarding "other police trickery" the Court referred back to its *Rothman* [1981] 1 S.C.R. 640 decision with approval on this specific point. If the trickery might "shock the community" then chances are it will be considered involuntary -- para. 67.

50 It was the position of the Defence at the hearing that there is no material evidence of oppression, nor that A. did not have an operating mind, nor that there was police trickery. Mr. A. argues that his will was overborne by the police interviewers who created an atmosphere of trust, minimized the charge, which in the circumstances, caused Mr. A. to lose sight of his right to silence.

51 Mr. A. argues collectively these items caused his will to be overborne and rendered his statement involuntary. I keep in mind that it is the Crown who must prove beyond a reasonable doubt that his statements are "voluntary".

...

55 In *R. v. Oickle*, Iacobucci, J. discusses a similar argument made in that case under the heading "abuse of trust". He commented:

> In essence, the court criticizes the police for questioning [page 52] the respondent in such a gentle, reassuring manner that they gained his trust. This does not render a confession inadmissible. To hold otherwise would send the perverse message to police that they should engage in adversarial, aggressive questioning to ensure they never gain the suspect's trust, lest an ensuing confession be excluded.

58 The officers did employ this approach. In relation to such approaches, Iacobucci, J. observed in *Oickle* that:

> Insofar as the police simply downplayed the moral culpability of the offence, their actions were [page 46] not problematic. As even the Court of Appeal recognized (at para. 126), "minimizing the moral significance of the offence is a common and usually unobjectionable feature of police interrogation". Instead, the real concern is whether the police suggested that "confession will result in the legal consequences being minimal" (para. 126). As discussed above, this is inappropriate.

[emphasis added]

20 Since *Oickle*, the Supreme Court has also re-iterated that:

1. In *R. v. Spencer*, 2007 SCC 11 (incl. at paras. 11-15):

> ... While Iacobucci J. recognized in *Oickle* that the existence of a *quid pro quo* is the "most important consideration" when an inducement is alleged to have been offered by a person in authority, he did not hold it to be an exclusive factor, or one determinative of voluntariness. On the contrary, the test laid down in *Oickle* a is "sensitive to the particularities of the individual" [paragraph 42], and its application "will by necessity be contextual" [paragraph 47]. Furthermore, *Oickle* does not state that any *quid pro quo* held out by a person in authority, regardless of its significance, will necessarily render a statement by an accused involuntary... Inducements "become improper only when... standing alone or in combination with other factors, [they] are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne" [paragraph 57].
>
> ...
>
> Therefore, while a *quid pro quo* is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused statement.

2. In *R. v. Singh*, 2007 SCC 48:

> 28 **What the common law recognizes is the individual's right to remain silent. This does not mean, however, that a person has the right not to be spoken to by state authorities**. The importance of police questioning in the fulfilment of their investigative role cannot be doubted. One can readily appreciate that the police could hardly investigate crime without putting questions to persons from whom it is thought that useful information may be obtained. The person suspected of having committed the crime being investigated is no exception. Indeed, if the suspect in fact committed the crime, he or she is likely the person who has the most information to offer about the incident. Therefore, the common law also recognizes the importance of police interrogation in the investigation of crime.
>
> 29 Of course, the information obtained from a suspect is only useful in the elucidation of crime if it can be relied upon for its truth -- hence the primary reason for the confessions rule, the concern about the reliability of confessions.

...

34 As we can see from the foregoing discussion, the right to silence, as a facet of the principle against self-incrimination, was already very much part of the common law confessions rule when the Charter came into force in 1982. Any remaining uncertainty as to whether the confessions rule embraces the right to silence was clearly dispelled by this court in *Hebert* [1990] 2 S.C.R. 151. In reviewing the scope of the common-law confessions rule [McLachlin J. as she then was] explained at pages 166 - 67 that the jurisprudence of confessions revealed two persistent themes. The first related to the exercise of free will in choosing whether to speak to police or remain silent and the second to ensuring that reception of the impugned statement would not result in unfairness or bring the administration of justice into disrepute.

...

36 On the question of voluntariness, as under any distinct section 7 review based on an alleged breach of the right to silence, **the focus is on the conduct of the police and its effect on the suspect's ability to exercise his or her free will. The test is an objective one. However, the individual characteristics of the accused are obviously relevant considerations in applying this objective test**

37 Therefore voluntariness, as it is understood today, requires that the court scrutinize whether the accused was denied his or her right to silence. The right to silence is defined in accordance with constitutional principles. A finding of voluntariness will therefore be determinative of the section 7 issue. In other words, if the Crown proves voluntariness beyond a reasonable doubt, there can be no finding of a Charter violation of the right to silence in respect of the same statement. The converse holds true as well.

...

40 ... It is well-established that the test for determining who is a "person in authority" is not categorical; rather it is contextual. It depends largely on the reasonable perception of the accused. The test was reiterated recently in *R. v. Grandinetti* [2005] 1 S.C.R. 27, 2005 SCC 5: 'the operative question is whether the accused, based on his or her [reasonable] perception of the recipient's ability to influence the prosecution, believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment' [paragraph 38]. This approach is rooted in the rule's traditional concern about the reliability of confessions, the rationale being that there is a greater risk that an accused may be influenced to give a false confession to

a person perceived to have the authority to influence the course of the investigation or the proceedings.

...

47 **Mr. Singh takes particular issue with a leeway afforded to the police and questioning the detainee, even after he has retained counsel and has asserted his choice to remain silent**. He submits the courts have erroneously interpreted the underline passage above [from *Hebert* that "police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence"] as permitting the police to ignore a detainee's expressed wish to remain silent and to use "legitimate means of persuasion". **I say two things in response to this argument. First, the use of legitimate means of persuasion is indeed permitted under the present rule** -- it was expressly endorsed by this court in *Hebert*. This approach is part of the critical balance that must be maintained between individual and societal interests. **Second, the law as it stands does not permit the police to ignore the detainee's freedom to choose whether to speak or not, as contended**. Under both common-law and Charter rules, **police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities.**

...

53 ... **The ultimate question is whether the accused exercised free will by choosing to make a statement**; *Otis* [2000] J.Q. no 4320 at paras. 50 and 54."

21 I bear in mind that, if it should occur that, at some identifiable point in time during the taking of the two statements, a determinative cessation of what had previously been to that point a voluntarily provided statement is identified, such "improper inducement does not have the retroactive effect of vitiating what may have transpired beforehand - see *R. v. Jack* (1992) 76 Man. R. (2d) 168 (Man.CA.)" per Beveridge J.A. at para. 20 in *R. v. Thomas*, 2015 NSCA 112.

22 Moreover, I observe that there is a significant disagreement between the British Columbia and Ontario courts of appeal, regarding whether an accused's statement put to him/her in cross-examination is admissible for the truth of its contents without adoption by the accused, or if its use is limited to impeaching the accused's credibility: *R. v. Groves*, 2013 BCCA 446 at para. 41; *R. v. McKerness*, 2007 ONCA 452 at para. 37.

> 23 In spite of the latter reference, the applicable law is generally not in dispute. It is the application of that law to the facts that is in dispute herein.
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> [my emphasis added]

The applicable principles regarding Section 7 Charter right to silence and undercover police officers known as “cell plants”

[5] In relation to the “cell plant” statement made by Mr. Gillis, the Crown relies upon the principles set out in *R. v. Quigley*, 2016 BCSC 2308, at para. 6 citing from *R. v. Deboo*, 2015 BCSC 69, at para. 15, per Dickson J. (as she then was-having been appointed July 28, 2015 to BCCA). As Justice Dickson stated:

> 26 When a detained person speaks to an undercover cell plant the detainee's s. 7 *Charter* rights are implicated. Pursuant to s. 7 of the *Charter*, a person can only be deprived of life, liberty or security of the person in accordance with the principles of fundamental justice. The right to silence is a fundamental principle of justice embedded in s. 7 and related to other *Charter* rights and legal rules such as the confessions rule and the privilege against self-incrimination. Its scope and application in the cell plant context is illuminated by the Supreme Court of Canada in a trilogy of decisions: *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Broyles*, [1991] 3 S.C.R. 595; and *R. v. Liew*, [1999] 3 S.C.R. 227.
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> …
>
> 53 In my view, the following key points emerge from the jurisprudence on statements made by a detainee to an undercover cell plant:
>
> > 1. Pursuant to s. 7 of the *Charter*, a detainee has a constitutionally protected right to silence which includes a positive right to make a free choice whether to speak to the authorities or to remain silent.
> >
> > 2. The detainee's right freely to choose whether or not to speak to the authorities is defined objectively, based on all of the surrounding circumstances.
> >
> > 3. When an undercover cell plant actively elicits a statement from a detainee the detainee is unfairly deprived of his or her s. 7 *Charter* right because the detainee, while in the state's superior power, is unable to make an informed choice on whether to speak to the authorities or remain silent. In such circumstances, the detainee is unwittingly conscripted by police into producing evidence against himself or herself.
> >
> > 4. When a detainee speaks to an undercover cell plant in the absence of active elicitation there is no s. 7 *Charter* breach because the detainee has freely chosen to accept the risk that the recipient of his or her volunteered

> speech may inform the authorities of its content. In such circumstances, the detainee, while in the state's superior power, has not been tricked or manipulated by police to self-betray by producing evidence against himself or herself.
>
> 5. Active elicitation is difficult to define with precision and may be difficult to identify. The central question for determination is whether there is a causal link between the conduct of the cell plant and the making of the detainee's statement.
>
> 6. Assessment of whether a detainee's statement was actively elicited is highly fact dependent and context sensitive. Factors for consideration include whether the cell plant merely followed and picked up on the natural flow of conversation or engaged in the functional equivalent of an interrogation. The nature and characteristics of the detainee/cell plant relationship are also relevant factors to be taken into account.
>
> 7. An oppressive atmosphere or persistent questioning by a cell plant is not required for the Court to find an exchange amounts to the functional equivalent of an interrogation. Subtle interrogation, manipulative questioning or other exercises of power which infringe upon a detainee's mental liberty and freedom to choose whether or not to speak to the authorities constitute active elicitation.
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> 8. Violation of a detainee's s. 7 *Charter* rights in the course of an undercover cell plant operation does not automatically render any statement the detainee makes inadmissible. Nevertheless, where a detainee makes a statement to a cell plant in response to active elicitation the statement will likely be excluded on a s. 24(2) *Charter* analysis because its admission would render the trial unfair.

[6] Mr. Gillis specifically relies upon the summarized general principles set out by Justice Leach in *R. v. Skinner*, 2017 ONSC 2115:

> 5 In this case, the accused claims that the "cell insert" operation breached his right to remain silent, and therefore the rights guaranteed to him by section 7 of the Charter, which reads as follows:
>
> > 7. Everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> …
>
> 26 There is no question that the rights extended by section 7 include a detained person's right to silence; a well-settled principle that has been part of the basic tenets of our law for generations.[24]
>
> GENERAL PRINCIPLES -- SECTION 7 AND THE RIGHT TO SILENCE

27 Further general principles relating to the right to silence include the following:

* The essence of the right to silence is the fundamental notion that the person whose freedom is placed in question by the judicial process must be given a free, meaningful and informed choice of whether to speak to authorities or not.[25]

* The right to silence arises and applies only after detention of a suspect, when the state takes control over the suspect and assumes responsibility for ensuring that his or her rights are respected. At that point, the accused is subjected to the coercive powers of the state through his or her detention, and the need arises to protect the suspect from the greater power of the state.[26]

* However, an express assertion of the right to silence, (e.g., in the form of a declaration that the accused does not wish to speak to the authorities), is not a condition precedent to the right to silence and the application of corresponding protections such as those applied by the courts in relation to "cell insert" operations. It would be absurd to impose, on the accused, an obligation to speak in order to activate his or her right to silence.[27]

* The ambit of the right includes not only the negative right to be free from coercion induced by threats, promises or violence, but a positive right to make a free choice of whether to remain silent or speak to the authorities.[28]

* There is no absolute right to silence, in the sense of a right capable of being discharged only by waiver. Nor can all of a detainee's speech immediately be deemed involuntary merely by virtue of his or her being detained. In particular, although placed in the superior power of the state upon detention, a suspect retains the right to choose whether or not he or she will make a statement to the police, and if the suspect chooses to make a statement, the suspect may do so. The state accordingly is not obliged to protect the suspect against making a statement, and it is open to the state to use legitimate means of persuasion, (short of denying the suspect the right to choose or depriving him or her of an operating mind), to encourage the suspect to do so. For example, the police may question an accused in the absence of counsel, after the accused has retained counsel, and if the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the Charter.[29]

* However, the state is obliged to allow the suspect to make an informed choice about whether or not he or she will speak to the authorities. The state accordingly may not engage in conduct which effectively and unfairly deprives the suspect of the right to choose; e.g., by engaging in tricks which effectively deprive the suspect of such a choice. Similarly, if

the suspect chooses not to make a statement to the authorities, the state is not entitled to use its superior power to override the suspect's will and negate his or her choice.[30]

* The right to choose whether or not to speak to authorities, and the corresponding test for determining whether a suspect's right to choose has been violated, essentially is defined objectively rather than subjectively. In particular, the right does not necessitate a particular state of knowledge on the suspect's part over and above a basic requirement that he or she possess an operating mind. Once that has been established, the focus under the Charter shifts to the conduct of the authorities vis-à-vis the suspect.[31]

GENERAL PRINCIPLES -- RIGHT TO SILENCE AND "CELL INSERT" OPERATIONS

28 Conduct of the authorities in relation to use of undercover officers and agents, (e.g., in the context of "cell insert" operations), and the possible impact of such techniques and subterfuge on a suspect's right to silence, has been the subject of more specific observations, principles and guidelines. They include the following:

* The purpose of the right to silence is to limit the coercive power of the state to force an individual to incriminate himself or herself; it is not to prevent individuals from incriminating themselves *per se*. In every case where the right to silence is raised, there accordingly will be a threshold question as to whether the person who allegedly subverted the right to silence was an agent of the state.[32]

* For example, as the right to silence is predicated on a suspect's right to choose freely whether to speak to authorities (such as the police) or not, it generally does not affect voluntary statements made to fellow cell mates.[33]

* However, even when the person witnessing a statement by the accused is found to be an agent of the state, and his or her status in that regard was not known by the accused at the time the statement was made, such considerations alone do not entail a breach of the accused's right to silence. In particular, the right to silence does not rule out the use of undercover police officers. To the contrary, in affirming a detainee's right to silence, the Supreme Court of Canada has preserved and defined an area of police investigation where undercover operations, including "cell block interviews", are perfectly legitimate. For example, the right to silence is not breached by the use of undercover agents to simply observe and/or listen to a suspect. More generally, the use of undercover agents in circumstances where there is no eliciting behaviour on the part of the police, or their agents, entails no violation of the right to choose whether or not to talk to the police. If the suspect speaks in those situations, (even to an undercover officer), it is by his or her own choice, and he or she

must be taken to have accepted the risk that the recipient may inform the police. In that sense, the detainee's speech is voluntary.[34]

* However, choosing to speak to a fellow prisoner is "quite a different matter" than choosing to speaking to an undercover police officer posing as a fellow prisoner, (or a cell mate acting at the time as a police informant), when the suspect is ignorant of the fact that he or she actually is talking to an agent of the state. It does not reflect a choice to speak to the police, raises different concerns, and "different considerations will apply". In particular, when the police improperly use subterfuge to interrogate an accused, improperly eliciting information they were unable to obtain by respecting the suspect's right to silence, the accused has been deprived of his or her choice, and his or her constitutional right to silence has been subverted and breached.[35]

* In short, when dealing with cases involving the right to silence and the use of undercover police officers, (e.g., in "cell insert" operations), courts are not concerned with subterfuge *per se*, but with subterfuge that, in actively "eliciting" information, violates an accused's right to silence by depriving him or her of his or her choice whether to speak to the police.[36] It accordingly is of no consequence that a police officer was engaged in a subterfuge, permitted himself or herself to be misidentified, or lied, so long as the responses by the accused were not actively elicited or the result of interrogation. Police can, within the limits imposed by the law, engage in limited acts of subterfuge and a legitimate area of police investigation.[37] For example, an undercover officer in a "cell insert" operation is not obliged to confess that he or she is an undercover agent, or say nothing.[38] The Supreme Court of Canada unambiguously has rejected adoption of an "absolute right to silence" standard or a "listening post" standard of complete passivity. An undercover officer may and indeed must interact with a suspect in a natural and convincing way.[39]

* An atmosphere of oppression, (typically but not exclusively thought of as persistent questioning, a harsh tone of voice, or explicit psychological pressure on the part of the state agent), is not required to ground a finding that a detainee's right to silence was violated.[40] There need not be an effective "interrogation" in that pejorative sense. Again, the focus is on whether the state agent, in the course of the subterfuge, actively "elicited" information so as to violate the accused's right to silence. Subtle interrogation, (e.g., through gentle questioning in a congenial atmosphere, using "honey not vinegar"), may still constitute active elicitation.[41]

* As for what may constitute active "elicitation" in the sense required to establish a violation of the right to silence:

* **The Supreme Court of Canada has emphasized that it is difficult to give a short and precise meaning of "elicitation" in this context. One instead looks to a series of factors which test the relationship between**

the state agent and accused so as to answer this question: "Considering all the circumstances of the exchange between the accused and the state agent, is there a causal link between the conduct of the state agent and the making of the statement of the accused?"[42]

* While the Supreme Court of Canada **provided a list of factors to be considered in that regard, (arranged into two groups "for convenience"),** it was emphasized that the list was **not exhaustive, and that no one factor necessarily would be dispositive. They are, rather, guidelines to test the relationship between the state agent and the accused so as to determine whether there was a causal link between the conduct of the state agent and the accused so as to determine whether there was a causal link between the conduct of the state agent and the making of the statement by the accused**.[43]

* **The first set of factors concerns the nature of the exchange between the accused and the state agent**.[44] In that regard, the focus is not on the form of the conversation, but on whether the relevant parts of the conversation were the functional equivalent of an interrogation. To make that determination, courts generally ask whether the state agent actively sought out information, (such that the exchange could be characterized as akin to an interrogation), or conducted his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have done.[45] More specifically, courts have focused on considerations that include the following:

> * Whether the state agent was instructed not to initiate a conversation with an accused, ask leading questions or otherwise elicit information, (although such instructions do not end the inquiry as the state agent may have exceeded his or her instructions, and the state ought not to benefit from such a failure);[46]
>
> * Whether the state-determined circumstances of an accused's confinement and proximity with an undercover officer influenced his or her "choice" to speak to cell mates; e.g., by effectively creating an inevitability of conversation, and/or a situation where the psychological impact of confinement encouraged the accused to speak about that which likely weighed most heavily on his or her mind, namely, the charges against him or her;[47]
>
> * Whether it was the state agent or the accused who initiated a relevant exchange, perhaps after lengthy pauses;[48]
>
> * Whether it was the state agent or the accused who broached or returned to a particular subject-matter providing the context of an exchange;[49]
>
> * Whether the accused hesitated or spoke freely about a subject;[50]

* Whether the accused continued to speak freely despite indications or reminders by the state agent that comments and admissions of misconduct might be repeated to authorities;[51]

* Whether the state agent allowed the conversation to flow naturally, (e.g., conducting his or her part of the conversation as someone in the role the accused believed the state agent to be playing ordinarily would have done, which may include simple allusion to concerns that someone in a "cell mate role" naturally would have), or directed or redirected the conversation to areas where he knew the police needed or were seeking information, (e.g., by straying from the flow of conversation or asking clarifying questions), and/or directed the conversation in any manner which "prompted, coaxed or cajoled" the accused to respond;[52] and

* Whether the state agent requested any information from the accused or offered inducement of any kind for that information.[53]

* **The second set of factors concerns the nature of the relationship between the state agent and the accused at the time** a statement was made. In that regard, courts will consider matters that include:

* Whether the state agent exploited any special characteristics of the relationship to extract the statement;

* Whether there was a relationship of trust between the state agent and the accused, (e.g., a situation where an undercover officer cultivated a sustained relationship with the accused over time such that the accused arguably may have spoken to the undercover officer in the reasonable expectation that his or her communications would not wind up in the hands of the police, in contrast to a situation where the state agent and the accused had no prior knowledge of each other and speaking of a "relationship" at all may exaggerate the circumstances);

* Whether the accused was obligated or vulnerable to the state agent, (which may involve consideration of the accused's apparent level of sobriety, confidence, fear, intelligence and/or experience with the justice system); and

* Whether the state agent manipulated the accused to bring about a mental state in which the accused was more likely to talk, (e.g., by undermining confidence in a lawyer's advice to remain silent, and/or by manipulating sympathies and supposed common interests and experience).[54]

> * **Active elicitation is therefore not only difficult to define with precision, but also highly fact dependent and context sensitive. It may also be difficult to identify, as underscored by the reality that principled and reasoned analysis of the same particular circumstances may result in quite different judicial conclusions**.[55]
>
> [emphasis added]

Summary of findings

[7] Counsel have agreed that I should consider the evidence of the three statements together. I will be referencing the transcripts herein for convenience because I find them generally accurate, however, I appreciate that strictly speaking, the audio/videotaped exhibits are "the evidence".

[8] In summary, I find:

1. The first videotaped statement to be freely and voluntarily given by Mr. Gillis beyond a reasonable doubt, and correspondingly that there is therefore no Section 7 Charter breach – it is admissible and, if the Crown choses to present it as part of its case-in-chief, subject to editing to remove content whose prejudicial effect on Mr. Gillis's fair trial rights outweighs its probative value, if a limiting instruction by me to the jury could not neutralize that prejudice; [1]
2. The statement given to the undercover police officer was not generally the product of a Section 7 Charter breach although in some instances there were discrete breaches – with those exceptions excluded, it is admissible and, if the Crown choses to present it as part of its case-in-chief, subject to editing to remove content whose prejudicial effect on Mr. Gillis's fair trial rights outweighs its probative value, if a limiting instruction by me to the jury could not neutralize that prejudice;
3. Similarly, the second videotaped statement is also admissible.

In the next sections, I will explain my reasons for each of these conclusions.

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[1] I bear in mind the "whole statement" principle, which requires that generally speaking, the court should require to be introduced for consideration by the trier of fact the entirety of an accused's statement, even if it is partly exculpatory and inculpatory: see *R. v. Mallory*, 2007 ONCA 46, at paras. 203-206; *R. v. Smith*, (1986) 71 NSR (2d) 229 (CA), at paras. 19-22, per MacDonald JA.

Why I conclude that the first videotaped statement is freely and voluntarily given

[9] I heard the testimony of Det. Constables Bradley Jardine, Jason Shannon, and Anthony Blencowe. I found their testimony was given in a straightforward manner, and did not reveal any material inconsistencies internally or externally. I accept their testimony as honest and reliable, unless I specifically state otherwise.

[10] Mr. Gillis is not arguing that he did not have an operating mind. Nor is he arguing that there was police trickery here which would shock the community. He did not identify any threat or promise or other form of improper inducement, which would rise to the level of a *quid pro quo* – i.e. that Mr. Gillis gave a statement in exchange for an identified positive or negative inducement-or that otherwise overbore his free will. In any event, based on the evidence presented I am satisfied beyond a reasonable doubt that Mr. Gillis had an operating mind throughout; there was no police trickery that would shock the community; nor was there any improper inducement that caused him to give any portion of that statement to police.

[11] Mr. Gillis centres his argument on a claim that there was a combination of oppressive circumstances that overbore his will to remain silent. He premises this argument largely on Justice Charron's statement for the court in *Singh* at paras. 47 and 53:

> 47 …Second, the law as it stands does not permit the police to *ignore* the detainee's freedom to choose whether to speak or not, as contended. **Under both common law and *Charter* rules, police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities.** As we shall see, the trial judge in this case was very much alive to the risk that the statement may be involuntary when a police officer engages in such conduct.
>
> …
>
> 53 It must again be emphasized that such situations are highly fact-specific and trial judges must take into account all the relevant factors in determining whether or not the Crown has established that the accused's confession is voluntary. **In some circumstances, the evidence will support a finding that continued questioning by the police in the face of the accused's repeated assertions of the right to silence denied the accused a meaningful choice whether to speak or to remain silent: see *Otis*. The number of times the accused asserts his or**

> **her right to silence is part of the assessment of all of the circumstances, but is not in itself determinative.** The ultimate question is whether the accused exercised free will by choosing to make a statement: Otis, at paras. 50 and 54
>
> [emphasis added]

[12] As I understand his argument, he would say that circumstances of oppression existed primarily due to the following factors:

a. The police persistence in continuing the questioning, despite repeated assertions by him that he wished to remain silent; [2]

b. The nature of the police questioning which was intended to, and had the effect of tending to, undermine his intention to remain silent (ie. when he asserted this intention, the police ignored his intention by continuing their questioning, which implied they would continue their questioning until he provided a statement implicating himself; that part of this effort involved denigrating his lawyer's advice and his intention to deal with their questions "in court"); [3]

c. He had little sleep in the five days preceding his detention, and police deprived him of an opportunity to sleep over the 10 hour period of off-and-on questioning.

[13] Mr. Gillis says that he repeatedly asserted his intention to maintain his silence throughout the first statement, and his will to remain silent was improperly undermined by the police.

[14] It was abundantly clear that Mr. Gillis fully understood he had the right to remain silent, [4] and he repeatedly affirmed his intention to do so, in so many words, between 4:59 p.m. and 11:43 p.m. [5]

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[2] See eg. Transcript of the first statement where police persist in continuing to engage Mr. Gillis in conversation: 76(14-20); 88(22)-89(2); 108(5); 118(9); 137(2-4); 138(17-19); 150(8-16); 159(15-21); 194(2); 195(9-18); 215(3-7).

[3] At page 57(5) of the transcript of the first statement, Cst. Jardine says: "I understand [that your lawyer told you not to say anything], that's fine. But, they're not sitting in the chair, you are. You have to make your decisions for your life, for your future. Right?" Mr. Gillis replies: "I'm not saying anything else". See also p. 77(3-19) and 231(3-20). While such comments are generally disapproved of by courts, in these circumstances I find Cst. Jardine's words evince poor choice of wording, rather than an intention to denigrate counsel's advice, and that, in any event, the comment had no effect insofar as Mr. Gillis' stated intention to remain silent – e.g. for a similar comment see *R. v. Robles*, 2008 BCSC 133, paras. 196-206.

[4] Mr. Gillis was given a Charter of Rights advisement and right to silence caution verbally upon arrest at 1:54 PM March 2, 2016. Shortly thereafter, Constable Shannon read the same rights to him from a card, and Mr. Gillis indicated he understood these. He was again re-advised of these rights and the secondary caution in the videotaped

[15] However, those words cannot be viewed in isolation. In spite of his references to not wanting to say anything, a review of the entire time he was questioned reveals that he was clever and cagey in how much he would reveal; [6] he had the experience of previously being questioned while in custody, and remembered that the *only* other time he talked to police it was to his disadvantage; [7] he recognized that he had a choice about whether he wanted to talk, and could have decided to merely listen to the questions put by the police, yet he continued to acknowledge their questioning almost immediately after he chastised himself for talking too much; [8] he explained repeatedly that the reason he did not ignore them was because he was trying to be polite to the police officers; [9] and as late as 10:23 p.m. he acknowledges that he has been making the choice to continue to talk to the officers - see pg. 340(2):

> Constable Blencowe - well, I don't think it's anybody else's [fault that you are tired]. You're making your choices, right? Mr. Gillis – yeah, that's true. Not much use to – I'm not talking man. Because I'd only fuck myself now, I'm sure.

[16] Yet shortly thereafter, he continues the conversation, noting that "but this time I think I need to look out for my interests." – pg. 341(2). This pattern runs through the interview. I conclude that Mr. Gillis' will to remain silent was not overborne. Rather he freely, selectively, and deliberately decided to answer some questions and not others – particularly not any that might directly implicate him in Blaine Clothier's death.

[17] The nature of the police questioning – whether "just keeping him talking" or "redirecting the conversation" back to the circumstances surrounding the alleged offence – did not render his statement involuntary. The questioning was within

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interview at 2:38 PM. His clothes were seized and photos were taken of him between 2:38 and 3:07 PM. He consulted with duty counsel Roger Burrill between 3:17 and 4:37 PM. At 4:59 PM in the interview room he was again given a secondary caution, which he indicated he understood, saying: "I have the right to remain silent" – page 40(5) transcript.

[5] [e.g. for convenience see transcript pages: 48(11); 57(1) and (9);65(9) and (17); 69(10); 76(16)-77(9); 86(18); 88(22); 96(5); 108(12); 128-29;[at page 223 a portion of S's videotaped police statement is played for him]; 231(3-7);249(4-8); 255(4-8); 257(6); 269(3); 277(22); 288 (3); 338(10)].

[6] E.g. see pages 47(13 – 15)-48(11) "I'm not saying anything else… already almost caught me up for saying… I'm not saying nothing else man I'm sorry…"; 62(22) "you look like a guy that is trying to imprison me"; 108(12); 172(5); 195(8-19); 256(19-22); 260(15-21); 301(16);302(9); 305(8).

[7] E.g. see pages 73 (8-22); 91 (15); 138 (20); 231 (3-18); 244 (8-14); 313(8).

[8] E.g. see pages 76(16)-77(9); 82(1); 83(8); 113(18); 150(12-15).

[9] Eg see pages 154(11) "that's why I'm not sitting here like a fucking wall and not saying nothing to you, because I'm not a fucking dick"; 261 (15) "… I'm not stupid man, like I'm not trying to be smart or rude but… I'm tired"; 344(10) "I've been trying to be nice to you guys all fucking day."

permissible bounds – *Oickle*, paras. 74, 80, 85-87; *Singh*, paras. 28 and 47. His counsel suggested that he reiterated his right to silence 69 times during the questioning. The difficulty with this statement is that it is a questionably accurate oversimplification, and misleading if taken out of context. Any weight to be attributed to Mr. Gillis's reiteration of his right to remain silent must be seen in context. The police have a duty to investigate – they are entitled to question arrested persons and these persons are entitled *not to answer* – *R. v. Singh*. It is significant if, and I find, that the police did not question Mr. Gillis using excessively aggressive, and intimidating questioning for a prolonged period of time. The tone and manner of their questions were civil, not loud or intimidating. This is not a case of "oppressive circumstances"; not if considered alone, or in combination with other circumstances, do they lead me to conclude that there is a reasonable doubt regarding Mr. Gillis' freely and voluntarily making the first statement.

[18] The evidence available to me regarding the state of his tiredness, could *possibly* come from three sources: my observations of his words and actions during the videotaping of his statement; the testimony of the police officers who had contact with him that day; from Mr. Gillis's own assertions recorded in the videotaped statement. I am not satisfied that, at law, his statements about his lack of sleep, should be considered for the truth of their contents. In my view, such evidence should come by testimony from some person who has personal knowledge of that matter. If he testified and was cross-examined thereon, Mr. Gillis would be the best source of that information. Nevertheless, even if it would be correct in law to consider his own statements given during his detention, I could only give them little weight, because I have a limited basis to assess the honesty or reliability of his statements. [10] The officers testified that upon arrest at approximately 1:54 p.m. on March 2, 2016, Mr. Gillis did not appear to be intoxicated. Constable Jardine specifically testified that he did not consider Mr.

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[10] If I could consider his statements for the truth of their contents, presumably then I could also rely on the statements that he made to the undercover police officer – for example at page 15 transcript: "didn't say nothing, right, but I answered their questions but like… All like… I didn't tell them anything, but you know what I mean? I still answered the questions right, I was just like smart and shit. I shouldn't of said nothing at all."; Page 34: "… I wish I would of never said nothing to them at all. That's just stupid. I was fucked up… Yeah, like man, I was… They, they made it seem like I was fucking coherent or something. I was right, but not completely, like… I didn't even sleep until I got here for fuck, four or five days."; Page 63 "Hmmm, I'm not fucking telling them half… They think I'm going to confess. I'm surprised they're not down here interrogating me… I guess well, people got a weak mind… *that is actually like a really exhausting process ehhh… like them, them battering me like that. Like me, I don't care like I… I don't care, you know what I mean? [chuckles]. But imagine some people, that's going to drive them nuts, right? But me, I can just sit there [just listen and do your thing?] yeah, that's right.…"*

Gillis at any time to have been so tired while they were talking that it was "to a point of dysfunction". Constable Blencowe acknowledged that Mr. Gillis was tired, but felt he was still able to make decisions about when he wanted to talk, and when he did not. He did not seem to be under the influence of any drugs. He found him to be sober and lucid. He was adamant that Mr. Gillis was not delusional as he had claimed on at least one occasion.

[19] My own observations of the videotaped interview indicate that, particularly towards the end of the interview, Mr. Gillis does appear tired. However, I am satisfied that he was not so tired even at that time that, his tiredness in combination with any of the other factors claimed were sufficient to raise a reasonable doubt about the free and voluntary nature of the answers Mr. Gillis gave throughout the interview.

Summary

[20] Although Mr. Gillis likely became more tired as the interview went on, given his state of tiredness, the persistence of questioning by the officers, and the manner of the questioning of Mr. Gillis, including in my view the lack of any improper inducements to Mr. Gillis, and in the context of the circumstances otherwise, when the relevant factors are cumulatively considered, simply stated, I am satisfied beyond a reasonable doubt that Mr. Gillis gave the statement freely and voluntarily, and it is admissible at trial against him. [11]

Why I conclude that the second videotaped statement is freely and voluntarily given

[21] The first videotaped police interview of Mr. Gillis ended at 11:56 PM on March 2, 2016. Between 11:56 p.m. and about 2:37 a.m., Mr. Gillis was left alone in the interview room. He is seen on the video laying down on the floor to rest, and I infer sleeping for some of that time.

[22] At 2:37 a.m. on March 3, 2016, Detective Constables Shannon and Jardine escorted Mr. Gillis from the interview room at HRP headquarters to the cells area

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[11] If Crown presents it in its case-in-chief, then editing may be required, if the effect on his fair trial rights of admitting any discrete portions thereof significantly outweighs the probative value thereof, where a limiting instruction to the jury could not neutralize that prejudice.

downstairs. There was no significant conversation by either Constable except to say that they were taking him to cells.

[23] Between 2:49 a.m. and 3:20 a.m., Mr. Gillis engaged in conversation with the only other person present in cells – an undercover police officer (Sgt. Brown). Then, he slept until approximately 4:00 a.m., when he was briefly woken again. He again slept from about 4:10 a.m. until 5:26 a.m. Briefly woken, he then sleeps again until approximately 7:00 a.m.

[24] Det. Cst. Shannon speaks to him shortly afterwards and inquires when he needs or regularly receives his methadone dose so that they can arrange to maintain that schedule. Constable Shannon arranges for it to come between 8:30 a.m. and 9:00 a.m., and leaves the area of cells at about 7:14 a.m. According to the timestamp on the cells area surveillance tape, at approximately 8:51 a.m., Det. Buell and the Special Constable, Jamie Marshall, brought Mr. Gillis his breakfast and then transported him to the front counter of the building to get his methadone dose, which he drank once given to him by Direction 180 staff. He was directly taken back to the cells. This contact with Constable Buell was a maximum 10 to 15 minutes, and there was no significant conversation between them during that time. Just prior to the March 3 interview, which commenced at 9:55 a.m., Constables Buell and Shannon escorted him directly to the interview room, during which interval there was no significant conversation between them.

[25] Between approximately 7:12 a.m. and 9:53 a.m., the undercover officer, Sgt. Brown, and Mr. Gillis continue to have conversations between themselves.

[26] The second videotaped interview started at 9:55 a.m. and ended at approximately 12:56 p.m. During these three hours Mr. Gillis argues that he did not freely and voluntarily make any statements. He says that his free will to remain silent was overborne by the persistence and nature of the questioning by the police officers. There is no suggestion of police trickery.

[27] Mr. Gillis points to him having 10 times reiterated that he wanted to maintain his right to silence, yet the police ignored that keeping the conversation with him going, and redirecting it to the circumstances of the offence on March 2, 2016. [12]

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[12] On a review of the transcript, I find the following arguable examples at: pp. 4(4-12);9(8-22);30(18)-31(9); 161(18); 162(6); 170(2-5); 183(16)-184(4); 187(18-22); 192(14-18).

[28] My review of the videotape reveals that during that time, Mr. Gillis had an operating mind, was not given any improper inducements (threats or promises), nor were the circumstances oppressive, such that his free will to remain silent was overborne.

[29] The circumstances of that entire time period are fairly characterized as involving police questioning that is not overly aggressive or otherwise inappropriate. Mr. Gillis freely and deliberately decides what questions he answers, and in fact asks questions of the officer(s) from time to time. Generally stated, Mr. Gillis answered questions which dealt with peripheral matters, but whenever the questions approached matters which could implicate Mr. Gillis, such as the circumstances of what happened just before, at the time of, and just after the alleged stabbing of Mr. Clothier, he effectively does not answer. This is aptly captured by the following exchange at approximately 12:32 p.m. (p. 171 transcript):

> Detective Constable Blencowe-I wholeheartedly believe that you had no intention of making this a murder. And I believe that that's what's ripping you up inside right now, because you never, ever wanted him to die. You never wanted him to pass away.
>
> Mr. Gillis – you guys don't even want to try to give me – give it a chance or make an effort to [go] fucking below the charge from that second-degree murder. You guys want me to fucking say I stabbed him, so you guys can stick me with this fucking charge… And I'll be in jail for the rest of my life. And I'm too fucking smart for that shit, man.

Summary

[30] I am satisfied beyond a reasonable doubt that Mr. Gillis gave this statement freely and voluntarily, and it is admissible at trial against him.

Why I conclude that the statements to the undercover "cell plant" officer are largely admissible

i) The evidence is reliable

[31] The undercover officer, Sgt. Brown, was placed in the cell next to the one occupied by Mr. Gillis at 2:49 a.m., March 3, 2016, and the continuous period of their contacted lasted until 4:46 p.m. that day. Between 9:55 a.m. and 12:56 p.m. on March 3, 2016, Mr. Gillis was not in cells, but being interviewed by police

officers upstairs in an interview room (i.e. second videotaped statement). After the interview, Mr. Gillis is briefly returned to his cell, and then removed at 1:29 p.m. when he is placed in a van to be taken to Provincial Court on Spring Garden Road, Halifax. After his attendance there, he is transported in the van, alone with Sgt. Brown who joined him at 3:52 p.m. to the Burnside Correctional Facility in Halifax. They are both handcuffed and seated on opposite sides of the van with a steel partition between them which has holes in it such that each could see and hear the other.

[32] The evidence at the *voir dire* was limited to: cellblock video and audio taping, as a result of a body-pack worn by Sgt. Brown; audio taping as a result of a body-pack during the transport of Mr. Gillis and Sgt. Brown in a sheriff's van to the Burnside Jail; and the testimony of Sgt. Brown. The recordings span a time period from 2:49 a.m. on March 3, until 4:46 p.m. on March 3, 2016.

[33] I found the testimony of Sgt. Brown was given in a straightforward manner, did not reveal any material inconsistencies, internally or externally, and I accept his evidence as honest and reliable, unless I specifically state otherwise.

[34] Sgt. Brown testified that, as is standard operating procedure, his initial briefing by Constable Mike Sanford before the "cell plant" operation began, provided him with minimal information regarding the suspect and crime. He only knew that Mr. Gillis was the suspect, charged with murder, and that Blaine Clothier had died because of an injury. His objective was to obtain information from Mr. Gillis regarding his involvement, if any. He had subsequent debriefings with the investigative team as opportunities presented themselves when Mr. Gillis was absent from the cell area. Sgt. Brown emphasized that these were only "one-way debriefings" – that is the team is not permitted to ask him any questions – he tells them what items of significance came up in his conversation, and the investigative team does whatever they think they should with the information he provides. Thus, there is no steering of the undercover operator's conduct by the investigative team. Thereafter, he returned to the cell to await Mr. Gillis's return.

[35] He described his responsibility as including, to have general conversation with, and obtain any information from, Mr. Gillis regarding his guilt or innocence. Based on his review of the jurisprudence, he understood that he should not ask direct questions. He engaged in a "credibility scenario", "designed to be proportional to the offence being investigated", which was intended to establish his credentials, and making him believable, as an actual criminal. That scenario took

place in view of Mr. Gillis in the booking area, where Sgt. Brown was escorted into the area in handcuffs by two police officers who carried an exhibit bag with a large handgun and two packets of white powder, which could be presumed to be cocaine. Sgt. Brown could see Mr. Gillis and presumed Mr. Gillis saw Sgt. Brown as they were only 5 to 10 feet apart at about 2:48 a.m. on March 3, 2016. They were placed in cells next to each other separated by a concrete wall such that they could not see each other, but could converse. No other persons were detained there at any time during their interactions.

[36] I find that the video and audiotapes are complete and accurate recordings. Having said that, the recordings, and consequently the transcription thereof which I accept as generally accurate, reveal unintelligible portions- whether comments by Mr. Gillis, Sgt. Brown, or other officers or special constables attending in the area.[13] The unintelligible portions are continuous, but I find them to be of no evidentiary consequence.

ii) Mr. Gillis's arguments regarding the violation of his right to silence pursuant to Section 7 of the Charter of Rights

[37] Mr. Gillis presents two categories of argument relating to his right to silence pursuant to Section 7 of the Charter, which arguments were not expressly stated as deriving from *R. v. Skinner, 2017 ONSC 2115,* but appear to be so (paras. 5-9).

[38] He appears to argue that there is a systemic Section 7 Charter violation that affects the entirety of his statements given to Sgt. Brown, as well as specific instances of Section 7 Charter violations as a result of impermissible "active elicitations" by Sgt. Brown which caused Mr. Gillis to make material inculpatory statements to Sgt. Brown.

[39] The systemic violation argument is in effect a general claim that police trickery or subterfuge violated Mr. Gillis's right to silence, and I extrapolate that he would say that all Mr. Gillis's responses to Sgt. Brown arguably rise to the level of an abuse of process, whether under the common law or Section 7 of the Charter: *R.*

[13]The sergeant testified that he reviewed the audiotapes on March 6 and 7, 2016, and verified their accuracy as shown by his handwriting on the transcripts as per the court's statements in *R. v. Fliss*, 2002 SCC 16.

v. Derbyshire, 2016 NSCA 67, leave to appeal denied [2016] SCCA No 529; or generally were unfairly obtained: *R. v. Harrer*, [1995] 3 S.C.R. 562.

[40] The specific instances of violations by impermissible "active elicitation" by Sgt. Brown are based on the principles outlined in: *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Broyles*, [1991] 3 S.C.R. 595 and *R. v. Liew*, [1999] 3 S.C.R. 227.

(a) *Why I reject the claim that the police, through the use of the 'cell plant' officer in violation of his right to silence, unfairly obtained a statement(s) from Mr. Gillis*

[41] As part of his systemic argument, Mr. Gillis relies on the fact that police investigators clearly knew that he repeatedly stated that he did not want to provide a statement at the end of their efforts by 11:56 p.m. on March 2, 2016. Relying on the reasoning in *R. v. Spanavello*, [1998] B.C.J. No. 1208 (CA), he argues that placing an undercover officer in the cell beside him, with no other prisoners present, "would make discussion all but inevitable", and that this was "to trick him into abandoning his Section 7 Rights [which] is an obvious Charter violation… exactly the scenario envisioned by McLachlin J. (as she then was) in *Hebert*." He cites specific references in the transcript. [14]

[42] Sgt. Brown was asked in cross-examination why he and Mr. Gillis were placed in cells without any other prisoners present. He stated that this was done primarily to allow for better audio quality recording since they were in separate cells and the audio originated with a body pack worn by Sgt. Brown.

[43] I note that in *Spavanello*, the "detailed" first two of three oral statements *Spanavello* made to the undercover officer were affirmed as admissible, and that only the third was not, because the appeal court was "satisfied that this[after making the first two statements to the undercover officer, and refusing to give a statement upon formally being requested to do so by police officers], was tantamount to an assertion by him of his right to remain silent, particularly in light of the fact that his lawyer had just told the investigating officer that *Spanavello* would not be making a statement. At this point, we are of the view that the line set out in *Hebert* and *Broyles* was crossed and the cell-mate became engaged in the functional equivalent of an interrogation" (para. 12).

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[14] Pages 15; 34; 39; and 86 [page 2 December 12, 2017 defence brief]

[44] That reasoning from *Spanavello* has not been followed in any subsequent case. In my view, the mere formal claim to maintain one's right to silence, does not create a bright line in time, after which police are precluded from using a cell plant undercover officer to gain admissions from a detainee. Those circumstances do not by themselves create a Section 7 Charter violation regarding the right to silence. I draw some comfort from the Supreme Court's comments in *Singh*, which expressly rejected such a bright line prohibition upon further questioning by police, who were in that case, obviously "persons in authority". The latter factual distinction makes no difference in my view, to the case at bar where the recipient of the statements is an undercover police officer.

[45] Other than his reference to the *Spavanello* case, Mr. Gillis did not provide amplification of his generalized legal reasoning supporting his position that, Sgt. Brown "drove nearly all of the relevant discussion with Mr. Gillis. He repeatedly and continuously directed the conversation to topics that he would have known would be of interest to investigators. He did so without care for the fact that Mr. Gillis was refusing to provide a statement to police. He tricked Mr. Gillis into giving up his right to remain silent." I acknowledge that by presenting the following cases as reflective of his legal position, he indirectly adopts those positions: *R. v. Skinner*, 2017 ONSC 2115; *R. v. Tang*, 2015 BCSC 1643; *R. v. Deboo*, 2015 BCSC 69. *Skinner* is most recent and is a very comprehensive treatment of the issues and application of the law to the facts.

[46] Notably in *Skinner*, Justice Leach concluded there was a causal link between the State agent's conduct in the making of Mr. Skinner's statements, and therefore there was an active elicitation which violated Mr. Skinner's right to silence. More generally she concluded that "having regard to all the evidence and circumstances, the defence satisfied me, on a balance of probabilities, that the 'cell insert' operation breached Mr. Skinner's rights guaranteed by Section 7 of the Charter and his right to silence in particular." – paras. 42-44. She further concluded that admitting the evidence in question would bring the administration of justice into disrepute, and the appropriate remedy under Section 24(2) of the Charter was exclusion of statement number two *in its entirety* – paras. 54-55.

[47] Justice Leach was invited to consider, but declined, as it was "unnecessary and inappropriate", to comment on the application of the principles in *R. v. Hart*, [2014] 2 S.C.R. 544 to that case – para. 59. She also gave consideration to the possibility (highlighted in *Liew*) that some portions of statement number two might be admitted while others might be excluded. She declined to do so, saying it was

inappropriate because doing so would destroy the context, and "ignore the realities and pervasive concerns such as the particular vulnerabilities of Mr. Skinner, the somewhat unusual circumstances of incarceration that made him more likely to speak with the undercover officers about the situation, and the perhaps unintended, but nevertheless effective, cultivation of a mental state, that encouraged Mr. Skinner to be more talkative and open vis-à-vis the undercover officers, which in my view influenced and permeated the conversations as a whole." – para. 55, footnote 157.

[48] I will address Mr. Gillis's generalized position briefly, as it seems to be the basis for Mr. Gillis seeking the exclusion of his *entire* statement made to Sgt. Brown.

[49] While it is true that even in the absence of a discrete and specified Charter breach, courts may exclude evidence which would render the trial unfair, either at common law or under Section 24(1) of the Charter, that possible argument by Mr. Gillis has not been expressly elaborated upon here . Nevertheless, it is an interesting exercise to examine the legal landscape, and specifically the commonalities among the broad parameters of the various principles that may be applicable to such cases. [15]

[50] In the context of statements given to *persons in authority*, the Supreme Court in *Oickle*, recognized that the *distinct* "police trickery" inquiry within the "voluntariness" analysis, which is oriented to maintaining the integrity of the criminal justice system, was introduced by Lamer J.'s concurring reasons in *R. v. Rothman*, [1981] 1 S.C.R. 640. In *Rothman*, Justice Lamer stated that "the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigourously is conduct on their part that shocks the community." Justice Iaccobucci concluded in *Oickle* that while the court in *Hebert* had overruled the result in *Rothman*, based on the Charter's right to silence, "I do not believe that this renders the 'shocks the community' rule redundant. There may be situations in which police trickery, though neither violating the right to silence

[15] *R. v. Skeete*, 2017 ONCA 926 at paras. 149-156 per Watt JA; *R. v. Derbyshire*, 2016 NSCA 67, at paras. 84, 90 – 98 per Beveridge JA, leave to appeal denied, [2016] SCCA No 529; see also *R. v. Harrer*, [1995] 3 SCR 562 at paragraphs 43 – 46, where police abuse or unfairness was the only ground argued.]

nor undermining voluntariness per se, is so appalling as to shock the community. I therefore believe that the test enunciated by Lamer J. in *Rothman…* is still an important part of the confessions rule."- at paras. 65-67].

[51] For present purposes, those tests may be restated as: was the accused *unfairly* deprived of his right to silence? If he was, the evidence should not be admissible.

[52] Whether seen as police trickery within the voluntariness inquiry regarding statements to persons in authority, [16] or police trickery within the undercover police officer scenario, where an abuse of process inquiry takes place, [17] both these tests reflect a judicial intolerance to police conduct that is "offensive to notions of fair play and decency".

[53] Similarly, in *Hebert*, McLachlin J. (as she then was), stated under the heading "Conclusion on the Scope of the Right to Silence", at paras. 68-69:

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

[54] She added at paragraph 76:

> Fourth, a distinction must be made between the use of undercover agents to observe the suspect and the use of undercover agents to actively elicit information in violation of the suspect's choice to remain silent... *However, in the absence of eliciting behaviour on the part of the police*, there is no violation of the accused's

[16] *Oickle*- which enunciates a "shock the community" test

[17] *Derbyshire, at paras. 95*-8 and *104*-which seems to suggest that perhaps the abuse of process principles from *R. v. Hart* are the "appropriate analytical framework to regulate" undercover police operations mimicking the more elaborate Mr. Big scenarios "given the State's role in generating the confession". The court approved of, and paraphrased the trial judge's reasoning as: "while the misconduct in this case could be categorized as offensive to notions of fair play and decency and proceeding with the trial in the face of that conduct would be harmful to the integrity of the justice system, I am satisfied that the harm can be remedied by excluding the evidence which was obtained"- paras. 111 and 149.

> right to choose whether or not to speak to the police. *If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police.*
>
> [Italics added]

[55] Therefore, generally we may conclude that if police conduct effectively and *unfairly* deprives the suspect of the right to choose whether to speak to the authorities or not, this will be a violation of the right to silence enshrined in Section 7 of the Charter. Specifically, in the context of undercover agents (including cell plant officers), the test for such unfairness will be whether the cell plant officer "actively elicited" the information, or conversely that the suspect did not "volunteer" the information.

[56] Mr. Gillis argues a generalized violation of the right to silence component of Section 7 of the Charter.[18] He would suggest that the continuous efforts by Sgt. Brown to elicit responses from Mr. Gillis, even if the discrete acts of elicitation were not breaches of Section 7, are "the functional equivalent of an interrogation" and therefore, the entirety of the statements by Mr. Gillis in response should be found to be a Section 7 breach. In my opinion, but for unusual cases where the detainee's vulnerabilities are exploited, and therefore, the entirety of the responses are tainted, such as in *Skinner*, the proper approach in this case, and generally, is to contextually examine discrete instances of claimed "active elicitation" and determine if they individually each amount to a breach of Section 7, Charter. Detainee's Section 7 Charter Rights are still protected, though circumscribed, in cases of claimed generalized breaches of Section 7, by the "unfairness" standards based on jurisprudence arising in *Harrer, Hart*, 2014 SCC 42, at para. 88 and *Derbyshire* at paras. 84, 90-98. In any event, I conclude that the circumstances of Mr. Gillis's interactions with the cell plant undercover officer are not of a nature or order (abusive or unfair in manner or effect) that would, regarding the suggested police trickery here specifically, "shock the community", or if viewed as "the methods resorted to by the authorities in eliciting that unwilling statement" would not "bring the administration of justice into disrepute" (*Rothman*)- or otherwise stated: "taint the fairness of the trial itself" (*Harrer, para. 46*).

[57] Moreover, although in *Oickle* (para. 69), police trickery that unfairly denies the accused's right to silence will be considered to have produced an "involuntary" statement to "persons in authority"- under the *Harrer* analysis Mr. Gillis's trial

[18] As well as specific instances of Section 7 Charter violations which are considered separately below.

would not be rendered *unfair* by the admission of his statements to the "cell plant" undercover officer in these circumstances, because the Supreme Court has set guidelines and principles specifically in relation to such scenarios in the trilogy *Hebert*, *Liew* and *Broyles* and their progeny. These ensure that the minimum constitutional standards regarding the Section 7 Charter right to silence are maintained. If those guidelines and principles are met, *to the extent that I find they were here*, then Mr. Gillis's right to silence will not have been violated.

[58] I conclude that there is no such generalized or systemic Section 7 Charter violation here.

b) *Why I conclude that there were only limited relevant instances of improper and material "active elicitation" by Sgt. Brown in obtaining statements from Mr. Gillis*

[59] As Justice Iaccobucci stated in *Broyles*:

> 35 If, on the other hand, the suspect is ignorant of the fact that he is talking to an agent of the State, whether a suborned informer or an undercover police officer, somewhat different considerations will apply. It is clear from the majority reasons in *Hebert*, supra, that *statements volunteered by the suspect to the agent of the State will not infringe the suspect's right to silence. There will be a violation of the Section 7 right to silence only if the statement is elicited by the agent of the State. As McLachlin J expressed it in Hebert, supra, at p 184, the State agent must 'actively elicit' the information or statement.*
>
> [Italics added]

[60] This explains why the court went on at paras. 37 – 39 to discuss two sets of factors: [19]

The *nature of the exchange* between the accused and the State agent (were relevant parts of the conversation the 'functional equivalent of an interrogation', characterized by the State agent actively seeking out information, or did they conduct the conversation as someone in the role the accused believed the State agent to be playing would ordinarily have done?) ; and

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[19]Described as "guidelines provided to test the relationship between the State agent and the accused so as to determine whether there was a causal link between the conduct of the State agent and the making of the statement by the accused" – para. 46, *Liew*]

The *nature of the relationship* between the State agent and the accused (was there a relevant and material inequality between them?)

[61] If a State agent's "active elicitation", effectively being an unfair elicitation, causes a relevant response by Mr. Gillis, he is deemed to have not freely chosen to speak to the authorities. I suggest that, consistent with the Supreme Court of Canada's jurisprudence, (*Liew,* at paras. 41 and 51) in cases involving "cell plant" operations**,** the underlying concern is whether the defendant has demonstrated on a balance of probabilities that he has not freely chosen to speak as he did, and therefore *sufficiently knowingly accepted the risk* that the recipient of his volunteered speech may inform the authorities of its content. I conclude that, with some exceptions, he has *not* demonstrated this.

[62] The application of the law to the facts in this case, requires a close consideration of the following matters:

1. Notionally, where is the line between the permissible role-playing conversation by Sgt. Brown (i.e. conversely, is Mr. Gillis truly volunteering information) and active elicitation by him? and
2. Specifically in this case, identifying the elusive "causal link" between statements by Sgt. Brown and Mr. Gillis's materially inculpatory responses. [20]

(1) When does permissible role-playing become impermissible "active elicitation?

[20] In *Skinner*, at paras. 33 – 34 Justice Leach found a relevant causal link existed in the case of two categories of responses by Mr. Skinner: "the manner in which he claimed to approach and deal with police charges and questioning; including his formal interview… [and] comments relating or arguably relating to the events underlying his second-degree murder charge." Justice Leach did not set out and examine in detail the transcribed exchanges between the two undercover police officers and Mr. Skinner in that case. She found that the "nature of the relationship" factor was sufficient for her to exclude the entirety of statement #2. In the case of statements made to "persons in authority", it matters not that the statement is inculpatory or exculpatory or both – the Crown must prove them voluntarily made beyond a reasonable doubt: *R. v. Piché*, [1971] S.C.R. 23. I suggest that in the case of admissions to undercover police officers, only arguably inculpatory statements ought to be considered, given the close examination required of the causal connection between the nature of the exchanges: the officer's conduct and whether it caused the statement to be made, especially where the "nature of the relationship" is a neutral factor and the focus is on the nature of the "nature of the exchanges". If the connection is established then it is a situation of impermissible "active elicitation" – a breach of s. 7 *Charter*. I acknowledge that, whether the Crown puts the entire statement before the jury in its case-in-chief or ultimately uses it on cross-examination of Mr. Gillis if he testifies, in both instances Mr. Gillis's statements can be used as evidence for the truth of their contents – *R. v. Groves*, 2013 BCCA 446.

[63] Sgt. Brown reviewed the jurisprudence – thus, I accept that he would have taken guidance from *Hebert, Broyles* and *Liew*.

[64] Sgt. Brown was entitled to have "conducted his part of the conversation as someone in the role [Mr. Gillis] believed the officer to be playing would ordinarily have done"; however, "…The point is not that role-appropriateness by itself sanitizes the exchange, but that the undercover officer did not direct the conversation in any manner that prompted, coaxed or cajoled [Mr. Gillis] to respond." (para. 51 *Liew*).

[65] In *Liew,* the court found as *not* objectionable the undercover officer's following statements (after a minute of silence Mr. Liew initiated the conversation):

> Liew-That Lee is hot
>
> UC-What?
>
> Liew-That Lee is hot
>
> UC- Fuck
>
> Liew-Did you pass the money?
>
> UC-Fuck. The cops got it.
>
> Liew-how much?
>
> UC-$48,000
>
> Liew- Ah,fuck.
>
> UC-What happened?
>
> Liew-The cops watching us.
>
> UC-Yeah. They got my fingerprints on the dope.
>
> Liew-Lee and me too.

[66] The court characterized the question, "what happened?" as: "[it] cannot be said to have directed or redirected the conversation to a sensitive area… picked up the flow and content of the conversation so naturally it would not be inaccurate to say that it was itself elicited by [Liew's] "That Lee is hot". The officer did nothing more than continue the conversation about the arrest initiated by the appellant… Similarly, the officer's statement, "Yeah. They got my fingerprints on the dope" simply alluded to concerns that [he in his role] would naturally have regarding the arrest. The statement was entirely in keeping with the officer's cell-mate role and did not stray from the flow of the conversation about the arrest initiated by the

appellant. Nor did the statement request any information from the appellant or offer inducement of any kind for that information."- paras. 47-50.

[67] In the earlier decision, *Hebert,* the court expressly identified one example of acceptable cell plant conduct: [21]

> 78 Some Canadian police forces appear to already be following the rules implicit in this approach. Thus in *R. v. Logan* (1988), 46 C.C.C. (3d) 354 (Ont. C.A.), it is stated at p. 365:
>
> In his evidence, P.C. Grant (testifying under the pseudonym used by him in the undercover operation) said:
>
>> (P)art of my instructions entailed -- and it was made quite clear to me that *I was not to initiate any conversation, if possible, with the accused persons* and in the event that we did or were able to get in conversations with these persons, that *we would not ask leading questions or lead them on to the area in which I was attempting to gather information for.*
>>
>> (W)e were to act as normal as possible and of course from further instructions from the official we had a very good idea of what would be an acceptable line of conversation, what questions woud [sic] be acceptable, what wouldn't be acceptable. [Emphasis added in original.]

[68] It must also be remembered that, the rule regarding statements obtained by undercover officers, including cell-plant undercover officers, enunciated in *Liew, Broyles* and *Hebert*, is "a specific qualification to the party admissions hearsay rule". [22]

[69] What I draw from the foregoing, and my understanding of the policy rationales for the specific "active elicitation" rule is as follows:

1. Any proven "admissions" made by an accused to another person (including undercover police officers and agents - unless they are engaged in a "Mr. Big" operation) are presumptively admissible against an accused person;

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[21] A closer examination of the Ontario Court of Appeal decision, at paras. 30 – 45, reveals that the facts included that there were lengthy exchanges there, but that significantly the accused "took the initiative and seemed most anxious to tell the undercover officers of the group's involvement in the Becker's robbery"

[22] *R. v. Evans*,[1993] 3 S.C.R. 653 per Sopinka J, at para. 24; *Hart,* para 85 (see also Footnote 17 -regarding the potential application of the presumptively inadmissible statement regime of the new common law rule enunciated in *Hart* to other forms of undercover police work).

2. However, if an accused can demonstrate, it more likely than not, that such admissions were made as a result of "active elicitation" by an undercover State agent, they are breaches of the accused's Section 7 Charter Right to Silence, unless the Crown can show that the violation of Section 7 should not result in the exclusion of that evidence pursuant to Section 24 of the Charter;
3. To constitute an "active elicitation", there must be evidence that demonstrates, it is more probable than not, that the nature of any relationship between Sgt. Brown and Mr. Gillis, and the nature of their exchanges, reveal a causal link between Sgt. Brown's statements, and any material inculpatory statements made by Mr. Gillis ["did the officer direct the conversation in any manner that prompted, coaxed, or cajoled" Mr. Gillis to respond (*Liew*)? Or did the officer "ask leading questions or lead them on to the area" in which the officer was attempting to gather information (*Hebert*)? – The explanation that the officer was merely role-playing, by itself, does not sanitize such "active elicitation" exchanges]. However, this examination must also be contextual, including a consideration of the impact of preceding permissible exchanges between Sgt. Brown and Mr. Gillis. What information Mr. Gillis previously volunteered informs the court's analysis whether statements later made, on an objective basis, will be considered to have been volunteered as well.
4. An (informal) admission is inherently a statement that entails the maker adopting as true the fact(s) expressly or necessarily indirectly contained therein; however, the weight to be placed thereon is for the trier of fact;
5. While generally admissions need not necessarily be against the declarant's interest- they may be inculpatory or exculpatory (see Footnote 1 in *R. v. Skeete*, 2017 ONCA 926), - effectively the "active elicitation" test is designed to screen out inculpatory statements, and therefore should only be applied to arguably material inculpatory statements. As a consequence of excluding some inculpatory statements, later admissions made, which are sufficiently directly caused by the impermissible earlier active elicitation, may also therefore be seen as not volunteered, and possibly subject to exclusion by s. 24 *Charter*. Moreover, further incidental contextual editing may be required to maintain the integrity of the admissible statements, consistent with the spirit of the "whole statement" rule, which strives to ensure the trier of fact hears as much as

required of the "whole statement" in order to properly assess the meaning of the specific statements in question, and the weight to be given thereto- see e.g. *R. v. Mallory*, 2007 ONCA 46, at paras. 204-6;

6. The court always retains a residual discretion to edit portions thereof, and to exclude the entire statement, which might otherwise be admissible, if the corresponding prejudice to the fair trial rights of the defendant outweighs the probative value thereof.

The application of the law to the facts in this case

[70] In order to focus the court's inquiry regarding the alleged Section 7 Charter violation, bearing in mind that the transcription is 122 pages in length, I requested, and then received, from Mr. Gillis's counsel, *specific* identified portions of the statements made by Mr. Gillis to Sgt. Brown, which Mr. Gillis claims were the result of improper "active elicitations" as set out in the following decisions of the Supreme Court of Canada: *Hebert*, *Liew* and *Broyles*. As a result, I have initially only specifically addressed those instances, though I will review the entire record of conversation in my role as a gatekeeper to ensure that inadmissible evidence is not placed before the trier of fact (which in this case is a jury).

[71] His counsel argues that the following instances are violations (for ease of reference only, counsel and I have referred to the transcript pages)

[preceding quotation- not cited by defence, includes at pg. 3]

S/Cst Longtin-you alright Bud?

BG – Yeah, I'm alright

S/CST Longtin-You good?

UC – Yeah, what time is court in… this province?

…

BG – Am I going to court tomorrow for *this murder* I mean?

Page 4 [start of quotation cited by the defence]

BG –Mmmm… I'm on a fuckin *murder* charge man [snickers]

UC (undercover officer) – seriously, that's fuckin crazy

BG – Yeah, that is [chuckles]

UC – Murder, holy fuck

BG – I know. It's stressing

> UC – *I guess I don't got it bad-Fuck. Fuck, that piece got nothing on that then*
>
> BG - No man. Fuckin with this… [Unintelligible]…
>
> UC – Yeah, it's… That's pretty intense bud. Yeah, *I'd be pretty fuckin stressed too. Fuck, I ain't worrying about this at all though.*
>
> [Defence quotation ends here]
>
> [following quotation cited by the court]
>
> BG – No?
>
> UC – No, fuck man, a rental car… [Unintelligible]… fuckin… [Unintelligible]… Buddy's name's in the trunk.
>
> BG –Ahhh… shit… That's a bomb
>
> UC –… And… *But I didn't touch fuckin shit* so they can fuckin… They're not going to fuckin do anything. The only fuckin thing is if they let me out or not. I don't know the fuckin … I'm from Newfoundland boy, so I'm not really sure what the fuckin system's like here.

[72] Mr. Gillis suggests this is problematic, because it is representative of a pattern, namely: that Sgt. Brown is building a false rapport with him, and that factor and the impact of the particular cover story, amplified Sgt. Brown's ability to engage, befriend, and therefore gain the trust of Mr. Gillis in order to elicit incriminating statements from him - e.g. also see pg. 25:

> BG – What was in there, fuckin … [Unintelligible]?
>
> UC – *I don't care. Fuck, I trust you.*
>
> BG – What was that fuckin loose stuff?
>
> UC – Oh, that was just two sample packs [of illegal drugs]

[73] Regarding this systemic argument (largely focused on the nature of the relationship), I make the following comments.

[74] Mr. Gillis did not testify. No precise evidence was presented about his previous criminal history, level of education, etc. I do not know with confidence, what effect, if any, the interactions with Sgt. Brown had on him. I am prepared to infer, as I have earlier, that based on his interactions with police officers, and in his exchanges with Sgt. Brown, Mr. Gillis is a smart, even cagey, young man with some considerable experience and familiarity in the criminal justice system. He would, therefore, be aware of the risk of revealing sensitive information to other individuals generally, and specifically cell-mates, who might seek to repeat what he revealed to them, for their own advantage, or even for reasons of conscience. He

is not unusually vulnerable, or susceptible, to the tone, manner or content of communication adopted by Sgt. Brown in his role as a criminal in this case. I note that while Mr. Gillis drops his guard during some portions of the conversations with Sgt. Brown, on the whole he is guarded in what he says, and remains cagey in his responses even to Sgt. Brown, a person who he believes is a significant criminal. I am well satisfied that Mr. Gillis selectively and deliberately chose what he was prepared to reveal to Sgt. Brown. A review of their conversations confirms that not once does Mr. Gillis directly discuss the circumstances of the stabbing itself.

[75] I also find that the nature of the relationship between Mr. Gillis and Sgt. Brown is a neutral factor in this case – Mr. Gillis displayed no particular vulnerabilities, nor was he subject to exploitation by Sgt. Brown- in contrast to the circumstances in *Skinner,* which involved a homeless, drug addict with schizo-affective disorder, having an "almost childlike naïveté" (footnote 96), who was befriended by two cell-plant officers, which in the circumstances amounted to their exploiting his vulnerabilities "to bring about a mental state in which the accused was more likely to talk", and had shades of a Mr. Big scenario.

[76] Generally speaking, I do not find that this argument, individually or taken cumulatively with the other relevant considerations I must consider, satisfies me that there is more likely than not, a systemic violation of Mr. Gillis's Section 7 Charter rights.

[77] Next, I will address the individual instances of suggested "active elicitation" (i.e. the nature of the exchanges) raised by the defence. I bear in mind the wording used in *Liew* helps to delineate the permissible boundaries of State agent conduct (Largely focused on the nature of his words and actions cannot cause, by having "prompted, coaxed or cajoled", the detainee to respond in violation of his right to silence). However, while the Supreme Court has by use of those words given us some measure of appreciation for what factual circumstances will constitute "active elicitation", those words relate primarily to "the nature of the exchanges" between Mr. Gillis and Sgt. Brown. In a case such as this, where the nature of the relationship between Sgt. Brown and Mr. Gillis is a neutral factor, it is therefore that much more important to carefully and contextually examine the nature of exchanges between Sgt. Brown and Mr. Gillis. In my opinion, underlying those words ("prompted, coaxed or cajoled") is a concern that detained persons have not been unfairly caused to volunteer information in violation of their right to silence.

2-Page 11

[earlier quotation not cited by defence]

> [Page 10] UC – I hear you say they got methadone on a bus now that drives around?… So whatever one is closest to your res[idence], you just go there.
>
> BG – Yeah.
>
> UC – That's all right.
>
> BG – Yeah, it's alright
>
> UC – Gets the job done.
>
> [defence quotation begins here]
>
> BG – Yeah. I can't believe I'm on fuckin *murder* charges man.
>
> UC – Yeah, that's some pretty ahhhh… That's pretty big one there boy.
>
> BG – I'm gonna …[unintelligible] …for a while [NB-I will add here that upon listening to the tape I heard him say: *"I'm gonna go away for a long while… (chuckles) Nah, I wouldn't say…*]
>
> UC – *Well it depends fuck too though man, it depends what they got, right?*
>
> BG – What if ahhh… They got one witness, right
>
> [Continued quotation includes]
>
> BG – What if that witness doesn't go to court
>
> UC – If what?
>
> BG – What if they only got one witness and they don't go to court?
>
> UC – Well, fuck man, I would assume that that's the fuckin majority of your shit…
>
> BG – Yeah
>
> UC – Unless there is other shit, right, like…
>
> BG – No, all coming from her.[23]

[78] Mr. Gillis says that, although this is not a direct question, "it is a statement formed to elicit a response" and that as such it is an impermissible "active elicitation". I disagree.

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[23] This is a reference to a 15 – 16 year old female, whose identity I have anonymized as "S".

[79] Mr. Gillis introduced the topic of a “murder” charge. The causal link between Sgt. Brown’s statement and Mr. Gillis’s response is not sufficiently clear to say this is more likely than not “active elicitation”. Moreover, the later questions from Mr. Gillis suggests that he was content to continue that conversation in greater detail; and no material inculpatory statement was made by him because he already knew as a result of being shown five minutes of her videotaped statement, that S. had given a statement to the police and he claims repeatedly throughout that she is not being truthful. There is no improper active elicitation here.

3-Page 15

[Start of quotation cited by defence]

> BG – Yeah, I’m going… [Unintelligible]… today and I’m saying for the record, yesterday I was coming off a five-day drug binge, I hadn’t slept, they didn’t let me sleep and I don’t remember anything I said yesterday… [Unintelligible]… Think about that and today I’m not saying shit [unintelligible]… No sayin nothing.
>
> UC – [chuckles]
>
> BG – Didn’t say nothing, right, but I answered their questions but like… all like… I didn’t tell them anything, but you know what I mean?
>
> UC – Oh yeah
>
> BG – I still answered the questions right, I was just like smart and shit. I shouldn’t of said nothin at all.
>
> UC – *But it’s one of the beauty things too, like even… You know, you just sit there, they give you fuckin food and shit, at least you’re getting your smokes or something out of it.*
>
> BG – Yeah. Oh man, they were givin me cheeseburgers and shit.
>
> UC – Oh yeah. They brought… They brought me up like six smokes on that last one. It’s like buddy, I don’t how much else to ya. I’m not saying anything else so….

[Quotation cited by defence ends here]
[following quotation not cited by defence]

> BG – That was awesome.
>
> UC – ‘Thanks for the smokes’.

[80] Mr. Gillis argues “this is a subtle encouragement to talk to police in the interrogation”. I disagree.

[81] I conclude that this exchange is properly characterized as: likely that, Mr. Gillis having found a friend who also enjoyed manipulating the police to their advantage (whether that be the provision of food, or cigarettes etc.), without giving up anything in return. My conclusion is objectively confirmed when one examines Mr. Gillis's interactions with the police officers during the second videotaped statement in the afternoon of March 3, 2016. There is no material inculpatory admission by Mr. Gillis. This is not an improper "active elicitation".

4- Pg. 22

[Preceding quotation – not cited by defence- pg. 21]

> UC – Yeah. Like I was supposed to be on the fuckin ferry [back to Newfoundland] tonight. Fuck.
>
> BG – Do you got family and shit man?
>
> UC – Yeah, I got an old lady and a fuckin youngster.
>
> BG – Ahh… fuck man.
>
> UC – Yeah.
>
> BG – *See these guys got no fuckin kids or nothing, right?*
>
> UC – Yeah.
>
> BG – *That's one good thing.* It's not… You know what I mean like, like…

[Start of quotation cited by defence]

> UC – *Oh yeah. Yeah man, murder is fuckin, it's ahhh… It's, it's a hard one bud.*
>
> BG – Yeah.
>
> UC – *Yeah, but they fuckin say that, that can change six fuckin times yet. That'll be simple fuckin assault.*

[Defence quotation ends here]
[Following quotation –cited by the court]

> BG – True, you're right. That would make… [Unintelligible]… [On listening to the tape what I heard was: "true, you're right. They always make it sound worse (unintelligible)…"]
>
> UC – Yup. And *you know they're gonna fucking start at the top.*
>
> BG – Yeah. *Yeah, that's why they're saying to me, they're like* ahhh… It's not a question of… [Unintelligible]… How you did it, or, or when; it's why. … *Why did you do it? Tell us why you did it. It's like okay, tell you why I did it, so…*

> *[Unintelligible]... time… [Unintelligible]... Believe that ahhh… Maybe I did it out of self defence or something, so they're trying to get me to say that…It's like, if that's what you guys think, then why am I charged with fuckin murder?* Why am I charged… Why aren't I charged with manslaughter, you know what I mean?
>
> UC – Exactly
>
> BG –… *Because if I say that, then I'm going to admit to fuckin doin it, you know what I mean, they think I'm stupid, right, or somethin, I don't know.*

[82] Mr. Gillis argues that Sgt. Brown "broaches the subject of murder and directs Mr. Gillis back to discussing the murder".

[83] I find that Mr. Gillis introduced the subject of family and children. Sgt. Brown was tweaked to Mr. Gillis's mention thereof, and his referencing Mr. Gillis's being charged with murder flowed naturally given his presentation as a sympathetic similarly minded criminal in the circumstances. In context, these exchanges can be fairly characterized as being about how long each of them may be away from their families and friends as a result of their respective charges, including that a very young girl is without her father (Mr. Clothier) now, and the fact that Mr. Gillis apparently has no children who will miss him. Moreover, there is no material inculpatory admission by Mr. Gillis. This is not an improper active elicitation.

5-[Preceding quotation –cited by the court] – pg. 30

> BG – Yeah. *She [S.]... and she's the only witness.Only witness that can testify* so she, she's not gonna be able to fuckin … She's lyin. She's already lyin, you know what I mean? So how can they use that shit? I already know *she's lyin*… Where are ya gettin the things, you know what I mean?
>
> UC – Yeah. Yeah.
>
> BG – She ain't going to be able to stick to that story twice especially not three or four years from now.
>
> UC – Yes, fuck that's true too man, it's gonna be a while.
>
> BG – Yeah
>
> UC – *The other thing though is like, you know, well fuck. The only thing I could see like from... For anything, even on my own stuff is if they find shit.*
>
> BG – yeah.
>
> UC – Like that's what I learned, like it wasn't so much what people says like, you know… they find the fucking car or they find fingerprints and they find shit like that, that's the fuckin stuff that fucked me over.

> BG – *well they found the knife, but they didn't say they found my fingerprints on it.*
>
> UC – Nice.
>
> BG – That's fuckin bomb ehh…? They would of told me if they had fingerprints on my knife, on the knife… After everything else they told me they had, right? Are not just going to leave that out?
>
> UC – I don't how long it takes though to fuckin… for them to do that shit.

[Defence quotation begins here]
Pg. 33

> UC – *Hopefully they didn't fuckin… For yours and my sake, they didn't go look around for more shit last night man.*
>
> BG – *Yeah. I really don't*. I said ahhh… fuck man, I wish I would of never said nothing to them at all. That's just stupid. I was fucked up. I don't even know how to use that shit.

[84] Mr. Gillis says this is an example of "the undercover again brings the conversation back to the murder, by saying out of the blue [but what 'if they find shit?']."

[85] A minute or two earlier, Mr. Gillis referenced the unlikelihood that S. would be able to effectively present evidence for the Crown by the time the matter goes to trial. Sgt. Brown then references real evidence and that the forensic examination thereof may become problematic for Mr. Gillis. This exchange is continued at page 33 when Sgt. Brown brings the topic up again. I conclude that Sgt. Brown's comments flowed naturally as part of the existing conversation. Sgt. Brown's statements are not sufficiently causally connected to material inculpatory statements by Mr. Gillis. There is no improper active elicitation here.

[86] In the various following excerpts (and otherwise throughout the audio taping), Mr. Gillis suggests that we see examples of Sgt. Brown repeatedly bringing the conversation back to the murder, regarding physical or forensic evidence, S.'s involvement and statement, the defence of self-defence, which are all "topics that he would have known would be of interest to investigators", although "he did so without care for the fact that Mr. Gillis was refusing to provide a statement to police. He tricked Mr. Gillis into giving up his right to remain silent."

[87] I will briefly revisit the law here.

[88] There is undoubtedly a powerful tension between, the duty on police to investigate crimes, which can legitimately involve placing "cell-plant" officers in detention with suspects, and the concern that a detainee not be unfairly deprived of their right to silence. To strike this balance the Supreme Court of Canada confirmed that an accused will no longer be presumed to have volunteered information, and thereby accepted the risk of its further disclosure to police, when the State agent actively elicits the response. Whether there is *active* elicitation or not is a matter of degree, dependent on the specific facts in any given case, looking at the nature of the exchanges and the relationship. As may be obvious, mere elicitation is insufficient – the State agent must *actively* elicit Mr. Gillis's responses. This requirement suggests some form of calculation or deliberation by the State agent, which then elicits a response which is demonstrably connected to the State agent's statements.

[89] In my opinion, generally speaking, Sgt. Brown's comment(s) flowed naturally from the existing conversation, given his presentation as a sympathetic similarly minded criminal in the circumstances. Sgt. Brown testified that he was to play the part of a criminal of some stature. Therefore, he brought up matters because he wanted to remain credible in his role. To fulfil his role, he was motivated to mention the topics that he selected based on: "that's what I would be worried about"; if he were in Mr. Gillis's position. He expressly recognized however, while he intended to stimulate further conversation, he steered clear of asking direct questions, as a result of his understanding of the jurisprudence. He had to make quick decisions in his role-playing, about when to speak, and what words to use, to appear conversing in a naturally flowing manner. It was skilful police work on his part – however, on some occasions, he crossed into impermissible active elicitation, bearing in mind that his role-playing by itself cannot "sanitize" what is otherwise active elicitation.

[90] In my view, provided that the circumstances allow the conclusion that Sgt. Brown's words were a continuation of the existing, not itself improper, conversation (present theme(s) or a natural extension thereof), then absent direct questioning, generally Sgt. Brown's words are not the functional equivalent of interrogation, or improper active elicitation. For example, it is permissible to "chum the water with bait" using words or themes in such circumstances. Notably, in *Liew,* at paras. 14-18 and 35, the Supreme Court approved the following conversation between Jones, the undercover officer, and the accused, as *not* the functional equivalent of an interrogation,(in dispute specifically was the italicized portion of the entire exchange):

Appellant: That Lee is hot.

Jones: What?

Appellant: That Lee is hot.

Jones: Fuck.

Appellant: Did you pass the money?

Jones: Fuck. The cops got it.

Appellant: How much?

Jones: $48,000.00.

Appellant: Ah, fuck.

Jones: What happened?

Appellant: The cops watching us.

Jones: *Yeah, they got my fingerprints on the dope.*

Appellant: Lee and me too.

Jones: Why the fuck didn't you give it to me out of the black car? Why did you drive away?

Appellant: That other guy. That not my dope. I just give it to Lee and drop him off. We very careful.

Jones: The cops must have been following you guys

Appellant: No we were careful but Lee very hot.

[Emphasis added]

The appellant then asked about the $48,000 and the conversation continued:

Jones: Fuck man, they're going to kill me for this man.

Appellant: Where are you from?

Jones: From Slave Lake.

Appellant: Whose money?

Jones: Indians from up there. Fuck man, my prints, Lee's prints and your prints are on the shit.

Appellant: Yeah.

[91] Significantly, *reflecting much of the argument put forward here by Mr. Gillis*, Lamer J., in his lone opinion, dissented on the basis that, the contested words were "active elicitation":

> 3 In *Broyles*, Iacobucci J. considered whether the actions of the state agent acting undercover allowed the conversation to flow "naturally" or directed it to areas where the police needed information. When looking at the flow of the conversation in question here, it is clear to me that *the police officer's statement about fingerprints raised for the first time the spectre of possession in a conversation which was not centred on that issue.* Prior to Mr. Jones' comment, the dialogue between the two cell mates (albeit very brief) concerned the police confiscation of a bag of money which Mr. Jones (acting undercover) had in his possession. The police officer's statement about fingerprints *actively directed the conversation towards the matter of possession. The police wanted the accused to admit to possession.* Mr. Jones' statement elicited the necessary agreement that indeed, the accused's fingerprints were also on the drugs.
>
> 4 *Major J. asserts that this statement by Mr. Jones was not framed as a question or request for information and thus could not be described as inducing any particular response.* I disagree on this point of characterization. Until Mr. Jones' statement, the exchanges between the two men had been initiated by the accused and focussed on money. Mr. Jones then took over the conversation and directed the conversation to possession, the crime which formed an integral part of the police investigation. *While the police officer's comment was not grammatically framed as a question per se, the reasoning in Broyles makes it clear that substance must triumph over form.*
>
> [Italics added]

[92] Moreover, as I have noted elsewhere, I conclude that the nature of the relationship between Sgt. Brown and Mr. Gillis is a neutral factor. However, in relation to the nature of the exchanges between them, Justice Major’s comments in *Liew* (paras. 47-50), are especially helpful in concluding which, if any, of Sgt. Brown statements are improper or proper statements.

[93] I am satisfied that Mr. Gillis did not entirely trust the circumstances in which he found himself when he spoke with Sgt. Brown. During his interviews with the police officers, he was noticeably cagey, and although he did speak to them, he showed great care in not revealing material inculpatory details regarding any involvement in the stabbing of Mr. Clothier. In the cells area, he largely maintained this position, whether his concern was grounded in his concern regarding audio recording in the cells area by police (Pg. 66), or he was simply deliberately careful not to reveal material inculpatory details regarding his involvement in the stabbing of Mr. Clothier to anyone. This is evident from his consistently guarded conversation with Sgt. Brown, who he likely believed was a somewhat sophisticated criminal. I conclude that Mr. Gillis was having an ongoing friendly chat with Sgt. Brown, but was also deliberately engaged in an information

seeking exercise during his conversations with Sgt. Brown, where the circumstances surrounding the offence are discussed. I conclude that generally Mr. Gillis only provided information to Sgt. Brown, after he deliberately decided to take the risk of its further disclosure by Sgt. Brown to others. Therefore, I conclude he revealed to Sgt. Brown only information that he did not consider materially inculpatory, though it may still be seen to be so by the court on an objectively based assessment.

[94] Consequently, contextually viewed, *even if* some questions by Sgt. Brown approached what could be construed as "active elicitation" otherwise, I do not find that Mr. Gillis's responses were unfairly obtained, and therefore they do not run afoul of the spirit of the proscription in the jurisprudence against depriving Mr. Gillis of his choice whether to speak to the police or not. I infer that he chose to speak to a person who he believed was a risk to reveal, what he said to him, to the police. Moreover, in those situations I conclude that the causal link has not been demonstrated. In some instances however, Sgt. Brown crosses the line into impermissible active elicitation.

6-Pg 34

[Defence quotation begins here]

> BG – Yeah. I really don't. I said ahhh…fuck man, I wish I would of never said nothin to them at all. That's just stupid. I was fucked up. I don't even know how to use that shit.
>
> UC – Yeah, well your lawyer will bring that up for fuckin sure.

[Defence quotation ends here/immediately following quotation cited by the court]

> BG – Yeah, like man, I was [unintelligible]… They, they [unintelligible] made it seem like I was fuckin coherent or something. I was right, but not completely, like… I didn't even sleep until I got here for fuck four or five days.
>
> UC – Yeah
>
> BG – How you gonna take a statement from me
>
> UC – Yeah
>
> BG – *And the person that's in the other fuckin room, the witness was the same way.*

[Defence quotation begins again]

> UC – Yeah like,… How much fuckin , fuckin weight do you put on that shit… For her?
>
> BG – What's that?
>
> UC – How much weight can someone put on fuckin her…
>
> BG – Yeah, really
>
> UC – When she's fucked up herself ?

[Defence quotation ends here/immediately following quotation cited by the court]

> BG – That's what… That's another thing they're trying to say, they're saying, 'oh take the burden off her shoulders'. They just keep saying… It's selfish to take it to trial [chuckles]… Like 'fuck off'
>
> UC – Oh really?
>
> BG – That's what they're saying, yeah, trying to make me feel bad for fuckin go to the trial… I didn't give a shit
>
> UC – It's not fuckin next, fuckin several years, it's going to be a fuckin year [chuckles] she can [unintelligible] the fuckin murder.
>
> BG – For real, she can go to fuckin trial [unintelligible]… she wants
>
> UC – Yeah
>
> BG – She might not even go
>
> UC – Nope
>
> BG - I don't think she will… Honestly. Maybe not, I don't know.
>
> UC – *Well you don't know what they fuckin promised her either though.*
>
> BG – Yeah, true. And I know she's scared of them too ehhh?

In this exchange, it is Mr. Gillis who brought up S., by saying "and the person that's in the other room, the witness was the same way [not coherent]". Thus, Sgt. Brown was merely following the flow of conversation. Mr. Gillis knew that police have video of him at Mr. Clothier's residence with S. and Mr. Clothier on March 2, 2016. There is no sufficiently direct causal nexus between what the officer said and what Mr. Gillis said, no material inculpatory admission, and therefore no improper active elicitation.

7-Pg. 36

[Intermittent defence quotation begins here]

UC-Yeah… [Unintelligible]…fuckin [unintelligible]… *Fingerprinted that fuckin thing last night…*

BG – What's that?

UC – *When they fingerprint that shit, and I already have an answer for her this morning*

BG – Oh…fuck knows man. I don't think it takes them that long to get fingerprints… [Unintelligible]

UC – *Well I know for fuckin sure it's not going to be on it*

BG – That's awesome

UC – [unintelligible] yeah, they make fuckin … *a lot of times man for that, they fuckin just probably started you at the top, man.*

BG – Yeah

UC – *That's what it sounds like to me, they fuckin going to throw the hardest thing at ya and then fuckin that shit will trickle down*

[Pg. 37]

BG – Yeah. Yeah, that's right. The keep trying to make me [unintelligible]… me shit. Does really like, they have to prove… [Unintelligible] say anything [unintelligible]

UC – You would think.

BG – It's fucked

UC – I don't know man, maybe I watch too many fuckin TV shit, but…

BG – Yeah. I hear ya.

UC – *Like basically, you gotta have* fuckin, you know, like watching TV, it makes it seem like *they almost got to have either a fuckin witness, the weapon or like something else. Like how… How or whatever happened right?* Like it was fucking shootin or some shit, they gonna fuckin find like a gun or something.

BG – Yeah. With fingerprints.

UC – With fingerprints or DNA I guess, yeah.

BG – Yeah. Yeah.

UC – *But that don't mean like I said, just because you find that, you don't know what the fuck, you know, how it happened, right?*

BG –Mmmm…

UC- *You know, like buddy fuckin , you know tells me, he is gonna fuckin , you know, run me over* or fuckin cap me, so then he don't know that I got something, *so I take care of him first.*

BG – Yeah, really.

UC – You know, *like there's a reason I did what I did, you know what I mean?*

BG –Mmmm,Hmmm

UC – *Now is that going to mean fuckin self defence, I don't know.*

BG – No, not necessarily. Especially not… not in the interrogation room [chuckles]

…

[Pg. 39]

BG – I'm not fuckin tellin them nothin

[Defence Intermittent quotation ends here]

[95] Mr. Gillis says Sgt. Brown is steering the conversation back to physical evidence and forensic examination thereof, as well as the notion of "self defence" (e.g. pg. 37). Mr. Gillis introduced "self defence" at page 22 when he referenced that while the police were questioning him, they suggested "maybe I did it out of self defence or somethin". Sgt. Brown speaks in hypothetical terms, thus he only indirectly causes Mr. Gillis to respond. In any event, there is no material inculpatory statement made by Mr. Gillis in any event. This is not an improper active elicitation.

8- Pg. 39

[Defence intermittent quotation begins here]

BG – Yeah, so that… [Unintelligible]… Know what I mean? Once, I'll fuckin … *I'll tell my lawyer, you know what I mean…*

UC – Yeah

BG – *... Everything, And you know what I mean?*

UC – Oh yeah.

BG – *I'm not fuckin telling them nothin*

[End of quotation cited by Defence – immediately following quotation cited by the court]

UC – Yeah, lawyers man, they're ones to fuckin [unintelligible] do their job

BG – Yeah

> UC – You tell them fuckin… Most of the fuckin lawyers are good man, like, no matter what they are. Tell them about what's up, and then they'll fuckin work magic and make it come out the right way, right? That's why you fuckin pay 'em.
>
> BG – Mmmm,hmmm… It's harder than fuck man, I'm gonna have to fuckin use like legal aid or some shit.
>
> UC – But even then like, fuck, I did need a legal aid once when I was a youngster fuckin… Buddy was fuckin switched on man, like…
>
> BG – That's not fuckin cool man. Yeah, I don't like that.
>
> UC – But no, he was good. Like he actually fuckin listened.
>
> …

9- Pg 40

[Continued quotation cited by Defence]

> UC – Well even now like fuckin, *even if, you know, in any case someone fuckin doesn't say anything, but* they just find fucking … *They got a witness and find your weapon*. Yeah, okay, they might be able to put you there and assume that he did this… *that don't fuckin mean that's what happened*.

[Defence quotation ends – following quotation cited by court]

> BG – Yeah, really though.… And like I said I've known the girl was sayin everything, things, right, to make herself sound better and shit…
>
> UC – Yeah
>
> BG – *She's lyin, she's not credible. She's a fuckin liar.*
>
> UC – *Yeah, and the fuckin lawyer will pick that apart.*

[96] Mr. Gillis says that here again Sgt. Brown is guiding the conversation and there is "a clear causal relationship between the undercover operator's words and Mr. Gillis's responses. There is little or no difference between what transpired, as opposed to the undercover just questioning Mr. Gillis about the witness [S.]." I note however that Mr. Gillis had previously seen 5 to 6 minutes of S.'s videotaped statement during his own first videotaped statement. He was also aware that the police had video of him together with Mr. Clothier and S. on March 2, 2016 very near the location of the homicide (pg. 88). There is no causal connection between what Sgt. Brown has said and Mr. Gillis's responses. Those responses do not involve any material inculpatory admissions. There is no improper active elicitation here.

10- Pg. 43

[97] Mr. Gillis suggests the following excerpts reflect Sgt. Brown minimizing the offence in order to get Mr. Gillis to describe “what the story is” and that it is the functional equivalent of saying ‘I have a friend who got five years, tell me your story and I’ll tell you if it’s similar’.

[Following quotation precedes that cited by the defence]

> BG – Mmmm, Hmmm… cause that’s all that happened [unintelligible] you know, like something [unintelligible] that’s all they got is her [S.]
>
> UC – And their fuckin ahhh what is it, they have
>
> BG – Body
>
> UC – And the fuckin ahhh…fuckin Jesus, weapon there or whatever.
>
> BG – Yeah, yeah, yeah. Yeah, that’s true too. Which is stupid as fuck.
>
> UC –Hmmm…?
>
> BG-[On review of the tape I heard: “which is stupid [unintelligible]”]
>
> BG – *Which is kinda dumb on my part, wear gloves… [Unintelligible]* [on review of the tape I heard: which is kinda dumb on my part, or whoever’s part,… [Unintelligible]”]
>
> UC – Whatever the fuck it is, what it is now bud, know what I mean?
>
> BG –Fuck. I just don’t want to be played.
>
> UC – What did you say?
>
> BG- I just don’t wanna be [unintelligible]… I probably… Fuck man. I would… *I’d probably take 10 years*… [Unintelligible]… You know what I mean?

[Defence quotation starts here]

> UC – Yeah, but… Like I’ve had buddies fuckin charged with manslaughter and fuckin attempted murder and shit and they get like five years. *It all depends on what the fuckin story is.*

[Defence quotation ends here – immediately following quotation is cited by the court]

> BG – Yeah
>
> UC – You know, it’s not like cut and dry, right?
>
> BG – Mmmm, Hmmm… Yeah, really. *It’s not completely obvious what happened*

[98] Sgt. Brown speaks in hypothetical terms, and uses themes, such as self-defence, etc. to attempt to stimulate Mr. Gillis to discuss the specifics of his own situation. There is no causal connection between what Sgt. Brown has said and Mr. Gillis's responses. Mr. Gillis never reveals what the "story" is. There is no improper active elicitation here.

11- Pg. 44

[99] Mr. Gillis says the following excerpts reflect Sgt. Brown's directing the conversation towards things his experience tells him would be relevant to the investigation, however it's problematic because he effectively does so in a way that is the functional equivalent of an interrogation. Specifically, he brings up self defence "out of the blue". However, although Sgt. Brown brought it up at page 37, Mr. Gillis spontaneously brought it up at page 22, which appears to be the first reference to self-defence.

[Immediately preceding quotation cited here by the court]
[Pg. 43]

> BG –Mmmm, Hmmm… Yeah, really. It's not completely obvious what happened.
>
> UC – No, like it's different if, you know like [unintelligible] fuckin … A lot of those fuckin shows are like… Those court fuckin cases that are out of the States on TV, you know what's one's… Where it's like if some guy goes up and fuckin, you know, cracks a kid over a baseball bat over the head or something just randomly or he goes to a house party gets in a fight with a guy and after the fistfight, he fuckin grabs the bat and hits him. There's two totally different fuckin types of situations.
>
> [Pg. 44]
>
> BG – Yeah
>
> UC – So… There's one… *Are they gonna get the same fuckin 25 years to life? No, you have different fuckin things.* That's what happens on TV all the time.
>
> BG – Yeah, you're right. Yeah.
>
> UC – *And no fucking two stories are alike, like situation that, you know, fuckin you been into could happen to a different person, it's still going to be different at certain points of it, right?*
>
> BG –Mmmm,mmm,… Yeah, I think… *I think his mom is not going to actually say I did it [chuckles]*

UC – Yeah

BG –Hmmm…Ahhh… There's a lot of fuckin [unintelligible]… You never know with these fuckers, man.

[Defence quotation begins]

UC – No. *Well the self-defence card is a fuckin good one too*.

BG – What's that?

UC – *The self-defence card too is a good one* that your lawyer will have to talk about .

[End of defence quotation cited – following quotation cited by the court]

BG – Yeah. Yeah, I got bruises and shit all over me too.

UC – Well, lawyers are good man, they'll fuckin … They'll poke that shit, they'll fuckin know what to say and shit. Fuck.

BG –Mmmm,… Just with legal aid, you never know if you're actually going to get one that's going to fight for ya

UC – Yeah, but fuck man, in Newfoundland, you can fire one and get another one if it's, if they're not doing what you think is right.

BG – Yeah, you can do that here too.

[100] There is no causal connection here, *until* the express reference by Sgt. Brown to "the self defence card is a fuckin good one". There is a causal connection between what Sgt. Brown has said and Mr. Gillis's responses. Those responses do involve a material inculpatory admission. Although Mr. Gillis never reveals what the "story" is, and Mr. Gillis's body was photographed, so there is a detailed videotaped record of his bruises, as well as his statements about how he got those bruises as part of his first videotaped interview, which is all already admissible trial evidence, he does suggest that he got the bruises from the encounter with Mr. Clothier. That constitutes an *improper active elicitation*

12- Pg 64

[101] Mr. Gillis says that the following excerpt shows that once again Sgt. Brown is encouraging Mr. Gillis to speak to the police.

[Preceding quotation cited here by the court]

[Pg. 63]

UC – I thought for sure they were gonna go for a run at ya. Oh, ‘ here’s your methadone, now come with us’.

BG – Yeah, really though eh? Fuck man, you’re right, I’m surprised they didn’t that. Yeah,fuck… [Unintelligible]

UC – First they come with brekkie [breakfast], which I betcha they didn’t have to

BG – Yeah

UC – Maybe it seemed like they did because they gave me one

BG - Yeah. That’s right.

UC – and ‘here’s your methadone, here’. I thought for fuckin sure as shit, you’d be goin up again [to be re-interviewed].

BG –Mmmm,hmmmm… [Unintelligible]… forget [unintelligible] I guess, well people got a weak mind [unintelligible]… *that is actually like really an exhausting process eh? Like them, them battering me like that, like me, I don’t care like I… I don’t care, you know what I mean [chuckles]*

UC – Yeah

BG- *But imagine some people, that’s going to drive them nuts, right? But me, I can just sit there.*

[Pg. 64]

UC – Just sit there and listen and fuckin do your thing

BG –Huh?

UC – Just listen and do your thing

BG – Yeah, that’s right. Say somethin stupid every now and then. You shouldn’t even do that man. My lawyers… My lawyer actually came in and talked to me and fuckin told me, and he fuckin told me over and over and over again not to say nothing. I was up there all high on fuckin pills [chuckles] [unintelligible]… probably [unintelligible] like anything.

[Start of quotation cited by defence]

UC – Just fuckin,…*when I went, I was fuckin nice to them. When they’d ask me stuff, I could tell or I can tell… I knew right away what they were fuckin get at*

BG –Mmmm…

UC – *And they were kinda learnin a little bit of what fuckin the Mrs. said… So you kind of answer [unintelligible]… the couple questions that wouldn’t fuckin burn ya*

BG – Yeah

UC –*... And let them give you more and before you know it, you can figure out what the fuck they have got, right?*

[End of quotation cited by defence – following quotation cited by the court]

BG – Mmmm,Hmmm

UC – *Like that fuckin broad didn't give you no statement because that don't even make sense*

BG – Not really, no.

[Sgt. Brown and Mr. Gillis speak at the same time making the next portion unintelligible]

BG – *But you can't fuckin…*

UC –… Then you find out about the camera [at the pharmacy or in the Autumn Drive residence area], and you're like… Yeah.

BG – You can… [Unintelligible]… half -truths like… *You can't say that I fuckin stabbed this guy to death, but you weren't selling your ass though… [Unintelligible] you know what I mean?*

You see – yeah

BG – Like fuck… [Unintelligible]…. fuck – I don't know man. It's like a [unintelligible] I was in shit and like… It's stupid… *It doesn't look good for her, she's not gonna be credible*

[102] I would characterize these excerpts, as Sgt. Brown suggesting that he and Mr. Gillis are smart enough to manipulate the police into revealing what they know about the case, rather than encouraging him to speak to them in order to get inculpatory admissions from Mr. Gillis. There is no causal link between Sgt. Brown's statements and material and inculpatory statements by Mr. Gillis (not even in his second videotaped statement). There is no improper active elicitation here.

13- Pg. 66
[Preceding quotation cited by the court]

BG – I know a lot of people in jail, so… [chuckles]… I'm getting by and shit anyway. Plus, I'll probably get a lot of respect down here… [Unintelligible]

UC – Oh yeah, the street credit will be massive.

BG – [chuckles] yeah, right. [Unintelligible]… Oh fuck, It's stinky. Ahh… fuck , I shouldn't be down here laughing about this shit, Ehhh…?

UC – Fuck man, it is… I don't give a fuck

[Defence quotation starts here]

BG – Do they got mikes down here?

UC – I don't think so, I think they gotta tell you though man. I don't even see a fuckin camera.

BG – They're on, on the next set of bars. You go outside the bars. Up top. The little circle. There is like one camera for every two cells.

UC – Yeah. Yeah, I wouldn't fuckin say there is going to be fuckin people [unintelligible]

BG – Say that again.

UC – I said, I wouldn't fuckin imagine there is many people in fuckin [unintelligible] for that. That can say that.

BG – Say what?

UC – You got fuckin arrested for a homicide.

BG – What?

[End of quotation cited by defence – following quotation cited by the court]

UC – You got arrested for a homicide.

BG – I don't know what you mean man.

UC – I said not many people can fuckin say that they've had that happen to them.

BG – Oh… Yeah, that's true too. Yeah, that's… Yeah, man it's good to be optimistic, right? Especially these fuckin situations.

UC – Yeah, that's pretty bad ass.

BG – No point sittin here fuckin going nuts over it, right?

UC – No

BG – You might as well make the best of her. I got my methadone, I got fuckin these [unintelligible]… [chuckles] heavy shit, you know what I mean? Some company.

UC – Yeah

BG – Fuckin right [laughs] …shit. I'm adjusting already

UC – [Chuckles]

> BG- [Chuckles] fuckin life or, lifer… [Unintelligible]… Maybe I'm just a lifer. [Unintelligible]… Yeah, I don't… [Unintelligible] I don't wanna be a lifer.
>
> UC – No. [This is at approximately 9:35 a.m. on March 3, 2016]

[103] Here again, there is no sufficiently direct causal connection between what Sgt. Brown has said and Mr. Gillis's responses. Those responses do not involve any material inculpatory admissions. Mr. Gillis never reveals what the "story" is. There is no improper active elicitation here.

14- Pgs. 82- 88

[Mr. Gillis is absent from the cell area for the second videotaped interview between 9:56 a.m. and 12:56 p.m. on March 3, 2016 – following quotation arises upon his return to the cell – page 81 onward]

Pg. 82
[following quotation cited by the court]
…

> UC – My fuckin lawyers gotta get the paper together so we can do a bail hearing tomorrow.
>
> BG – Well, that's good that.… You get the process started.
>
> UC – Well, he'd said it'd be a fuckin rush today, he said fuckin stay overnight and tomorrow, I'll be able to get ya out, most likely on bail
>
> BG – There you go.
>
> …
>
> UC – Well geez boy, I thought you were fuckin gone.
>
> BG – –Mmmm… *I'm fucked man. For sure*
>
> UC – Really?
>
> BG -I think so. *I don't know. I'm charged with first-degree*… [Unintelligible]
>
> UC – Jesus
>
> BG-Ahhh… *I thought maybe I'd get away with manslaughter, but I don't know how right, who knows right?*
>
> UC –Fuckin lot can change man.
>
> BG – Yeah. They make that sound they got all this new evidence when really they don't. They're just like… [Unintelligible]

UC – *I was thinking though man like, if that was me, I want to know why the fuck the witness got it out for me.*

BG – Yeah.Mmmm… Yeah really. Really though, ehh? Good fuckin thought. I like that.Hmmm…

UC – Like… *You know in my fuckin case*, I never like… *The witness was one of my buddy's girlfriends…* So *I don't know why she was fuckin ahhh… being a witn[ess]…* Or like, you know what I mean, talk to the fucking cops about me. It's my buddy's girl, like I know her.

BG – Yeah

UC – It was like she had it out for me and she fuckin right away, called the fuckin cops saying I was in a fight.

BG – Yeah. *It's like this girl too*. She's ahhh… In her statement and shit, she is like saying all kinds of shit to make, make herself look better.

UC – *Sounds to me like she had it out for you though.* [pg 83]

…

Pg. 84, *infra*

UC – Even my fuckin lawyer was like, well where it was found [the two packages of cocaine in the rental car], did you touch it, just tell me, like type of bullshit. I was like, yeah, no worries. Fuckin I'll tell you I didn't fuckin touch it like… I touched it, yeah, but I had fuckin … I used the sleeve of my shirt, so no fingerprints on it.

BG –Hmmm… Yeah.

UC – Straight up.

BG – *Can you get convicted of second-degree without getting life?*

UC – Convicted of second-degree [unintelligible]

BG – Yeah, like it's only first-degree murder that you automatically get life, right?

UC – I think so, yeah.

BG – Yeah.

UC – Yeah, because I think second-degree, can't you just get like… You can get like 10 or 15.

BG – Yeah. Yeah man.

UC – *But like in my… I think in my opinion*, like fuckin read and like fucking… Watching TV and shit , it depends on… Because a lot of the fuckin shit on TV is from the states, right… But like depending on what it was, like, *you know,*

> *hypothetically, you go fuckin to a random guy on… just… out of fuckin nowhere, it's totally different than if you get in like an argument with someone and then… which escalates into a fuckin fistfight or something more serious… That's different.*
>
> BG - Yeah.
>
> UC – *Like it's not gonna be the same jail time, right?*
>
> BG – Yeah, because the family saying that they know me for 15 years and shit. *And the girl saying that ahhh… I called and asked if he was okay and made sure she called an ambulance and all this shit , right, all this shit that looks very good, you know what I mean?*
>
> UC – That's good.
>
> BG – *Yeah it makes me look like a human being instead of like a psychopath right?*
>
> UC – Yeah
>
> BG – *So that's good, right?*
>
> UC – That's fuckin huge.

[End of quotation cited by the court]
[Start of quotation cited by the defence]

> BG – Yeah. I'm still not gonna tell on myself though. You know what I mean? That's what they want.

[End of quotation cited by the defence]

[104] Mr. Gillis suggests that Sgt. Brown is undeterred and goes back to engaging in the functional equivalent of an interrogation thereafter:

[Following quotation cited by the court]

> UC – Alright, absolutely they want.Fuckers.
>
> BG – Yeah man…
>
> [Quotation cited by defence starts here]
>
> UC – But like I think… [Unintelligible] *you know, to me, it's like… was it*, you know, like you just fuckin, you know, it's different if… isn't it… Now fuckin I don't know if this is Canada or the States, but like if you would look in their fuckin, you know, you know, *do someone in and it's different than your fuckin sittin there chillin…*

> BG –Mmmm…
>
> UC – *Hittin a couple hits and then you get in an argument which fuckin then… It happens, shit happens, right… That's a big fuckin difference.*
>
> BG – Yeah, you're right. That's capital… [Unintelligible] looking for it, its capital, capital murder.
>
> UC – That's what it's called.
>
> BG – It's first-degree murder here.
>
> UC – So like, I think that's the big fuckin difference, right?

[Quotation cited by defence ends here]

[105] Mr. Gillis says that Sgt. Brown wants information about the circumstances of the death of Mr. Clothier, so he skilfully redirects the conversation following [pp. 86-7]:

> BG – fuckin right. It's a difference between life, life and not, hey? I think you can still get life, but I might not now. Who knows? I don't give a fuck. [chuckles]… I doubt it, you never know.

[Defence quotation starts again here]

[Pg. 87]

> UC – Well, the fuckin thing is, you know… I was just thinking what she said.
>
> BG – Mmmm
>
> UC – Like ahhh… They're just sittin there chillin and then fuckin , you know, he just fuckin runs over and fuckin jumps him.

[End of quotation cited by defence]
[Following quotation is cited by the court]

> BG – That's what she keeps saying, yeah, pretty much.
>
> UC – That's fucked
>
> BG – Yeah. She didn't even try to make me look better. Like she didn't even like… She didn't even explain anything that was going on, she wanted to make herself look better in front of her father and shit. Like what the fuck…fuck… [Unintelligible]… that pissed me off.
>
> UC – Yeah, but fuckin… You wouldn't have ahhh… I didn't think you were allowed to have a talk in front of your parents [unintelligible]
>
> BG – Was like – she's under 18

> UC – Oh fuck
>
> BG – She's 16
>
> UC – So you know fuckin right, she's not gonna fuckin say anythin in front of her fuckin old man.
>
> BG – *No, so how is that fuckin credible? I think that's why at this moment they're so keen, telling me that they're not all relying on her now because that's what they're up there saying right… Telling me about how. They got me on video at the pharmacies, using the phone and shit.* Then I [unintelligible] talking about [unintelligible]…Nah. So they don't even know about that shit, right?

[Defence quotation starts again here]
[Pg. 87]

> UC – Did they fuckin like… buddy told me right off the bat this morning… The first thing he fuckin said to me, we're doing fingerprints on everything and doing DNA. I was like 'well, you go right ahead'.

[Defence quotation ends here]

[106] Mr. Gillis argues that, "this subtle slip ('did they fuckin… like…') is telling, the officer is obviously skilled and being careful to refrain from [direct] questioning. Here he quickly rephrased so that it wasn't an obvious question. Which begs the question, is this truly what McLachlin J was dictating to be the law [in *Hebert*]?"

[107] The officer was right not to ask a direct question of Mr. Gillis. He does rephrase, by making a statement of what was said to him. There is no sufficiently direct causal link between what he said there, nor any material inculpatory response by Mr. Gillis. The mere fact that Sgt. Brown skilfully directs their conversations, does not in and of itself, create active elicitation.

[108] However, within the following exchanges I conclude that there are some problematic exchanges.

[109] For example, although Mr. Gillis's early statements at page 17 ("I just didn't attacked him… That's what it's soundin like"), and some later [24] were volunteered by Mr. Gillis, opening the door to Sgt. Brown to permissibly follow up, he did so impermissibly by positing scenarios that demanded response by virtue of their detail, and likeness to the allegation against Mr. Gillis.

[110] An example of this, where a sufficiently direct causal connection exists between what Sgt. Brown has said and Mr. Gillis's arguably material inculpatory admissions follows:

> BC - Yeah. I'm still not going to tell on myself though… that's what they want."; "… I think you can still get life, but I might not now. Who knows?… I doubt it, you never know.
>
> UC – they're just sittin there chillin and then… He just fuckin runs over and fuckin jumps him.
>
> BG – That's which she keeps saying yeah, pretty much… Yeah. She didn't even try to make me look better.

[111] Although Mr. Gillis never expressly reveals details of what is the "story", I find Sgt. Brown's statements referencing opposing scenarios such as: violence coming "out of fuckin nowhere" versus "an argument… which escalates into… something more serious…that's different"; followed up by: "like it's not gonna be the same jail time, right?"; "it's different if you're fuckin sittin there chillin…"; and, "Well, the fuckin thing is, you know… I was just thinkin what she said… They're just sittin there chillin, and then fuckin , you know, he just fuckin runs over and fuckin jumps him"; are examples of impermissible active elicitation.

[112] Therefore, from page 85 ("UC – but like in my… I think in my opinion… that's different") to and including page 87 ("… So they don't even know about that shit, right?") are breaches of Section 7 Charter.

[Following quotation is cited by the court]

[Pg. 88]

> BG – That's awesome man

[24] At pgs. 82 and 84-" I'm fucked man. For sure… I think so. I don't know. I'm charged with first-degree… I thought maybe I'd get away with manslaughter, but I don't know right, who knows right? " and "can you get convicted of second-degree without getting life?"

UC – I'm like yeah, perfect, it's going to help me out.

BG – Yeah. [chuckles] that's what I said about her fuckin… When they told me, yeah, just so you know, all the burden is [unintelligible]… that little… on that young girl's shoulders any more. I was thinking to myself, good, because she's fuckin made me look like an idiot. You know what I mean? I don't want you guys to rely on that statement. Or maybe I do, right, because it's…

UC – Well it's almost better fuckin … Basically *if she fuckin is a shit liar.*

BG –Mmmmm, hmmm… Cross examine her, right?

UC – *But it depends on how many – how their – many fuckin witnesses there are I think*

BG – *She's the only actual witness*. But there are witnesses that were her… seen me on the phone and shit.

UC – Yeah, but that don't fuckin mean anything.

BG – No. And they got… They got me on camera leaving the building, going in ahhh, they got me on camera the night before with the Vic [tim] and that girl… Just chillin in the hallway. I don't know – a bunch of little things, right?

UC – Yeah

BG- Weird [unintelligible] I don't… any of that is significant… Like… this all shouldn't [unintelligible] right?

[Defence quotation starts again here]

UC – [Unintelligible] hey, like… Hey, if it was me, like I'd just be worried about the fuckin… the weapon.

[Defence quotation ends here – following quotation cited by court]

BG – Worried about what?

UC – Like… I would fuckin want to know… *Like I would make sure that shit that [unintelligible] there not going to find. If it was me, they're not going to find that fuckin weapon.*

[Pg. 89]

BG – Well…hmmm… *I know. They already found it. Well they didn't find it, they did find a knife.*

UC – They didn't?

BG – *They did, but they didn't. Well they [unintelligible]… They found a knife with blood on it.* I think. I know they found a knife. It did have blood on it though. Huh… *It's a black handled silver knife. But there's 1 million black handled silver knives man.* There is a… *There's a whole fuckin knife set. A big block one*.

> UC- Yeah, well *if it was me, if it was the one I fuckin used, I want to make sure I at least clean it off or hid it.*
>
> BG – Yeah well… I don't know. It's crazy man.
>
> UC – As long as you're good, that's all that matters.
>
> BG- Yeah. Well I've been… *I don't think they would be pressing me so hard for admission if they fuckin had all this shit…they had all kinds of evidence, you know what I mean?*
>
> UC – Did they tell you… Like… I don't know, how long that shit takes to come back though… Like fingerprints and DNA and shit
>
> BG – Oh. I don't even know
>
> [Pg. 89]

[113] Mr. Gillis says that Sgt. Brown attempts to elicit information about the blood on Mr. Gillis's clothes, and when that topic doesn't prove fruitful, he abruptly changes the discussion back to the cause of death at pages 90 – 91. He again argues that Sgt. Brown by his statements directed the conversation in a way that effectively was the functional equivalent of an interrogation.

[114] Mr. Gillis had already stated that there was only one witness in earlier permissible exchanges (e.g. pgs. 11, 16, 17 and 30) and thus, there was no sufficiently direct causal link between Sgt. Brown statements, and those of Mr. Gillis : "she's the only actual witness. But there are witnesses that were her… seen me on the phone and shit".

[115] However, the reference to the weapon: "hey, if it was me, like I'd just be worried about [the knife]"… "If it was me, they're not going to find that fuckin weapon"… "… If it was the one I fuckin used, I wanna make sure I at least clean it off or hid it" are sufficiently directly linked to statements by Mr. Gillis, and are therefore active elicitations. They are impermissible because of his positing scenarios that demanded response by virtue of their detail, and likeness to the allegation against Mr. Gillis.

[116] Therefore, from page 88, "hey, if it was me, like I'd just be worried about the [knife]" to and including page 89, "oh. I don't even know." are provisionally excluded.

15- Pg. 90

[Following quotation is cited by the court]

[Pg. 90]

…

UC – Fuck-last time – here you go. The last fuckin time they were at me… They were fuckin showin me pictures of all the fuckin injuries.

BG – Yeah, I wonder why they didn't show me nothing like that. They were just showin me pictures of him with his kids and shit.

UC – Yeah. That's fucked.

BG – Yeah, fuck man.

UC – Like they harped on me last time, they're like you hit him here cause he's fuckin black and blue here, he's busted up here, so you must of struck him here… You know what I mean?

BG – Yeah. Yeah, like… fuck. I don't know. It's fucked up man.

[Quotation cited by defence starts here]

UC – Because it'd be a fuckin… to me, *like if I was fuckin like… Judge or jury* or any fuckin … whatever they fuckin do, like *I'd wanna know, was it like, you know, a slash or its fuckin six stabs or two stabs or a fuckin paper cut.*

[Quotation cited by defence ends here – following quotation is cited by the court]

[Pg. 91]

BG – Yeah

UC – You know, *it's the same fuckin charge, you know, there are different ways is I think more important, right?*

BG – *It's gonna matter, yeah. Like it's gonna matter [unintelligible] it look better if I just stabbed him once as opposed to four or five times.*

UC – Well yeah, exactly.

BG – Yeah, you're right. Fuckin right man. That's true.

UC – But on TV, like in… That's something, like on TV, it makes it seem like, you know, if it was one versus like fuckin ten, it obviously looks a lot fuckin worse, right?

BG –Mmmm,… You'd think yeah. But…

UC – Like I don't know,fuckin ahhh…

BG –Fuck

UC – *You know, like I don't know how many fuckin times this guy got [unintelligible]*

BG – *I think if I… I think if they determined that I actually did stab him and that's how he died, then that fucks me for manslaughter, cause manslaughter is ahhh… somebody dies by like… It's a different cause, right, like say, say I stabbed him and he fell and hit his head and, and it was the blow to his head that killed them, that's manslaughter*.

UC – Oh yes. Yes. Yeah. [Speaking at the same time unintelligible]

BG – *So if they can prove that I stabbed him, then I'm fucked. See what I mean?*

[Quotation cited by the defence starts here again]
[Pg. 91]

UC – Yeah. But hey… Like to me *it also matters how many times he got it too though.*

[Quotation cited by the defence ends here again – following quotation cited by the court]
[Pg. 92]

BG – Yeah. Like I don't know man.

UC – And, like you know, on t.v., it shows like where too…… fuckin accidentally in the fuckin leg or it's like in the neck…. And all that shit to me, fuck, makes a big difference I would assume.

UC – Well at least they're fuckin tellin ya somethin.

BG –Mmmm… I told them and maybe he didn't get stabbed at all. Hmmm [chuckles] just being a dick. I'm not admittin to it. [Unintelligible]

UC – Fuck them.

BG – I told them, I said maybe if I had a… *Maybe if this piece of paper said manslaughter not murder, maybe I'd have more to say*… [Unintelligible]… But

UC – Yeah, but they were playing games.

BG – Yeah…

UC – So like, *I'd wanna know which one that is*

BG – Ahh… *first degree, is like you actually planned it. Second-degree is it just kinda happened*. I didn't go there tending on killing him. I was already there and then something happened. I didn't plan… [Unintelligible]… You know what I mean?

UC – Yeah

> BG – Premeditated. *It wasn't premeditated. I don't know man, I just don't wanna get life* [chuckles]… [Unintelligible]
>
> UC – Fuck, no doubt
>
> BG – I might not even get anything though, you know what I mean [unintelligible] if they can't prove it beyond a reasonable doubt or whatever.

[117] Mr. Gillis argues that: Sgt. Brown hasn't gotten the information [about cause of death/number of stabs] he is attempting to obtain, so he nudges the conversation back to the cause of death. The words Sgt. Brown uses evinces "no practical functional distinction between the statement, and coming right out and asking 'how many times did you stab him?'.

[118] Even if that is so, however, Mr. Gillis did not respond by answering how many times he stabbed Mr. Clothier. He answered: "like, I don't know man… One of the cops said to me as far as they knew… he only got stabbed once" (at pg. 92). To that extent, there is no improper active elicitation.

[119] However, the references to : "[a trier of fact] would wanna know [how many/kinds of stabs]"; "it's the same fuckin charge, you know, there are different ways is I think more important right?"; "… If it was one versus like fuckin ten, it obviously looks a lot fuckin worse, right?"… "Like to me it also matters how many times he got it too though" are sufficiently direct causal prompts which makes the directly associated following responses improper active elicitations, and breaches of Section 7 Charter.

[120] Therefore, the exchanges from page 90 ("because it'd be a fuckin… to me, like if I was fuckin like… Judge or jury or any fuckin … whatever they fuckin do, like I'd wanna know, was it like, you know, a slash or its fuckin six stabs or two stabs or a fuckin paper cut"), to and including page 93, ("I might not even get anything though, you know what I mean… if they can't prove it beyond a reasonable doubt or whatever") are breaches of Section 7 Charter.

Other portions of the transcript where arguably material inculpatory admissions were made by Mr. Gillis

[121] Although these were not specifically identified by Mr. Gillis's counsel, he generally made arguments that could implicate the admissibility of the following excerpts, therefore I will examine them, pursuant to my role as the gatekeeper of admissible evidence. I observe that Mr. Gillis' case is distinguishable from *Skinner*, where the *entire* statement was excluded, without a piecemeal analysis of

the exchanges between Mr. Skinner and two undercover cell plant officers, largely it appears on the basis of the trial judge's findings regarding the "nature of the relationship" given the unusual characteristics of Mr. Skinner. I have found that the nature of the relationship between Sgt. Brown and Mr. Gillis is a neutral factor. Therefore, I must primarily examine individual material inculpatory statements by Mr. Gillis throughout his statement to ensure there is no impermissible active elicitation.

1- Pg. 16

> UC –… I've had buddies… One of my buddy that got fuckin through a rig more, same thing with a fuckin stupid fistfight where buddy fuckin fell down and died.
>
> BG – yeah
>
> UC – and they charged him with fuckin murder.
>
> BG – yeah. It's fucked up.
>
> UC – you know, like a…
>
> BG – *I'd probably take fuckin eight years or something just to start now*
>
> UC – the what?
>
> *I'd probably take eight years… If they offered it to me.*
>
> …

Pg. 17

> UC – Well, *it must of been a fuckin good shit show, if you got a fuckin murder charge.*
>
> BG – I don't know man. Hmm… The guy that died was my buddy for fuckin 12 years, 15 years, actually.
>
> UC – no way.
>
> BG – yeah
>
> UC – fuck that's fucked.
>
> BG – I don't just fuckin… *I just didn't attacked him* [unintelligible] right, that's, *that's what it's like soundin like*, you know what I mean? I don't know, it's fucked up man…

[122] There is no active elicitation here. The statement that "I'd probably take eight years… if they offered it to me" was spontaneously made by Mr. Gillis, as was the statement "I just didn't attacked him". The statements are admissible

2- Pg. 30

BG – Yeah, they said [unintelligible] things like that to me yesterday to man, like different bullshit things like… the… Well, the fuckin, the girl, all kinds of shit right, but I know, I know a lot of it she said to cover her ass, right…

UC – Oh yeah.

BG -Because her father was there and shit, so I know she said a lot of things that weren't true too, to make herself look better right?

UC – Yeah.

BG - So that's good for me I think.

UC – So, she don't get in shit.

BG – Yeah. She… And *she's the only witness. Only witness that can testify* so she, she's not going to be able to fuckin … She's lyin. She's already lyin, you know what I mean? So how can you use that shit? I already know she's lyin, where are ya get in the things, you know what I mean.

[123] There is no active elicitation here. Mr. Gillis spontaneously stated "she's the only witness…". The statements are admissible.

3- Pg 41

UC – Well… I don't know man, but that one with mine man, like he hit his head. I didn't even know he was fuckin out.

BG –Mmmm, yeah

UC – Like I don't know man you got fuckin …depends on what type of fuckin weapons on the go to right?

BG –Mmmm, fuck I wonder what time it is?

UC – and the other thing man like [unintelligible] chunk [his vernacular for a handgun] man, a lot of people are going to hear that noise

BG – What's that?

UC – Like when the fuckin chunk, a lot of people would hear a fuckin shot man. You have witnesses from everywhere.

BG – Yeah

UC – Or if it's like a bar fight with a fuckin shit ton of people around… Or it's something more quiet type of thing.

BG - Yeah. *Yeah, there was only one witness*. She's not fuckin credible, I would say [chuckles]… But fuck.

[124] There is no active elicitation here. Mr. Gillis had already volunteered that there was only one witness – at pages 11 and 30. The statements are admissible.

4- Pg. 42

UC – But for them to be fuckin flat out right now, on you, is like anything man like that bar fight, the same thing [unintelligible] they… That witness, witness didn't say I fuckin full had punched this fuckin kid in the head, they were going to charge me with assault causing…

BG – Yeah

UC – So now you didn't…

BG – They didn't have [unintelligible]… charge me.

UC – Somebody has to be fuckin sayin anything, fuckin, they had to say that I did it… So…

BG – That it had to be [unintelligible].

UC – What?

BG – *So she has to go to trial and say it too then.*

UC – Yeah, but she obviously not been, you know… *Like it sounds to me she told them what ya did*

BG – *Yeah, she did, [when I listened to the tape, I heard:] allegedly.*

UC –Hmmm, that's fucked.

BG – Yeah. I think at first, she didn't do nothing, she just laughed. She didn't even call an ambulance or nothin.

[125] There is no active elicitation here. Beforehand Mr. Gillis had mentioned that S.S. said he "just… attacked him" in her statement – see pages 11, 16 – 17 and 30. The statements are admissible.

5- Pg. 43

BG –Hmmm, because that's all that happened [unintelligible] you know, like something [unintelligible] *that's all they got is her.*

UC – And they're fuckin… What is it, they have…

BG – Body

UC – And the fuckin … fuckin Jesus, *weapon* there or whatever.

BG – Yeah, yeah, yeah, yeah, that's true too. Which is stupid as fuck

UC –Hmmm

BG – *Which is kinda dumb on my part*, [I listened to the tape and heard the following:] *or whoever's part.*

UC – Whatever the fuck it is, what it is now Bud, know what I mean?

BG – Fuck, I just don't wanna be played

UC – What did you say?

BG – *I just don't wanna be [I listened to the tape and heard the following:] played… I probably….fuck man. I would… I'd probably take 10 years [unintelligible]… You know what I mean?*

[126] There is no active elicitation here. Moreover, he has already volunteered that "I'd probably take eight years" at pages 16 – 17. The statements are admissible.

6- Pg. 56

BG –Mmmm, I know, that's what I want man, fuck [to stay out of trouble]… hopefully… a smoke [chuckles]… The guy that died had a fuckin daughter man. A little girl.

UC – That sucks

BG- Yeah. Some fucked up shit.

UC – Well I would say that, it'd been a lot worse if she was fuckin [unintelligible]

BG – What?

UC – I'd say, I would assume it'd be a lot worse if she was fuckin home.

BG – Yeah, really.

UC – [Speaking at the same time part portions unintelligible] they would go hard-core on you.

BG – Yeah

UC – That would be [unintelligible] even more so.

BG – Oh yeah. Well yeah… [Unintelligible] custody or anything. Yeah, I don't want to. *Probably doesn't help it happened in front of a 16-year-old girl either.*

UC – [Unintelligible]

BG – *It probably doesn't help… happened in front of a 16-year-old girl. She's like hysterical.*

[127] There is no active elicitation here. Mr. Gillis spontaneously stated “it happened in front of a 16-year-old girl” – and had previously stated that there was a single witness – at pages 11, 16 – 17, 30, and 41. The statements are admissible.

7- Pg. 61

UC – What time is afternoon court? One or two?

BG – 1:30 is when it starts. We’ll probably be there a little bit earlier. I hate court. Court’s a shit show. But I’d rather be there than here.

UC – Yes, by the fuck.

BG – We’re gonna have a lunch too [unintelligible] *I can’t believe this man. I feel like a celebrity. We’re both a celebrity. This is my second claim to fame. The first one was the Halifax axe attack… He got hit with a hatchet and shit .*

UC – Yeah, that hit the news.

BG – Yeah. It was pretty cool. Only did 20 months for that although.

[128] There is no active elicitation here. This statement was made spontaneously by Mr. Gillis. The statements are admissible, however arguably may require editing based on a prejudice versus probative value analysis.

8- Pg. 62

BG – Yeah, that of been good. *The robbery’s probably not gonna look good for this either…*

UC – Probably not, no. Because I think… can’t they bring up that other thing anyway, even if like the

BG – Well yeah, *history of violence right?*

UC – Yeah, assault thing or whatever.

BG – Yeah

UC – Fuck

BG –Fuck

UC – It probably depends on fuckin … *I would assume it kinda depends on what fuckin type of thing it was. Was it the same bullshit?* Was it bad or fuckin… You know what I mean

BG – Yeah

UC – Or just to like fist… like beat him up, fistfight or fuckin knuckles or…

BG – I just put a shine [unintelligible]

UC – *Whether it's the same type of fuckin ... weapons and shit*. I think… I would assume that they'll bring that up.

BG – Yeah, that's not good. fuck… Yeah he was [unintelligible]

UC – Yeah, man, that's a lot to take in, but [unintelligible] yeah.

BG – Oh, I had a lot of fun though man, you know in the last few years… Before I got arrested, right, for this. I'm just trying to look at the bright side, I guess. Talked to a lot of beautiful girls, fuckin … You know what I mean?

UC – You might not get the full fuckin … Yeah, but *you're definitely gonna get some years, I would assume*.

BG – Yeah. Yeah. I'm prepared though, like I really am, I accept it, you know? I'm not sss… I wouldn't accept to do life, I'm not… I don't want that, but *I am prepared to do like 10 years, you know*? I shouldn't say prepared, but…"

[129] I interpret the conversation about the "history of violence" as relevant to the potential sentence Mr. Gillis might receive if found guilty of the culpable homicide or stabbing of Blaine Clothier. Sgt. Brown's comments that "you might not get the full fuckin… Yeah, but you're definitely going to get some years, I would assume" are not active elicitation. Moreover, Mr. Gillis had already stated that he would be prepared to accept an 8 to 10 year sentence, which underscores that he believes he is guilty. These statements are admissible.

9- Pg. 65

BG –… You can't say that I fuckin stabbed this guy to death, but you weren't selling your ass though… [Unintelligible] you know what I mean?

UC – Yeah

BG – Like fuck… [Unintelligible] fuck. I don't know man. It's like a [unintelligible] I was in shit and like… It's stupid.

UC –Hmmm?

BG – it doesn't look good for her, she's not gonna be credible

UC – No

BG – Nothin. Fuckin , right man. As I had… She's intimidated right, she's scared so… *She scared so she's gonna tell them everything*, and she's going to try and make me look worse [unintelligible] herself look best as she can.

UC – Oh absolutely.

BG – So the bottom line [unintelligible]… I mean she gave a five hour fuckin statement.

[130] There is no active elicitation here. These statements ("she scared so she's going to tell them everything…") were made by Mr. Gillis spontaneously. These statements are admissible (see also item 12 earlier).

10-Pg. 95-7

UC – Basically man, my fuckin … *Basically my opinion, it's all gonna be what fuckin Missy said*

BG –Hmm?

UC – Man, when I'm think… What I'm thinking right now, like… It makes me think *it's gonna be what she said of how it went down is going to fuck you over*

BG – Yeah

UC – You know what I mean?

BG – *That's all they got really.*

UC – like did you… like… it was me, *like did I go there and just say 'hey, guys, how's it going'. Fuckin just run right at him and attack him.*

BG – Yeah

UC – *You know what I mean, like… is it all what she says is gonna fuck me over cause she's the only one gonna fuckin paint that picture, right?*

BG – Yeah. She's lyin and shit though man. It's fucked. *She's like lyin on some shit*, you know what I mean, like… You can't fuckin … Tell them all the bad things about me and then lie… [When I listened to the tape I heard: "about the bad things you were doing]… year ago. You know I mean?

UC – Yeah. And who really gives a fuck.

BG – Yeah. fuck off, bitch. Like I had your fuckin back, like [unintelligible] I think she was trying to help me. Fuckin whore.

UC – *Man, I'll tell you, by the sound of this, she ain't fuckin helpin ya.*

BG – Yeah. Not one fuckin bit. *After going on and on and on and on*, 'oh, I never talk to the police. The police don't scare me. Man, I know, okay. *You don't have to keep telling me, I know : 'S., you don't have to talk to the cops. Don't fuckin let them scare ya or listen to what they say, ever.' This was wrong. I said this to her 5000 times long before this ever happened and then look what happened, she fuckin told them.*

UC – *And said everything. Wow.*

BG –Fuckin bitch. You know what I mean though? She didn't tell on me, [when I listened to the tape I heard: "she wrote her statement out"]…

UC –Hmmm…

BG – You know?

UC –Hmmm?

BG – You know what I mean?

UC – I didn't hear ya

BG – Oh never mind, doesn't matter. Shhh… Yeah. She wrote a fuckin five-hour statement on video. In the first six minutes… They only showed me six minutes and she lied about three different things. Things that she didn't even have to mention.

UC – All they should be fuckin… what I think, is all they should be asking is did you see fuckin him do it…

BG – Yeah

UC –… And how… And how did it go down.

BG – Yeah

UC – Nothing else fuckin matters.

BG – *The whole thing might of took fuckin three minutes*. How is she gettin a five hour statement out of that without saying something to make me look… bad

UC – Jesus

BG-I don't know man. She should of said… [Unintelligible]… She's a goof.

UC –Fuck. That's brutal.

BG – Huh?

UC – That's fuckin brutal.

BG – Oh yeah. *I spent so much money and shit on that girl Man. I never felt so betrayed in my life.*

UC – *I think the difference too though,* like watching those fuckin shows… like law and Order and shit… *If you bring the fuckin weapon to the fuckin place*, is a fuckin, one of the biggest fuckin things that can get ya off.

BG – *So it looks better that I didn't. That's good*. I like that.

[131] Up until the following reference by Sgt. Brown there was no arguable active elicitation: "… *Fuckin just run right at him and attack him*."

[132] When seen in isolation, this approaches an improper prompting and active elicitation, however the exchange must be seen contextually – at pages 11, 16,17 and 30 there had been permissible exchanges between the two that S. was the only witness, and of the six minutes of her five-hour statement that Mr. Gillis viewed in

his police interview beforehand, that prompted him to comment to Sgt. Brown: "I just didn't attacked him… [Unintelligible]… Right, that's what it's sounding like, you know what I mean?" (pg. 17).It was Mr. Gillis who specifically introduced that scenario (at pg. 17), and also confirmed that he had called S. to ask if Mr. Clothier was okay, and to ensure that she called an ambulance (at pg. 85), therefore, generally Sgt. Brown was continuing from an earlier permissible conversation what he understood S. was alleging in her videotaped police statement.

[133] However, following at page 87, we find an impermissible exchange: Sgt. Brown stated, "I was just thinking what she said… they're just sittin there chillin and then fuckin, you know, he just fuckin runs over and fuckin jumps him"; Mr. Gillis stated: "that's what she's saying, yeah, pretty much").

[134] Consequently, the exchange starting at page 95, "like did you… fuckin just run right at him and attack him" to and including at page 95 "you know what I mean?" is active elicitation, and a breach of Section 7 Charter.

[135] Regarding "she ain't helping ya", I find that not to be an active elicitation. Mr. Gillis had already clearly said this himself repeatedly.

[136] Sgt. Brown's statement that all the police should have asked S. is, "how did it go down?", is not active elicitation.

[137] However, his statement at page 97, "if you [don't?] bring the fuckin weapon to the fuckin place… that can get ya off" is impermissible active elicitation, and therefore Mr. Gillis's response "so it looks better that I didn't" was caused by a breach of Section 7 Charter.

[138] Therefore, the exchange starting at page 97 is a breach of Section 7:

> I think the difference too though, like watching those fuckin shows… If you [don't?] bring the fuckin weapon to the…fuckin place… is a fuckin one of the biggest fuckin things that can get ya off", [to and including], "like is it a… I guess in this case but like… If you bring your own fuckin Joe Cool fuckin initialed fuckin blade…

11- Page 100 [the following exchanges occur while they are both together in the sheriffs' van being escorted to the Burnside correctional facility. Mr. Gillis joined Sgt. Brown who was already in the van]

> BG – So I don't think I'm gettin life.

UC – No?

BG – No

UC – That's good.

BG- They said fuckin fifteen [years].

…

[Pg. 102]

UC – Well fuckin 15 man, that's still fuckin a bit though.

BG – Yeah, like that's a… That's as old as… Well the girl was 16 that was there like fuck. It makes you think, ehhh?

UC – Like fuck

BG – I'll be what [unintelligible] 25… 50… 40. I'll be 40.

UC – Jesus

BG – Yeah. My mom said she… she would be a surety though if I ever needed it.

UC – Oh that's cool.

BG – I got a bail hearing… I think March 9… Supreme Court.

UC – Well now, I was thinking about it more and more man, as if it's like… *Well, it's only what I think, but if you didn't fuckin, bring the fuckin knife there… That's gonna [unintelligible]… be a lot more lenient on you.*

BG –that's good then. I didn't, right. You know, what I'm saying.

UC –Huh?

BG – It's from the kitchen, right.

UC – Yeah, see… So fuckin that, to me man, *that to me sounds like*, you know, *it's not planned and shit. Like they should go lenient on that shit*.

BG – Yeah. Yeah, you're right. Plus, it was self-defence, right.

[139] Up until the following reference by Sgt. Brown, there was no arguable active elicitation:… "Well now, I was thinking about it more and more… If you didn't fuckin, bring the fuckin knife there… that's gonna [unintelligible]… be a lot more lenient on you" .

[140] While this approaches an improper prompting and active elicitation, the exchange must be seen contextually: At page 30, in a permissible exchange, Mr. Gillis first mentions "the knife", and that "[the police] would of told me if they had fingerprints on my knife, on the knife… after everything else they told me they

had, right? Are not just going to leave that out?"; he again indirectly references the "weapon" at page 43.

[141] However, I found similar instances to be breaches, in the previous exchange at pp. 88 and 97 ("they already found it. Well they didn't find it, they did find a knife… They did, but they didn't. Well they [unintelligible]… They found the knife with blood on it… I think. I know they found the knife. He did have blood on it though.… It's a black handled silver knife. But there is 1 million black handled silver knives man.… There's a whole fuckin knife set. A big block one." Immediately thereafter, starting with "yeah, well if it was me, if it was the one I fuckin used, I'd wanna make sure I at least clean it off or hid it" I also found is an impermissible active elicitation.

[142] Sgt. Brown was on dangerous ground by making the statement in issue; although the continuation of a matter arising from an earlier conversation, it being found impermissible, so should the later one.

[143] Therefore, I find these statements in issue to be active elicitation. The beginning of those breaches starts with, at page 102, "well now, I was thinking…" up to and including, Mr. Gillis's response "[chuckled]" at page 103.

12-Pg 104

> UC – Well, fuckin, *I think self-defence man, at the end of the day, that's all ya gotta say.*
>
> BG- Yeah, they can't prove otherwise, you know what I mean?
>
> UC – Yeah
>
> BG – The girl is my ex-girlfriend right? fuckin,…fuckin, she had feelings for buddy right [unintelligible]… She's trying to give me more time.
>
> UC – Yeah, fuckin true.
>
> BG – she said that ahhh… [Unintelligible]… Right
>
> UC –Huh?
>
> BG – *She said that it, that he was bent over puttin in a DVD and I just came out of nowhere and started stabbing him [chuckles]*
>
> UC – Fuck right off.
>
> BG – Yeah, that's what she said. That's fucked up. I don't know why she do that to me.

UC – And obviously, that's nowhere near what happened.

BG – [unintelligible] [when I listened to the tape I heard Mr. Gillis say "exactly"]

… [pg 104]

BG – No. Why the fuck would I do that… [Unintelligible] you know, I'm not insane, I don't know [unintelligible]

UC – *Still man*, I still fuckin think based on those, you know, those fuckin shows and shit like… *How many times it fuckin happened is a big fuckin factor*.

BG – Yeah

UC – You know what I mean, like if there is *one little fuckin, you know, shank versus fuckin like twenty…*

BG – It was one 11 inch wound. There wasn't even any like blood, like… [Chuckles]

UC –Fuck

BG – Yeah. How the fuck did that happen like…

UC – I don't know man, usually on the fuckin TV is even one shank man, there's fuckin blood everywhere.

BG – Yeah. This was an 11 inch wound man. That's fuckin big.

[144] Firstly, Mr. Gillis's statement that "it was an 11 inch wound" was in direct response to Sgt. Brown's references to how many times Mr. Clothier was stabbed. Although there was generalized conversation preceding this exchange, in my opinion this is active elicitation because there is a sufficiently direct causal prompt which caused Mr. Gillis to make the statement. Those responses, in violation of Section 7, are from page 103 "well, fuckin I think self-defence man, at the end of the day, that's all you gotta say" up to and including pg.105: "yeah, really though. It really does. It's fuckin crazy man. [unintelligible]"

[145] Secondly, having found breaches of Section 7 led to Mr. Gillis's response at page 102 "well now, I was thinking about it more and more man… If you didn't fuckin, bring the fuckin knife there…" up to and including at page 103 "plus it was self-defence, right", confirms as Section 7 breaches the later exchanges starting with "yeah, that's a fuckin big thing too man, right like… well, fuckin, I think self-defence man… that's all you gotta say" up to and including at pg. 105 "yeah, really though. It really does. It's fuckin crazy man. I [unintelligible]…".

13-Pgs. 105-6

> UC – Yeah, but how do you… To me, like how do you know fuckin, ahhh… It wasn’t just fuckin you, the girl did somethin.
>
> BG – Yeah, they said that.
>
> UC – Right?
>
> BG – [unintelligible] I could of said that
>
> UC – But it doesn’t even make sense.
>
> BG – No, I know.
>
> UC – Like even if he said all this, and fuckin you know, it was, *it was her too right*?
>
> BG – *Yeah. Well she’s the one that didn’t call the ambulance.*
>
> UC – Yeah, that don’t fuckin look good.
>
> BG – Yeah. Really though. And she had… *She had a knife on her when they found her. She said she was scared of me. I don’t know. More and more things… [Unintelligible] first I wasn’t even mad at her because I understand she was scared.*

[146] This was not active elicitation. Mr. Gillis spontaneously volunteered the statements. The officer was continuing an existing permissible conversation.

14-Pg. 107

> UC – you know, *it’s not like you planned to get in a fistfight*, but one fuckin accidental smack to the face and then it’s game-on right?
>
> BG – Yeah.
>
> UC – Especially if your drinkin, you don’t know when to turn the switch off.
>
> BG – Yeah. *Well I know exactly what I’m gonna say. I’m not gonna say it now* but… I gotta a fuckin [unintelligible]… *I think I’ll be all right. I’m not gonna get off with it though…* [Unintelligible] *I might, but I don’t think*. But I don’t think I’m gonna get more than 15 years. That’s the minimum, right?
>
> UC – Fuck man, that’s still a long time, man.

[147] At this point in time the permissible exchanges between Sgt. Brown and Mr. Gillis suggest that, there was a confrontation between Mr. Gillis and Mr. Clothier which was situational, and triggered when they were both at the Autumn Drive residence with S. At page 17 Mr. Gillis had expressly rejected the suggestion in S.’s statement that he “just attacked” Mr. Clothier.

[148] Sgt. Brown's statements do not amount to active elicitation. Mr. Gillis's response "I'm not gonna get off with it though…", which are suggestive of his belief that he is culpable for the homicide, were not sufficiently directly caused by the Sgt. Brown's statements. Moreover, earlier Mr. Gillis stated words to the effect that he would accept, a sentence of 8 to 10 years…. and that he might "get away with manslaughter" – pages 16, 62 and 82.

15-Pg 111

UC – How long are they gonna take to book us into here?

BG – What's that?

UC – How long they take to book us into this shit?

BG – [unintelligible] man. It takes a while. Maybe not that long… It's hard to say man [unintelligible]

UC –Ahhh… *Either way man, it sounds to me like you got a solid self-defence fuckin case.*

BG – Yeah. There's no way they can [unintelligible] especially the one statement that I seen, man. They made it up.

UC – That's fucked.

BG – How can another person even say what I did if there wasn't another person there.

UC – Yeah. That makes no sense either.

BG -*It said in the statement that I, I was acting psychotic and trying to saw his leg with a cheese knife. That's what she said*. That's what they're saying that [unintelligible]… *She wasn't even there*… [Unintelligible] she said ahhh… [Unintelligible]

UC – Jesus

BG – That's what they said. That's fucked. But do you know what that sounds like? It sounds like they're ahhh … It sounds like they made that up [unintelligible]… She's trying to make it sound [unintelligible]… *because that wasn't the truth actually*.

UC – *It still fuckin surprised me that buddy would act fuckin tough in front if ya though, if you're his buddy*

BG – Yeah, I know [unintelligible]

UC – Well I guess a broad will make you do that.

BG – Yeah. *Then she brought me there to make us jealous.*

UC – Yeah. Fuckin..

BG – She's a manipulator, right?

UC – Yeah. Playing fuckin games with both of ya.

BG – Yeah.

UC – Look where it got her.

BG – Yeah. Yeah, *I guess it looks really good that I didn't do nothing to her.*

UC – Yeah, that's fuckin massive I'd say.

BG – [unintelligible] like that

UC – Yeah, the beef was just fuckin between you two.

BG – Yeah.

UC – She just happened to fuckin be puttin her nose where it shouldn't of been

BG – Yeah

UC – But I'd say that's fuckin right though man, that's what I think.

BG – What's that?

UC – I said that's what I think, I think that's right. *The fact that it was you two got into it, and didn't touch her, it looks better.*

BG – Yeah, oh, for sure. *I didn't even threaten her like I yelled at her, like I called her a bitch and shit , and that's it. But I didn't… I didn't raise the knife to her or nothin like that, like, you know what I mean?*

UC – Yeah

BG – *I didn't even get close to her actually.*

UC – Well that's huge man. That's what I think man the fuckin fact that you didn't raise a knife to her man, that solid like…

BG – Yeah. *As mad as I was*, right,like,… That happened, that happened,… [Unintelligible] going to forget, write [unintelligible]… I don't know man. So you're gettin out?

[149] Sgt. Brown was continuing existing permissible conversations. His reference to "self defence" came to nothing. Mr. Gillis's responses are in relation to what he says is S.'s incredible statement to police. He spontaneously stated that he did not do anything to her at the time of the incident. There was no impermissible active elicitation. However, as I have excluded other out-of-place references to self-defence, I will exclude, from page 111 "Ahhh – either way man, it sounds to me like you got a solid self-defence…" up to and including on the same page, "yeah. That makes no sense either."

[150] I will also exclude, based on references to “self defence”, and because their content’s prejudicial effect (Mr. Gillis has been in jail before/familiarity with jails) and virtually no probative value, the entire remaining transcript after page 113, “holy fuck” up to and including page 122 “this is Constable Brown with the RCMP…”.

[151] For similar reasons, I will exclude, at page 106 from “I’d be doing the same thing bud, self defence all the way” up to and including “Hunh?...”

(3) What is the appropriate remedy for the breaches of Mr. Gillis’s right to silence pursuant to Section 24 of the Charter of Rights?

[152] In relation to those individual instances where I found a breach of Section 7 of the Charter, I must now consider what is the appropriate remedy.

[153] In *R. v. Spin*, 2014 NSCA 1, Justice Farrar set out the test, which the Court of Appeal itself applied to the facts of that case, as a result of an error made by the trial judge.

[154] He went on to apply the test, saying:

> 44 In *R. v. Grant*, supra, the Supreme Court of Canada set out the analytical framework governing the exclusion of evidence. A court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to three lines of inquiry:
>
> > 1. the seriousness of the *Charter*-infringing state conduct;
> > 2. the impact of the breach on the *Charter*-protected interest; and
> > 3. society's interest in the adjudication of the case on its merits.
>
> 45 A court must determine whether, in all the circumstances, admission of the evidence would bring the administration of justice into disrepute after conducting these three lines of inquiry (para.57-87).
>
> …
>
> > 1. The seriousness of the *Charter*-infringing state conduct
>
> 59 In *R. v. Grant* the Court held:
>
> > [74] State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine

> public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

…

65 Constable Monteith's failure to follow up with Mr. Spin, given his equivocal response to his right to counsel in the police car "Not right now" may not be a separate 10(b) violation, however, it is a factor which can be taken into account in the delicate balancing process mandated by *R. v. Grant*. It speaks to Constable Monteith's reliability and good faith in recognizing the importance of Mr. Spin's *Charter* rights.

66 I agree with the trial judge that the following comments in *R. v. Grant* are directed at this type of situation:

> 75 ... "Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: *R. v. Genest*, [1989] 1 S.C.R. 59, at p. 87, per Dickson C.J.; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 32-33, per Sopinka J.; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59. Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence. It should also be kept in mind that for every Charter breach that comes before the courts, many others may go unidentified and un-redressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the Charter-infringing conduct was part of a pattern of abuse tends to support exclusion.
>
> 2. Impact on the Charter-Protected Interests of the Accused

68 Once again turning to *R. v. Grant*, the Supreme Court explains this inquiry:

> [76] This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter-* protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter breach may range from fleeting and technical to profoundly intrusive. The more* serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the

> citizen, breeding public cynicism and bringing the administration of justice into disrepute.
>
> [77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the *Charter* include the s. 7 right to silence, or to choose whether or not to speak to authorities (*Hebert*) -- all stemming from the principle against self-incrimination: *R. v. White*, [1999] 2 S.C.R. 417, at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.
>
> [78] Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

69 In this case, we have a s. 7 *Charter* infringement (right to silence); a s. 8 infringement (unreasonable search and seizure); and s. 10(b) (the right to retain and instruct counsel and to be informed of that right).

70 All of these breaches are fundamental to the *Charter*. They are neither fleeting nor technical. The s. 10(b) breach led to a s. 8 breach. As noted earlier, had Mr. Spin been informed of his right to counsel and exercised that right he could have refused the ASD demand with impunity. The breaches allowed the police to obtain evidence which they might not otherwise have had.

…

3. Society's Interest in the Adjudication on the Merits

73 It is not disputed that the Certificate of Analysis is reliable, the respondent concedes the point. However, the third line of inquiry does not mandate that, simply because the evidence is reliable, it should be automatically included. The Court must embark upon a balancing of interests. Again, quoting from *R. v. Grant*:

> [80] The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained (see *R. v. Wray*, [1971] S.C.R. 272) is inconsistent with the Charter's affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.
>
> ...
>
> [82] The fact that the evidence obtained in breach of the *Charter* may facilitate the discovery of the truth and the adjudication of a case on its

> merits must therefore be weighed against factors pointing to exclusion, in order to "balance the interests of truth with the integrity of the justice system": *Mann*, [2004] 3 S.C.R. 59, at para. 57, per Iacobucci J. The court must ask "whether the vindication of the specific *Charter* violation through the exclusion of evidence exacts too great a toll on the truth-seeking goal of the criminal trial": *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, per Doherty J.A.
>
> ...
>
> [84] It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society's interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, [1995] 2 S.C.R. 206, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, [1987] 1 S.C.R. 265, "[t]he Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[155] Justice Farrar ultimately concluded:

> 78 To allow the admission of the evidence, in this case, would, in my view, be a serious affront to fundamental *Charter* rights. It would effectively condone a variety of serious *Charter* violations in a situation where the police evidence was unreliable. Such a result would not instill confidence in the administration of justice and would seriously undermine its integrity.

[156] All of the breaches by Sgt. Brown in this case are of a similar nature. They all involve him, objectively viewed, stretching his role-playing *persona* into the realm of impermissible questioning. From his review of the jurisprudence he understood that he was not permitted to ask direct questions of Mr. Gillis-and he did not do so. He made some statements which were of a nature that suggested a

likely area of interest to the investigative team, and were likely intended to stimulate further discussion, but which generally were legitimately put by him in a manner that he believed was permissible.

[157] I bear in mind that Sgt. Brown was given very limited information by the investigative team – he knew that Mr. Gillis was a suspect in the March 2, 2016 killing of Blaine Clothier. The circumstances of what will develop during a cell-plant scenario are unpredictable. Sgt. Brown's contact with Mr. Gillis was lengthy, and their exchanges consumed a significant period of the total time between 2:49 a.m. and 4:46 p.m. on March 3, 2016.

[158] On my review of the entire circumstances, I am satisfied that Sgt. Brown was acting in good faith at all times. The line between permissible and impermissible questioning can be elusive even upon examination *in hindsight*. Sgt. Brown was alone – "one-way debriefings" with the investigative team meant that they could give him no further instructions about how to conduct himself in his role. He was acting, but without a script. He had to make quick decisions about when and how to continue his part of the conversation. And if he continued that conversation, he had to do so in a manner that appeared naturally to Mr. Gillis- who had significant exposure to the criminal justice system, and showed consistently that he was smart and cagey, not only in his dealings with known police officers, but also largely with Sgt. Brown who he believed was a drug dealer of some note. To appear naturally, Sgt. Brown often had to decide in seconds what would be the content of his response to Mr. Gillis's statements.

[159] Turning then to the *Grant* factors and analysis.

1- The seriousness of the Charter-infringing State conduct

A review of the entire period of conversations between Sgt. Brown and Mr. Gillis, reveals that Sgt. Brown continually made statements that, objectively assessed in hindsight, introduced areas of interest to the investigative team : e.g.

a. "It depends on what evidence they have got" –e.g. see references to witnesses, the weapon, fingerprints and blood/DNA -pages 11,12, 27, 30, 33, 37, 41, 64 –5, 87-9, 90, 95
b. Criminal culpability depends on "what the facts are" – different scenarios will entail different culpability (for example, was it self-defence, accident, no intent to kill, lack of premeditation):

> guilty of first-degree murder; guilty of second-degree murder; guilty of manslaughter; or not guilty of any of these offences)- eg. see references at pp. 15,22,37,43-4,85-7,91-3,102-107,111-112,116,118-120 of the transcript.

[160] There is no doubt that Sgt. Brown was attempting to elicit admissions from Mr. Gillis. That was his duty. However, I have found that only a small number of those were impermissible "active elicitation". [25]

[161] Though, each exchange must be individually analysed to assess whether there was an "active elicitation", the fact that I have found only a small number to be impermissible, confirms that Sgt. Brown was largely successful in obtaining information in a permissible manner. I find that Sgt. Brown acted in good faith. While the Charter right violated, namely the right to silence, is one of the most fundamental protections for persons detained by the State, it is significant that Sgt. Brown was consciously doing his utmost to respect Mr. Gillis's right to silence.

[162] On balance this factor favours *admission* of Mr. Gillis's statements

2- Impact on the Charter-Protected Interests of the Accused

[163] The Charter protected interest here is the right to silence. Courts should not lightly excuse violations involving this fundamental right.

[164] In the circumstances here, I conclude that *the impact* on Mr. Gillis's right to silence, is likely modest, if viewed from the perspective that there are only few impermissible active elicitations, and of those that were ruled to be breaches of section 7, so were any subsequent admissions by Mr. Gillis which could be sufficiently directly connected to the earlier admissions. In the case of some of the impermissible instances, there were similar-content related permissible admissions made by Mr. Gillis elsewhere. However, I appreciate that even one significant admission of culpability can speak volumes in the mind of a trier of fact.

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[25] I note here that alternatively, I have carefully examined all those exchanges that I identified and have found not to be "active elicitation", through the lens of s 24(2) of the Charter, as if they were violations of section 7. After examining the entire record, I conclude that, in relation to any of those arguably "active elicitations", which might properly legally be characterized as violations of sections 7, the admission of none of those would bring the administration of justice into disrepute.

[165] Sgt. Brown stepped over the “active elicitation” line, but not in a systemic manner. I will note here as well that, although Mr. Gillis only expressly identified 15 suggested impermissible exchanges, ending at page 92 of the transcript, I went on to identify 16 further arguably impermissible exchanges between pages 16 and 120 of the transcript, some portions of which I found to be impermissible elicitations. However, I would not go so far as to say that by not specifically identifying further exchanges, Mr. Gillis was condoning as permissible any that I identified as arguably impermissible.

[166] Nevertheless, I acknowledge that, by admitting these impermissible exchanges, the court could be seen as condoning conduct by State agents that may encourage a slippery slope to reckless, if not intentional, overstepping of the impermissible “active elicitation” line. That is not a message the court would want to send.

[167] On balance, this factor favours *exclusion* of Mr. Gillis’s statements.

3. Society's Interest in the Adjudication on the Merits

[168] Mr. Gillis is charged with the second-degree murder of Blaine Clothier. Although the seriousness of the offence can “cut both ways”, I must view this factor through the lens of considering "whether the vindication of the specific Charter violation through the exclusion of evidence exacts too great a toll on the truth-seeking goal of the criminal trial"? There is always a strong public interest in having as much otherwise admissible evidence presented at a criminal trial. Here however, if the evidence is excluded, the Crown will not be precluded from continuing its present prosecution – other sources of evidence from the exchanges between Mr. Gillis and Sgt. Brown exist, as well as potentially from witnesses and physical exhibits, some of which may have been forensically analysed, and upon which experts may give opinions.

[169] On balance this factor favours *exclusion*.

Summary-Section 24(2) Charter

[170] Ultimately, I am satisfied that a reasonable person, fully apprised of the circumstances here, on consideration of the long-term consequences on the justice system of admitting this evidence, would be satisfied, in keeping with the standard- the more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute-

that admission of the evidence *would* bring the administration of justice into disrepute.

[171] Therefore, of those exchanges that I have found impermissible active elicitations, and violations of Mr. Gillis's right to silence pursuant to Section 7 of the Charter, I find them to be inadmissible at trial.

The application of the court's residual discretion to exclude evidence whose prejudicial effect on the fair trial rights of Mr. Gillis outweighs its probative value

[172] In order to secure a fundamentally fair trial for an accused, the court has a duty to consider exercising its residual discretion to exclude evidence which might otherwise be admissible, on the basis that admitting such evidence would jeopardize the fairness of the trial. [26]

[173] This is a very fact driven exercise, but I am guided by the principles set out in *Skeete*, particularly paras. 151 – 155.

[174] I find the following portions of the transcript contain content, the prejudicial effect of which on the fair trial rights of Mr. Gillis outweighs any probative value thereof:

1. Pg. 61 from "we're gonna have a lunch too…we're both a celebrity. This is my second claim to fame. The first one was the Halifax axe attack."… and the fact that he would be prepared to accept 10 years as a sentence, is partly premised on the fact that he had a "history of violence"; up to and including page 63, "; Mmmm, Hmmm… I'm not fuckin telling them half… [Unintelligible]… They think I'm gonna confess. I'm surprised they're not down here interrogating me out";
2. Pg. 108 from, "Yeah. No, I hope I get out on bail man. It probably won't help that I just got out…" to but not including on page 109, "They… they picked me up, and stop, I guess where you were." [reference to his previous criminal history];
3. Pg. 113 from, " Holy fuck," for the remainder of the transcript up to and including at page 122, "this is Constable Brown…". For example: "I

[26] There are various means by which the courts can respond – see Justice Watt's commentary in *R. v. Skeete*, 2017 ONCA 926, at paras. 145 – 155, and the court's comments regarding the desirability of placing before the trier of fact as much, if not all, of the "whole statement" – *R. v. Mallory*, 2007 ONCA 476, at paras. 186 – 210.]

haven't been in one of these in a while" references Mr. Gillis's previous instances of detention; Mr. Gillis's reference to "so even if it is self-defence, it's still murder ehh?"; More discussion between the two of them regarding "self-defence"; Sgt. Brown's reference - "Girls man, is the fuckin root of it… Well man, all I can say is man I hope fuckin… your girl don't fuckin keep goin through with this shit. She's gonna have some time". – Mr. Gillis's response – "Yeah, I hope she fuckin snaps out of it…"; Sgt. Brown's reference to S. as: "best case scenario… she fuckin changed her tune and says it's self-defence on your behalf" – Mr. Gillis – "that'd be nice too. But who knows right? Maybe I'll be able to get a hold of her when I get out on bail, if I get out on bail. I guarantee ya, she's fuckin wet as fuck for me". Throughout that portion of the transcript, there is very little of probative value.

Conclusion

[175] I find Mr. Gillis's videotaped statements given to police officers both to be admissible in their entirety, subject to editing suggested by counsel and accepted by the court.

[176] I find the video and audio taping of Mr. Gillis's exchanges with Sgt. Brown are admissible subject to the excluded portions I have outlined in this decision. I conclude that admission of his redacted statement would not provide the trier of fact with a distorted view – the "whole statement" principle is not undermined thereby. [27] I am open to arguments regarding suggested further editing by counsel.

Rosinski, J.

[27] See *R. v. Mallory*, 2007 ONCA 46, paras. 203-210.