SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Buckley*, 2018 NSSC 2

Date: 2018 01 19
Docket: CRBW No. 461375
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

John Buckley

DECISION: *VOIR DIRE* 2
Cautioned Statement

Restriction on Publication: Section 486.5 CC

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	January 2, 3, 4, 5, 8, and 9, 2018, in Bridgewater, Nova Scotia
Written Decision:	February 14, 2018
Counsel:	Leigh Ann Bryson, for the Crown Patrick MacEwen, for the Defence

By the Court:

Overview

[1] Victoria Rae Brauns-Buckley was killed on March 1, 2012, in her family home. John Buckley, her eighteen-year old son, who grew up in that home, was charged with second-degree murder on March 13, 2012. He was remanded. His preliminary inquiry was scheduled for January 16, 17, 18, 21, and 24, 2013. He was provided with Crown disclosure in the normal course of preparing to meet the charge.

[2] On December 18, 2012, the Crown withdrew the charge of second-degree murder. Mr. Buckley was released from custody. The Crown was clear that the investigation was ongoing and requested an extension to keep all exhibits.

[3] In 2015-2016, the police conducted a "Mr. Big" investigation entitled Operation Hackman. John Buckley was the target. The first scenario took place in October 2015 and the final scenario occurred in April 2016. Scenario 75, the Mr. Big interview, also referred to as the crime boss confession, took place on April 6, 2016. During the Mr. Big interview, John Buckley confessed to killing his mother. Scenario 76 involved Mr. Buckley traveling with members of the fictitious criminal organization to Nova Scotia to conduct a re-enactment on April 7, 2016.

[4] Mr. Buckley was arrested for the first-degree murder of his mother on April 8, 2016, during a roadside stop. He was taken into custody, given his police caution and his right to counsel. He called a lawyer (not a criminal lawyer) and received some advice. The investigators felt that Mr. Buckley should speak to a lawyer who had more criminal law experience. Mr. Buckley initially declined.

[5] The police then attempted to take a statement from Mr. Buckley who maintained his innocence. He eventually requested an opportunity to speak to a criminal defence lawyer. The police provided him with this opportunity and for hours after that, with some minor exceptions, Mr. Buckley maintained his right to silence.

[6] The police used a phased interviewing technique. After a number of hours of a non-confrontational approach during which they tried to engage Mr. Buckley in conversation, the police switched to a more confrontational approach. During the confrontational phase, they revealed to Mr. Buckley that he had been the

subject of a Mr. Big operation, told him about the deception over the previous six months, and played a portion of his video recorded Mr. Big confession. The police became impatient with Mr. Buckley's repeated assertions of his right to silence. They spoke over him while he was asserting his right to silence. They told him that he did not need to keep asserting his right to silence, as they would protect his rights. They continued to press him to confess. The police told Mr. Buckley that because of his previous Mr. Big confession, confessing to them would not make matters any worse for him.

[7] Mr. Buckley eventually confessed to killing his mother, provided a full statement, wrote apology letters, described the murder weapon and took the police to two separate locations where he said the murder weapon was located.

[8] The sole issue on this *voir dire* is voluntariness in relation to Mr. Buckley's cautioned statement, the apology letters, his description of the murder weapon, and the re-enactment videos respecting the location of the murder weapon.

[9] This is a companion decision to the decision on admissibility of the Mr. Big confession. I have found it necessary to make reference to the Mr. Big confession in this decision. In arguing for admissibility of the Mr. Big confession, the Crown relies on the cautioned police statement as supporting evidence. At the same time, the Mr. Big confession is a central element of the background to the giving of the cautioned police statement. In *R. v. Buckley*, 2018 NSSC 1, I ruled the Mr. Big confession inadmissible.

Position of the Parties

The Crown

[10] The Crown says that they have proven the voluntariness of Mr. Buckley's statement beyond a reasonable doubt. The Crown says that while Mr. Buckley may have asserted his right to silence, during the same time period he also waived his right to silence, told the interviewing officers that he did not kill his mother, and engaged in various conversations with the police, all contrary to his stated assertion of his wish to remain silent.

[11] The Crown says that Mr. Buckley's will was not overborn by the police conduct and everything the officers did was in compliance with the guidelines established for the admissibility of a statement in *R. v. Oickle*, 2000 SCC 38.

[12] The Crown says that even if Mr. Buckley's Mr. Big confession is ruled inadmissible on the ground that its probative value is outweighed by its prejudicial effect, the derived confessions rule does not apply as that rule is limited to initial statements that were ruled involuntary. The Crown argues in the alternative that if the derived confessions rule does apply, then the factual nexus between the Mr. Big confession and the cautioned statement is not strong enough to render the cautioned statement inadmissible.

The Defence

[13] Mr. Buckley says that the Crown has not proven the voluntariness of his cautioned statement beyond a reasonable doubt. He does not allege any *Charter* violation, but says that his s. 7 *Charter* right to silence must be considered when analyzing voluntariness in accordance with *R. v. Singh*, 2007 SCC 48. He says that the length of the interview and the police persistence in questioning him in the face of his repeated assertion of his right to silence renders the statement involuntary.

[14] Mr. Buckley also says that if the Mr. Big confession is ruled inadmissible then the derived confessions rule applies, the cautioned statement was tainted by the initial statement, and it is involuntary or its probative value is outweighed by its prejudicial effect.

The Interview

[15] For analysis purposes, the cautioned interview can be broken into four parts: 1) before Mr. Buckley spoke to a criminal defence lawyer; 2) after Mr. Buckley spoke to a criminal defence lawyer; 3) after Mr. Buckley was shown his Mr. Big confession; and 4) when Mr. Buckley was taken out of the Chester R.C.M.P. Detachment to show them where the hammer was located.

1) Before Mr. Buckley spoke to a criminal defence lawyer

[16] After his arrest on April 8, 2016, Mr. Buckley was provided a full opportunity to get legal advice. At 1:24 PM he called the lawyer who was handling a civil claim for him and received legal advice. Constable Robert Daley, who conducted the first part of the interview, suggested that Mr. Buckley also speak to a lawyer who was experienced in criminal law. Mr. Buckley initially declined. The interview then proceeded, starting at 1:52 PM. Mr. Buckley variously asserted his right to silence, proclaimed his innocence, and swore at

Constable Daley. Mr. Buckley eventually asked for, and received, an opportunity to speak to a criminal defence lawyer at 3:00 PM.

[17] Between speaking to the first lawyer and speaking to the criminal defence lawyer, Mr. Buckley did not cooperate with the police, but he did engage with them and respond to questioning. He tried to leave the interview room and had to be physically restrained. He stood in a corner of the interview room. He was rude to Constable Daley. Some examples of the interaction between Mr. Buckley and Constable Daley during this time period include the following excerpts:

> JB: Oh no, no, I'm just gonna, I'm gonna maintain my ah, right to remain silent.
>
> RD: Fair enough and you know what,
>
> JB: I've been through this before and I'm not stupid.
>
> RD: I'm, I'm glad this, I'm glad at this stage, and I don't think you're stupid. Ah, do you go by John or Jack? What do you like to be called? I thought, is it OK if I call you John?
>
> JB: I don't want you to call me anything.
>
> ….
>
> RD: Let's work through that night. Your anger towards me, because of what, how you've been treated by the police angers me that that's how you've been treated, OK and I don't think it's fair and I'm sitting in here listening to you. This is your mother we're talking about, right. She gave birth to you and she raised you, right. I can't imagine what,
>
> JB: I can't fight with this shit anymore.
>
> RD: OK, then stop fighting.
>
> …
>
> JB: I was doing all right for a while but (sniffs).
>
> RD: Then tell me about that.
>
> …
>
> RD: There's just some things in our lives that,
>
> JB: Let me fucking go home. This is bullshit. I didn't do it.
>
> RD: You said you were doing good for a while, tell me about that.
>
> …
>
> JB: I don't want your fuckin' sympathy man.

RD: You're not getting that, I don't feel sympathetic towards you. Sympathetic is on the borderline of pity. I can empathize with your situation, you know, and that's why I was saying to you earlier like, I can't imagine what it must be like.

JB: Let me go (sniffs).

RD: That's not gonna happen, John, OK. Where we're at right now is you're telling me that you didn't do this and let's work through that. Everything in your life, every experience that you've had up to this point has brought you here, right. We tend to, in life, like we get ourselves in these circles and we can't get out because we, we do the same things over and over and over again and we expect a different result, right. When we approach things with the same, same focus and the same angle and the action and we keep getting the same results. You know, that's actually the ah, definition of insanity, right. Let's take some time today and veer out of that circle and change the direction of how this, how you're, how we're handing this issue, right, because if we, if we take a different action, we're gonna get a different result, right. I think you'd have to agree with me on that. What are you, twenty-two now? You were an eighteen year old kid then, you know. You've been through a lot since then and you're, you're a grown man now. Tell me about your life at least. (Inaudible) I saw you doing push-up in here, do you work out a lot? Is that important to you? What do you do for a work out, let's just talk about that? I used to work out a lot when I was your age, I used to train all the time. I get in about three days a week now, four days a week. I get to train as much as I used to. Things get in the way of that, I'm sure you find that. Do you have anyone in your life? Anyone significant in your life? I'm married, I have two kids. We just had a baby actually, back in January. You? Now, there's a lot of hurt in there, I can see it, John. Do you have people in your life? I imagine this is not, I know your dad died, I know that much and I know that your mom has obviously died. If you have people in your life now, they must mean that much more to you know that (inaudible), right. You want to talk about them? Who is the most important person in your life right now? Mine is my wife and my two kids. My oldest is Anna, she's ten years old. She's from my first marriage, that didn't go so well. I jokingly tell people that was my practice marriage. Ah, when ah, when we had her I, I wasn't married. I ah,

JB: Shut up man.

RD: Now come on man, let's be at least,

JB: I don't want to hear it.

RD: (inaudible)

JB: I don't want to hear your fuckin' story.

RD: Well, tell,

JB: That's your story and I don't want to hear it.

RD: Tell me yours then.

JB: I don't want to.

…

JB: Stop, stop man.

RD: Well,

JB: Go away.

RD: Well, I'm not gonna go away. That's just it, right.

JB: Go. There's the door.

RD: Yeah. Are you even working? Do you have a job?

JB: Go away.

RD: What? What do you want to talk about? Let's talk about something. What do you think?

JB: Go man.

…

JB: OK, give me my stuff and then I'm gonna leave.

RD: Leave where? You, you're not leaving here, that's, you've been arrested. You're gonna be charged with your mother's murder, OK.

JB: No, I'd like my things and I'd like to go.

RD: Well, it's not gonna happen. It's not happening.

….

JB: I can't talk to you.

RD: Why?

JB: Because you're just gonna fuckin', you're just fuckin' like everyone else.

RD: I'm here to listen to what you have to say.

JB: Leave me alone.

RD: No.

JB: Let me go.

…

RD: Take you hand off the door.

JB: No.

RD: Get your hand off the door.

JB: No, let me out.

RD: You're not getting out, you're not going anywhere.

JB: Come on.

RD: Get out. John, listen, you're twenty-two years old, act your age, OK. You're arrested for your mother's murder, this is where you're gonna be held, in this room and I'm, it's my duty to sit here and talk to you. You don't have to talk to me, you're absolutely right, but you're telling me you're innocent so you are talking to me and I'm telling you, if you're innocent, let's talk about it. You're not going, stop trying to get at the door, you're not going. Get your hands off me. You don't want to do that, bud. Take your hands off me. (Inaudible), listen man, I'm not gonna be a bully in this room but you can't go anywhere, OK.

JB: I'm innocent man, get me my things, I want to go.

RD: You're not going, all right. I understand that that's what you want to do but you can't do that, you're not going anywhere. John, look at me, that's not gonna work, OK. It's not gonna work. Look at me, I'm here to shake your hand, that's, that's all I want to do, OK, and listen to your story. That's all I want to do. Come on, we have to sit in this room together and just be respe', respectful to one another, OK. Tell me,

JB: I'm walking out that door.

RD: You're not walking out the door, OK, stop, stop, John, I know this is hard

2) After Mr. Buckley spoke to a criminal defence lawyer

[18] At 2:55 PM Mr. Buckley asked to speak with a criminal defence lawyer. Once he had done so, his demeanor changed slightly. Between the start of the interview and 7:57 PM, the interview was conducted by Constable Daley. After speaking to a criminal lawyer, Mr. Buckley told Constable Daley on numerous occasions, "On the advice of my lawyer, I choose not to speak."

[19] During this time, Mr. Buckley variously stood in the corner of the interview room, put his feet up on the table facing Constable Daley, and, on one occasion, stuffed pieces of tissue in his ears. Only occasionally did Mr. Buckley say anything other than his mantra of, "On the advice of my lawyer, I choose not to speak". Some examples of the interaction between Mr. Buckley and Constable Daley during this time frame include:

RD: Hey John. John, I was just talking to the officer who brought you in to talk to a lawyer and stuff. It's my understanding that you were talking to legal aid and you also talked to a lawyer of your choice, Pat McEwan [sic]. Is that correct?

JB: Yeah, I spoke to a lawyer and he advised me not to say anything and I agree with that.

…

JB: Yeah. On the advice of my lawyer, I chose not to speak.

RD: Ok, and that's totally within your rights and, and ah, I think I've been clear on that as well and ah, again ah, you know, we're, we're really just at that point, you know, where ah, think it's important for us to talk about ah, you know where you were, where you were at that night and what happened and the events that took place, because I think ah, you know, if that is absolutely true that you had nothing to do with your mother's death then ah, you know ah, that's something that we want to explore here today and ah, you know, it's just ah, you know, it's, it's about perspective and it's about what you have to say and you said, you made reference too, before ah, before you spoke to your lawyer in there that, that people were telling lies and stuff like that and I'm interested in hearing about that too. …

…

RD: … You can sit down, put the plugs in your ears cause you don't want to hear, because you know what, I'm starting to believe that you're doing that because you know that's the truth. That's that truth and I bet you it's haunted you every day cause there's no doubt in my mind that if you could go back and change things you would but you know yourself, … I didn't do it and that's why I was living what I, living with the consequences that I had and I think you're only plugging your ears because you know it's the truth. …

…

JB: Why am I supposed to believe you, why am I supposed to trust you that you're different than any other cop that, you know, you have your job to do.

…

JB: I don't intend to be here today.

RD: I know, and that's unfortunate but that's, that's what, that's the reality and with, with, sometimes those things happen in life. We have no, there's no guarantees, right. …

…

RD: … I'm not gonna have you over here in the corner and I'm not gonna have you with your feet up with the chair in the back, on the back legs and being disrespectful, right. If you want to see the stuff, I have no problem showing you, but we're gonna do it and we're gonna sit together and we're gonna watch it and we're gonna talk about it.

JB: No, no, no, no, no. No disrespect.

RD: OK. You don't want to see it? Just, just sit down with the legs on the chair and just look at what I have to show you, OK. It kind of explains things from the investigative stand point, OK. Are you willing to take that walk with me? You don't have to say anything. I, I, I gotta say to you, John, like I've never been so at odds with how I fell [sic] about someone that I've, that I've worked

> with here and ah, you know, I, I really am torn at what to think and what to take of you, or make of you and that's not a disrespectful thing at all. It's just where you're at in your life and how you're being, right. I, you know, I, I've never had this experience before.
>
> JB: Where am I at in my life?
>
> RD: With yourself. Are you interested in me flashing some of this up and showing you some stuff? …

[20] On two occasions, at 4:53 PM and at 7:17 PM, Constable Daley became frustrated with Mr. Buckley. At 4:53 PM he suggested that Mr. Buckley stop expressing his right to silence and at 7:17 PM he downplayed the significance of Mr. Buckley expressing this to him:

> JB: On the advice, I choose not to speak.
>
> RD: And I am listening to you and I hear you, OK, and you don't have to keep repeating that. You don't have to talk to me, we both know that.
>
> JB: On the advice of my lawyer, I choose not to speak. I [sic] the advice of my lawyer, I choose not to speak.
>
> …
>
> JB: On the advice from my lawyer,
>
> RD: Yeah, yeah. I've, I've heard that.
>
> JB: I choose not to speak.
>
> RD: Yeah. You choose not to speak but you keep saying things to me, right. You talk about things going on in your mind, right. So, I'm trying to talk to you about that.

3) After Mr. Buckley was shown his Mr. Big confession

[21] Constable Daley used a non-confrontational technique while he was the officer interviewing Mr. Buckley. At approximately 7:54 PM, about six and a half hours into the interview, Constable Rose-Berthiaume became involved, and he eventually took over the interview. Because Constable Daley's non-confrontational approach had produced no results, Constable Rose-Berthiaume switched to a confrontational approach. He was more aggressive with Mr. Buckley. He explained to Mr. Buckley that over the past six months there had been an undercover police operation during which Mr. Buckley was deceived as to who his friends really were and what his employment really involved. He played part of Mr. Buckley's video recorded Mr. Big confession.

[22] On several occasions when Mr. Buckley said, "On the advice of my lawyer, I choose not to speak", Constable Rose-Berthiaume interrupted him or spoke over him, telling him he did not need to keep repeating that phrase. The transcript does not reflect those interruptions, but they are clear on the recording. An example of what was said when Constable Rose-Berthiaume interrupted or spoke over Mr. Buckley during this time frame includes the following:

> JB: On the advice from my lawyer, I choose not to speak.
>
> GR: And, well you don't have to say anything and that's your right and we respect that and Rob's been respecting that all day, but in fairness to you, right, and out of respect, right which Rob's been showing you all day. You showed very little to him, I must say. You need to understand where you understand, you need to understand where you stand with this investigation, going forward here. There's something that you need to see, OK, and I'm gonna show you. Now, Rob hasn't seen this yet, in fairness to him, because Rob went in here with an open mind, wanted to get your side of the story, wanted to get to the truth and that's, that's it, the truth and that's all we're looking for here today, from your perspective, from your side of the story. Rob talked to you about the black and white photo, right, right and we need to try to make that colour out of respect to not only you but out of respect to your mother and everyone that your mother cared about and everyone that cared about your mother. There's a plug in there, right there, I think that's it.

[23] The Mr. Big confession was first shown to Mr. Buckley at 7:57 PM, and again at 8:13 PM, during and after which the following exchanges occur:

> JB: This is bull shit.
>
> …
>
> JB: I've been at this for three fuckin' years, OK. This guy tells me he has somebody in jail for murder that he can say did it and you know, end this for me. Like, the fuck, I don't want to be involved with this anymore. I don't have any fuckin' options, this guy comes forward with this fuckin', like yeah, OK, bring my mom's killer to justice, that's fuckin' great but that hasn't happened for five fuckin' years, four years and he comes here, and it's a way out, it's the only fuckin' way that I see out. I don't have any fuckin' options so
>
> GR: So what? So you take it. You were given that option and you take it.
>
> JB: I didn't kill her.
>
> GR: Well, that's what you say in here.
>
> JB: On the advice from my lawyer I choose not to speak.

GR: Well, you know what bud, everyone has their breaking point, right. Everyone has their breaking point bud and obviously you got to your breaking point at some point four years ago. At some point four years ago, you got to your breaking point (audio playing in background) and, I don't know what to say to you bud. Out of respect to you and out of respect to your mother, you don't have a leg to stand on this (audio inaudible – 05:56:40).

JB: This is fuckin' bull shit. So what am I supposed to do, just fuckin' live the rest of my life hoping to God that you guys (audio in background), and I know that I'm a fuckin' suspect.

GR: You're more than a suspect, you're responsible for the death of your mother.

JB: I didn't do it.

GR: You're responsible, you just, like, listen bud. I know you know that you said it, OK, and I can play this all day, right. You provided intimate details in relation to what happened. Intimate details that only the person responsible would know.

JB: I read that in a disclosure.

GR: OK, that only the person responsible would know.

JB: Fuck you man.

GR: Only the person responsible, intimate details OK, including what was used to cause the death of your mother.

JB: On the advice of my lawyer I choose not to speak.

GR: Yeah, all right, well, you don't have to say anything. …

…

JB: On the advice from my lawyer I choose not to speak.

GR: Ok, you don't have to speak, I'll speak, be spoken to and you don't got to keep repeating that bud, I'm gonna respect your rights while I'm in here. I've heard you say over and over again, I'm a police officer, I understand your rights. It's my job to uphold those rights and I will. I'm not gonna force you to say anything. All right, whatever you want to talk to me about, feel free. If you don't want to say anything, that's fine. But we know, like we don't, it's a broken record, OK.

…

JB: On the advice from my lawyer I choose not to speak.

GR: Bud, you don't got to keep repeating that. Like Rob said earlier, I'm here to give you the opportunity to make a choice, whether or not you want to speak to me or not and bud, you're driving the bus, right, you're driving the bus. You're twenty-two years old and you need to make those decisions, right, and people,

you know that, that, see, that's gonna see you make that decision, whether or not you want to come forward and be truthful. People who care about you want to know and bud, there are still people that care about you and if there's any doubt in your mind, let me help you clear it up. What do you think you've been doing for the last six months? Who do you think you've been going to the gym with? Rep-in' out push-ups with? Have a seat and I'll talk, talk to you about it. Who do you think you've been out working out with? [redacted], right. Pretty good fella, right. I'd say so, real nice fella. Got a lot of respect for [redacted], lot of respect for [redacted], good, solid individual, a police officer. [redacted], how do you feel about [redacted]? Helped you out a bit over the last couple of days? There for you at your time of need, gonna get you out of this mess. I like [redacted] a lot, good fella, good guy, a police officer. Mr. [redacted], Mr. [redacted], powerful man, make things go away, make things happen. Who do you think Mr. [redacted] is? I'm being honest with you, I'll telling you the truth. Who do you think Mr. [redacted] is, John?

JB: On the advice from my lawyer I choose not to speak.

…

JB: On the advice from my lawyer I choose not to speak.

GR: I know bud, you don't gotta keep tellin', I'm talking here, you don't have to say a thing.

JB: Then fuckin' go.

GR: You don't have to say a thing and that's OK, bud.

[24] At approximately 8:58 PM Constable Rose-Berthiaume confirmed with Mr. Buckley that he did not have to speak, but also told him that speaking to him would not make anything worse for him:

JB: On the advice from my lawyer I choose not to speak.

GR: Yeah, I know, bud, I know. I'm, I'm in here giving you the opportunity to take that step, to have that courage. That's all I'm doing, I'm not forcing you to say anything and I know you're rights, I'm here to protect your rights. I'm not gonna bang on the table or yell or anything like that. I'm gonna show you respect and treat you that way. Bud, you gotta find it within you, I can't do it for you and the fact that this happened, John, you did this, is, is, you know, in the words of, of [redacted], a hundred percent. Not ninety-nine, not ninety-seven, a hundred percent and just like [redacted] said, we don't do things that aren't a hundred percent, so what's missing is what happened from your perspective and why you got to that point. And bud, whether you tell me that or not, it's not gonna, I'm not gonna sugar coat it for you, it's not gonna make it any better or any worse for you, OK, as far as you know, what you're facing going forward, OK, but it's gonna allow the people who you care about, who believe in you, who care about you, who care

> about your mother, to understand what happened and that's, that's huge bud, and if you even give them anything is that understanding. … [Emphasis added]
>
> …
>
> JB: On the advice of my lawyer I choose not to speak.
>
> GR: I know, bud, I know. I'm just asking you a question, whether or not you answer it, that's up to you. That's entirely up to you. Like I said, what I believe or what Rob believes is really inconsequential, right, I, I see a scared eighteen year old kid, that's what I see. But that's not me, I'm not, I'm not your family, I'm not, I'm someone who just met you today, right. …

[25] Shortly after this exchange between Mr. Buckley and Constable Rose-Berthiaume, at 9:10 PM, Mr. Buckley stopped repeating, "On the advice of my lawyer, I choose not to speak" and began responding to the police questions.

[26] Then, at 9:23 PM, Mr. Buckley confessed to killing his mother.

4) Mr. Buckley is taken from the Chester R.C.M.P. Detachment to show the police where the hammer was located

[27] After his cautioned confession, Mr. Buckley was housed in cells. The next morning, on April 9, 2016, he took the police to two different locations where he claimed to have thrown the hammer that he said was the murder weapon. One location was in front of his house, directly across the highway from Chester Basin (where he also took the members of the fictitious criminal organization on April 7, 2016). The other was in the woods some distance away from his mother's house, in a completely different direction. No hammer was found in either location. If Mr. Buckley was being truthful about one location, then he must not have been truthful about the other. Alternatively, he might not have been truthful about either location.

[28] During this part of the statement, Mr. Buckley briefly escaped from the police, and, while fully dressed and handcuffed, ran down a pier and jumped into the frigid waters of the Atlantic Ocean. He was pulled out of the water by Constable Daley.

Analysis

Voluntariness

[29] In *R. v. Paterson*, 2017 SCC 15, [2017] S.C.J. No. 15, Brown J., writing for the majority, summarized the law regarding voluntariness and the interaction between the confessions rule and the right to silence:

> 14 The law's concern for "voluntariness" in relation to police investigative techniques is embodied in the confessions rule. That rule prohibits the admission *at trial* of statements made by suspects to police or to other persons in authority, unless the Crown proves beyond a reasonable doubt that such statements were voluntary... The Crown's burden -- which is identical to its burden in respect of the accused's guilt itself -- highlights that the rule is linked to the law's concern that involuntary statements are "unreliable as affirmations of guilt"… As this Court recognized in *Hodgson* (at para. 19), statements obtained by force, threat or promises are inherently unreliable.
>
> 15 The Court has also recognized, however, that concern for the untrustworthiness of involuntary confessions does not entirely capture the rationale for excluding evidence caught by the confessions rule. In *R. v. Hebert*, [1990] 2 S.C.R. 151, the rule was said to rest on fundamental notions of trial fairness and (at p. 173) "the idea that a person in the power of the state's criminal process has the right to freely choose whether or not to make a statement to the police", coupled with a "concern [for] the repute and integrity of the judicial process". Those same concerns, the Court added (at p. 175), underlay the privilege against self-incrimination, and supported recognition of a detainee's right to silence as a principle of fundamental justice under s. 7 of the *Charter*. "Voluntariness" then, as a concept designed to limit the scope of police investigative techniques, has been broadly associated with the principle that the Crown must, to maintain the repute and integrity of the trial process, establish guilt without the assistance of the accused...

[30] The interaction between voluntariness and an accused's s. 7 *Charter* right to silence was discussed in *R. v. Singh*, 2007 SCC 48. The appellant was arrested for second degree murder, and had been advised of his rights and had spoken to counsel. Justice Charron summarized the interview process, on behalf of the majority:

> 2 ... During the course of two subsequent interviews with Sgt. Attew, Mr. Singh stated on numerous occasions that he did not want to talk about the incident, that he did not know anything about it, or that he wanted to return to his cell. On each occasion, Sgt. Attew would either affirm that Mr. Singh did not have to say anything and state that it was nonetheless his duty or his desire to place the

> evidence before Mr. Singh, or he would deflect Mr. Singh's assertion and eventually engage him again in at least limited conversation. During the course of the first interview, Mr. Singh did not confess to the crime but made incriminating statements by identifying himself in pictures taken from the video surveillance inside the pub in question and in another pub.

[31] Justice Charron noted that there was "considerable overlap" between voluntariness and the right to silence:

> 24 ... First, the right to silence is not a concept that was newly born with the advent of the *Charter*. The right long pre-dated the *Charter* and was embraced in the common law confessions rule. Second, in *Hebert*, this Court's recognition of the residual protection afforded to the pre-trial right to silence under s. 7 of the *Charter* was largely informed by the confessions rule and the scope of the protection it provides to an individual's right to choose whether or not to speak to the authorities. Third, this Court's expansive restatement of the confessions rule in *Oickle*, in turn, was largely informed by a consideration of *Charter* principles, including the right to silence as defined in *Hebert*.

[32] In discussing the need for a careful inquiry into whether an accused person's right to silence was violated when conducting a voluntariness analysis, Charron J. stated:

> 8 Second, I find no error in law in the approach adopted by the courts below. The Court of Appeal's impugned comment on the interplay between the confessions rule and s. 7 of the *Charter* merely reflects the fact that, in the context of a police interrogation of a person in detention, where the detainee knows he or she is speaking to a person in authority, the two tests are functionally equivalent. It follows that, where a statement has survived a thorough inquiry into voluntariness, the accused's *Charter* application alleging that the statement was obtained in violation of the pre-trial right to silence under s. 7 cannot succeed. Conversely, if circumstances are such that the accused can show on a balance of probabilities that the statement was obtained in violation of his or her constitutional right to remain silent, the Crown will be unable to prove voluntariness beyond a reasonable doubt. As I will explain, however, this does not mean that the residual protection afforded to the right to silence under s. 7 of the *Charter* does not supplement the common law in other contexts.
>
> …
>
> 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 s. 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. If the circumstances are such that an accused is able to show on a balance of probabilities a breach of his or her right to silence, the Crown will not be in a position to meet the voluntariness test. ...

[33] Although she was specifically discussing an accused's s. 7 *Charter* right to silence, in *R. v. Hebert*, [1990] 2 S.C.R. 151, McLachlin J. (as she then was), confirmed that the police have the right to question accused persons. Justice McLachlin explained that as long as the police comply with certain guidelines they can try to persuade a reluctant accused to provide a statement:

> 73. First, there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the *Charter*. 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.

[34] *Oickle* is the leading authority on the voluntariness of confessions. In confirming that proper police questioning is a valuable and important tool in investigating and solving crimes, Iacobucci J., for the majority, set out guidelines for the admissibility of confessions:

> 33 In defining the confessions rule, it is important to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes. Martin J.A. accurately delineated this tension in *R. v. Precourt* (1976), 18 O.R. (2d) 714 (C.A.), at p. 721:
>
> > Although improper police questioning may in some circumstances infringe the governing [confessions] rule it is essential to bear in mind that the police are unable to investigate crime without putting questions to persons, whether or not such persons are suspected of having committed the crime being investigated. Properly conducted police questioning is a legitimate and effective aid to criminal investigation... . On the other hand, statements made as the result of intimidating questions, or questioning which is oppressive and calculated to overcome the freedom of will of the suspect for the purpose of extracting a confession are inadmissible... .
>
> All who are involved in the administration of justice, but particularly courts applying the confessions rule, must never lose sight of either of these objectives.

[35] In summarizing the considerations for a court in determining voluntariness, Iacobucci J. stated:

68 While the foregoing might suggest that the confessions rule involves a panoply of different considerations and tests, in reality the basic idea is quite simple. First of all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Both the traditional, narrow *Ibrahim* rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.

69 The doctrines of oppression and inducements are primarily concerned with reliability. However, as the operating mind doctrine and Lamer J.'s concurrence in *Rothman*, *supra*, both demonstrate, the confessions rule also extends to protect a broader conception of voluntariness "that focuses on the protection of the accused's rights and fairness in the criminal process": J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 339. Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible.

70 Wigmore perhaps summed up the point best when he said that voluntariness is "shorthand for a complex of values": *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, para. 826, at p. 351. I also agree with Warren C.J. of the United States Supreme Court, who made a similar point in *Blackburn v. Alabama*, 361 U.S. 199 (1960), at p. 207:

> [N]either the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last Term, "The abhorrence of society to the use of involuntary confessions ... also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." ... Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.

See *Hebert*, *supra*. While the "complex of values" relevant to voluntariness in Canada is obviously not identical to that in the United States, I agree with Warren C.J. that "voluntariness" is a useful term to describe the various rationales underlying the confessions rule that I have addressed above.

[36] It is clear that although involuntariness may be caused by police tactics in addition to the four key areas listed below, the following four key areas must first and foremost be kept in mind when determining whether a statement was made voluntarily: 1) inducements, such as threats or promises; 2) oppression; 3) operating mind; and 4) police trickery.

Threats or Promises

[37] Mr. Buckley does not allege that the police used threats or promises to induce him to make a statement. There was no *quid pro quo* offer from the police. The police did attempt moral inducements in order to obtain his statement. However, as noted, Constable Rose-Berthiaume told Mr. Buckley in the midst of a lengthy soliloquy:

> …so what's missing is what happened from your perspective and why you got to that point. And bud, whether you tell me that or not, it's not gonna, I'm not gonna sugar coat it for you, it's not gonna make it any better or any worse for you, OK, as far as you know, what you're facing going forward,…

[38] While not a *quid pro quo* offer, this comment of Constable Rose-Berthiaume is, in a sense, similar to the "It would be better" comments discussed in *Oickle.* It is a misleading comment. In discussing what might constitute an inducement, whether a threat or a promise, Iacobucci J. stated in *Oickle*:

> 53 The *Ibrahim* rule speaks not only of "hope of advantage", but also of "fear of prejudice". Obviously, any confession that is the product of outright violence is involuntary and unreliable, and therefore inadmissible. More common, and more challenging judicially, are the more subtle, veiled threats that can be used against suspects. The Honourable Fred Kaufman, in the third edition of *The Admissibility of Confessions* (1979), at p. 230, provides a useful starting point:
>
> > Threats come in all shapes and sizes. Among the most common are words to the effect that "it would be better" to tell, implying thereby that dire consequences might flow from a refusal to talk. Maule J. recognized this fact, and said that "there can be no doubt that such words, if spoken by a competent person, have been held to exclude a confession at least 500 times" (*R. v. Garner* (1848), 3 Cox C.C. 175, at p. 177).
>
> Courts have accordingly excluded confessions made in response to police suggestions that it would be better if they confessed. ...
>
> 54 However, phrases like "it would be better if you told the truth" should not automatically require exclusion. Instead, as in all cases, the trial judge must examine the entire context of the confession, and ask whether there is a

reasonable doubt that the resulting confession was involuntary. Freedman C.J.M. applied this approach correctly in *R. v. Puffer* (1976), 31 C.C.C. (2d) 81 (Man. C.A.). In that case a suspect in a robbery and murder asked to meet with two police officers of his acquaintance. At this meeting, one officer said: "The best thing you can do is come in with us and tell the truth" (p. 95). Freedman C.J.M. held that while the officer's language was "unfortunate", it did not require exclusion (at p. 95): "McFall wanted to talk, he wanted to give the police his version of what had occurred, and above all he did not want Puffer and Kizyma to get away, leaving him to face the music alone" (emphasis in original).

55 In his reasons, Freedman C.J.M. referred to a passage from an article he had written earlier, "Admissions and Confessions", published in Salhany and Carter, eds., Studies in Canadian Criminal Evidence (1972), at pp. 110-11, where he stated the following:

> Risky though it be for a policeman to use words like "better tell us everything"-- and an experienced and conscientious officer will shun them like the plague -- their consequences will not always be fatal. There have been some instances where words of that type have been employed, and yet a confession following thereon has been admitted. That may occur when the court is satisfied that the offending words, potentially perilous though they be, did not in fact induce the accused to speak. In other words, he would have confessed in any event, the court's enquiry on the point establishing that his statement was indeed voluntarily made. It is scarcely necessary to emphasize, however, that cases of the kind just mentioned will confront a prosecuting counsel with special difficulty. For words like "better tell the truth" carry the mark of an inducement on their very face, and a resultant confession may well find itself battling against the stream.

This Court upheld the Court of Appeal's ruling. See *McFall v. The Queen*, [1980] 1 S.C.R. 321; see also *R. v. Hayes* (1982), 65 C.C.C. (2d) 294 (Alta. C.A.), at pp. 296-97. I agree that "it would be better" comments require exclusion only where the circumstances reveal an implicit threat or promise.

56 A final threat or promise relevant to this appeal is the use of moral or spiritual inducements. These inducements will generally not produce an involuntary confession, for the very simple reason that the inducement offered is not in the control of the police officers. If a police officer says "If you don't confess, you'll spend the rest of your life in jail. Tell me what happened and I can get you a lighter sentence", then clearly there is a strong, and improper, inducement for the suspect to confess. The officer is offering a quid pro quo, and it raises the possibility that the suspect is confessing not because of any internal desire to confess, but merely in order to gain the benefit offered by the interrogator. By contrast, with most spiritual inducements the interrogator has no control over the suggested benefit. If a police officer convinces a suspect that he will feel better if he confesses, the officer has not offered anything. I therefore

agree with *Kaufman, supra,* who summarized the jurisprudence as follows at p. 186:

> We may therefore conclude that, as a general rule, confessions which result from spiritual exhortations or appeals to conscience and morality, are admissible in evidence, whether urged by a person in authority or by someone else. [Emphasis in original.]

[39] Iacobucci, J. went on to summarize the law around inducements:

> 57 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 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.
>
> The most important consideration in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise.

[40] The comment of Constable Rose-Berthiaume to Mr. Buckley that providing a statement would not make things "any worse" for him does not constitute a *quid pro quo* offer. It was not a veiled threat. While it may appear neutral or harmless, when making this comment, Constable Rose-Berthiaume gave Mr. Buckley inaccurate legal advice or information. He essentially suggested that because Mr. Buckley had already provided a Mr. Big confession, giving a cautioned statement

would not affect his jeopardy. This remark fails to take into account the fact that in *Hart*, decided in 2014 (two years before Mr. Buckley's interview with Constable Rose-Berthiaume), the Supreme Court of Canada presumptively ruled all Mr. Big confessions inadmissible unless the Crown could prove that their probative value outweighed their prejudicial effect. Mr. Buckley's Mr. Big confession was provided several days before Constable Rose-Berthiaume said this to him. Constable Rose-Berthiaume would not have known whether a court would rule the Mr. Big confession admissible. As it turns out, I have ruled the Mr. Big confession inadmissible. While Constable Rose-Berthiaume's comment in this regard did not involve a *quid pro quo* offer or a veiled threat, it was ill-advised, misleading and certainly is one factor to consider regarding the overall voluntariness of the statement.

Oppression

[41] Mr. Buckley says an atmosphere of oppression was created because: 1) the interview was too long; 2) the police were persistent in their questioning of him; and 3) the police put explicit psychological pressure on him.

[42] In *Oickle,* Iaccobuci J. provided guidelines for determining whether a police interview was oppressive:

> 58 There was much debate among the parties, interveners, and courts below over the relevance of "oppression" to the confessions rule. Oppression clearly has the potential to produce false confessions. If the police create conditions distasteful enough, it should be no surprise that the suspect would make a stress-compliant confession to escape those conditions. Alternately, oppressive circumstances could overbear the suspect's will to the point that he or she comes to doubt his or her own memory, believes the relentless accusations made by the police, and gives an induced confession.
>
> 59 A compelling example of oppression comes from the Ontario Court of Appeal's recent decision in *R. v. Hoilett* (1999), 136 C.C.C. (3d) 449. The accused, charged with sexual assault, was arrested at 11:25 p.m. while under the influence of crack cocaine and alcohol. After two hours in a cell, two officers removed his clothes for forensic testing. He was left naked in a cold cell containing only a metal bunk to sit on. The bunk was so cold he had to stand up. One and one-half hours later, he was provided with some light clothes, but no underwear and ill-fitting shoes. Shortly thereafter, at about 3:00 a.m., he was awakened for the purpose of interviewing. In the course of the interrogation, the accused nodded off to sleep at least five times. He requested warmer clothes and a tissue to wipe his nose, both of which were refused. While he admitted knowing that he did not have to talk, and that the officers had made no explicit threats or

promises, he hoped that if he talked to the police they would give him some warm clothes and cease the interrogation.

60 Under these circumstances, it is no surprise that the Court of Appeal concluded the statement was involuntary. Under inhumane conditions, one can hardly be surprised if a suspect confesses purely out of a desire to escape those conditions. Such a confession is not voluntary. … 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.

[43] This sentiment was reiterated in *R. v. Singh*, 2007 SCC 48, where Charron J. stated for the majority:

35 Ten years later, this Court in *Oickle* made express reference to the analysis in *Hebert* and embraced this modern expansive view of the confessions rule which, significantly for our purposes, clearly includes the right of the detained person to make a meaningful choice whether or not to speak to state authorities: see paras. 24-26. Iacobucci J. then reviewed the various components of the contemporary confessions rule, stressing, of course, that "[t]he application of the rule will by necessity be contextual" and that "all the relevant factors" must be considered (para. 47). He went on to describe the more common circumstances that vitiate the voluntariness of a confessions using the well-known headings: (a) threats or promises, (b) oppression, and (c) operating mind. In keeping with the broader modern approach to the confessions rule, he also added a final consideration in determining whether a confession is voluntary or not - the police use of trickery to obtain a confession that would "shock the community" (para. 66). He explained that: "Unlike the previous three headings, this doctrine is a distinct inquiry. While it is still related to voluntariness, its more specific objective is maintaining the integrity of the criminal justice system" (para. 65). Finally, it is noteworthy that, in summarizing the parameters of the confessions rule, Iacobucci J. made express reference to the right to silence as a relevant facet of the rule:

> The doctrines of oppression and inducements are primarily concerned with reliability. However, as the operating mind doctrine and Lamer J.'s concurrence in *Rothman*, *supra*, both demonstrate, the confessions rule also extends to protect a broader conception of voluntariness "that focuses on the protection of the accused's rights and fairness in the criminal process": J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 339. Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions

> introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible. [Emphasis added; para. 69.]
>
> 36 On the question of voluntariness, as under any distinct s. 7 review based on an alleged breach of the right to silence, the focus is on the conduct of the police and its effect on the suspect's ability to exercise his or her free will. The test is an objective one. However, the individual characteristics of the accused are obviously relevant considerations in applying this objective test.

[44] The police did not unfairly trick Mr. Buckley. They were not wholly honest with him, but their dishonesty (with the exception of the "not make it any better or worse" comment) was not such as to impact in any way upon the voluntariness of the statement. For instance, Constable Daley pretended that he had no knowledge of the Mr. Big confession prior to Constable Rose-Berthiaume playing it during the interview. Constable Daley was fully aware of the Mr. Big confession prior to interviewing Mr. Buckley. Constable Daley also made up stories about himself in an effort to engage Mr. Buckley in conversation. This type of deception is of no consequence to the voluntariness of Mr. Buckley's statement.

Length of interview and overall treatment

[45] Section 503(1) of the *Criminal Code* states, in part:

> 503 (1) A peace officer who arrests a person with or without warrant … shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law:
>
> > (a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and
> >
> > (b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible,
>
> unless, at any time before the expiration of the time prescribed in paragraph (a) or (b) for taking the person before a justice,
>
> > (c) the peace officer or officer in charge releases the person under any other provision of this Part, or
> >
> > (d) the peace officer or officer in charge is satisfied that the person should be released from custody, whether unconditionally under subsection (4) or otherwise conditionally or unconditionally, and so releases him.

[46] According to s. 503(1), following arrest, the police must bring an accused before a justice of the peace without unreasonable delay. However, depending on the circumstances, the police have up to twenty-four hours to interview that accused person before doing so.

[47] The police treated Mr. Buckley humanely. Food and water were made available to him. The officers expressed concern several times over his failure to take advantage of the nourishment offered to him. He was given an opportunity to use the washroom upon request. The police actually shut the interview down on April 8, 2016, before Mr. Buckley was finished writing his apology letters, to ensure he received proper rest at the end of a long day. During the reenactment, Constable Daley jumped into the frigid Chester Basin to retrieve Mr. Buckley. In many important ways the police were more than respectful of Mr. Buckley. However, Mr. Buckley's right to silence was not always properly respected by the investigators.

Repeated assertions of his right to silence

[48] Once Mr. Buckley spoke to a criminal defence lawyer he repeatedly told the police, "On the advice of my lawyer, I choose not to speak." Constable Daley expressed impatience with Mr. Buckley for repeating that comment and Constable Rose-Berthiaume became so impatient with Mr. Buckley's repetition of this phrase that he interrupted him, spoke over him and asked him to stop repeating it. While not in itself overwhelming in these particular circumstances, this was improper behavior on the part of the police. In *Singh,* Charron J. explained:

> 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... 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... [Emphasis added]

[49] While the number of times Mr. Buckley asserted his right to silence is not determinative as to whether his statement was given voluntarily, the number of times he made such an assertion is part of the overall assessment. If the police tell an accused to stop asserting his or her right to silence, and speak over him or her

while trying to assert his or her right to silence, how will a judge ever know how many times an accused might have made such an assertion? The police were wrong to interrupt and talk over Mr. Buckley while he was asserting his right to silence in this manner, and they were wrong to tell him to stop making such assertions. This behavior on the part of the police can go to the overall assessment of the voluntariness of the statement.

Persistent police questioning

[50] Persistent questioning by the police can undermine an accused's constitutional right to silence and thereby result in a statement being involuntarily given. However, the police are entitled to try to persuade an accused to give them a statement. In considering this issue the entire context of the statement must be considered. In *R. v. Sinclair,* 2010 SCC 35, McLachlin C.J. stated for the majority, in clarifying some of these issues:

> 60 The better approach is to continue to deal with claims of subjective incapacity or intimidation under the confessions rule. For example, in *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, at para. 61, the Court recognized that using non-existent evidence to elicit a confession runs the risk of creating an oppressive environment and rendering any statement involuntary. In *Singh*, the Court stressed that persistence in continuing the interview, particularly in the face of repeated assertions by the detainee that he wishes to remain silent, may raise "a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities" (para. 47). However, the cases thus far do not support the view that the common police tactic of gradually revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him automatically triggers the right to a second consultation with a lawyer, giving rise to renewed s. 10(b) rights.
>
> 61 We note that our colleagues LeBel and Fish JJ. express concern that these reasons, together with the majority judgment in *Singh*", "in effect creates a new right on the part of the police to the unfettered and continuing access to the detainee, for the purposes of conducting a custodial interview to the point of confession" (para. 190). While Binnie J. does not endorse their approach, he echoes similar concerns.
>
> 62 We do not agree with the suggestion that our interpretation of s. 10(b) will give *carte blanche* to the police. This argument overlooks the requirement that confessions must be voluntary in the broad sense now recognized by the law. The police must not only fulfill their obligations under s. 10(b); they must conduct the interview in strict conformity with the confessions rule. On this point, we disagree with Binnie J. that the test for voluntariness in *Oickle* "sets a substantial hurdle to making inadmissible a confession" (para. 92). As explained more fully in *Singh*,

> the confessions rule is broad-based and clearly encompasses the right to silence. Far from truncating the detainee's constitutional right to silence, its recognition as one component of the common law rule enhances the right as any reasonable doubt on the question of voluntariness must result in the automatic exclusion of the statement. We also disagree with LeBel and Fish JJ. that the number of times Mr. Singh asserted that he had nothing to say during the course of his interview demonstrates that the protection afforded under the confessions rule is meaningless (para. 183). Voluntariness can only be determined by considering all the circumstances. … [Emphasis added]

[51] The police must investigate crimes. Mr. Buckley was the prime suspect in the murder of his mother. He had confessed during a Mr. Big operation just days before the cautioned statement. While that Mr. Big confession was presumptively inadmissible, nonetheless the police had evidence from their prime suspect who claimed to have murdered his mother. The questioning during Mr. Buckley's cautioned interview was not so persistent as to be oppressive, thereby overwhelming Mr. Buckley. However, as noted by McLachlin C.J. in *R. v. McCrimmon*, 2010 SCC 36, police must tread delicately when an accused person asserts their right to silence during the course of a police interview:

> 22 As discussed earlier in relation to the right to counsel of choice, there was no breach of s. 10(b) prior to commencing the interview. We would also find no breach when Sgt. Proulx continued speaking to Mr. McCrimmon despite the latter's assertion, immediately when the discussion turned to the incidents in question, that he did not want to discuss the incidents under investigation until he had spoken with his lawyer... At that point, Sgt. Proulx confirmed with Mr. McCrimmon that he understood it was his choice whether to say anything but that he, Sgt. Proulx, had a lot of information to provide and wanted to get to know Mr. McCrimmon... Some 10 minutes further into the discussion, Mr. McCrimmon stated that he wanted to speak to a lawyer, indicated that he would answer no further questions until he spoke to his own lawyer, and asked to go back to his cell... Sgt. Proulx explained that it was his job to get to understand Mr. McCrimmon and to provide him with the facts. What followed was essentially a long monologue in which Sgt. Proulx continued to discuss the police investigation in relation to the incidents and tried to establish a rapport with Mr. McCrimmon in an attempt to persuade him to give his side of the story. During this portion of the interview, there was no objectively discernable change in circumstances which gave rise to Mr. McCrimmon's right to consult again with counsel.
>
> 23 Sgt. Proulx then proceeded to progressively reveal the evidence against Mr. McCrimmon. As described earlier, when pressed for his version of the events, Mr. McCrimmon emphasized the absence of his lawyer, expressing his sense of vulnerability without legal representation and his ignorance of the "legal ways", and insisted that he would not speak without his lawyer ... As we discussed in

> *Sinclair*, the gradual revelation to the detainee of the evidence that incriminates him does not, without more, give rise under s. 10(b) to a renewed right to consult with counsel. However, where developments in the investigation suggest that the detainee may be confused about his choices and right to remain silent, this may trigger the right to a renewed consultation with a lawyer under s. 10(b).
>
> 24 Arguably, Mr. McCrimmon's expression of vulnerability and ignorance of the law, when considered in isolation, could indicate such confusion. However, when the circumstances are viewed as whole, it is clear that Mr. McCrimmon understood his right to silence. Sgt. Proulx repeatedly confirmed that it was Mr. McCrimmon's choice whether to speak or not. It is apparent from Mr. McCrimmon's interjections in the course of the interview that he understood this. As the trial judge put it: "He clearly discerned which questions might put him in jeopardy and indicated he did not wish to answer those questions" (para. 46).
>
> 25 We conclude that there were no changed circumstances during the course of the interrogation that required renewed consultation with a lawyer.
>
> 26 It follows that we reject Mr. McCrimmon's further argument that the trial judge's failure to recognize a breach of the right to counsel undermined his conclusion that the statement was voluntary. It is important to add, however, as we noted in *Sinclair*, that the continuation of an interview in the face of the detainee's repeated expression of his desire for the interview to end and to speak with counsel may raise a reasonable doubt as to the voluntariness of any subsequently given statement. However, it is clear from the trial judge's reasons that he considered all relevant circumstances in determining that the statements were voluntary, including any subjective impact the refusal of Mr. McCrimmon's requests to speak to counsel may have had on him. Consequently, we see no reason to interfere with the trial judge's conclusion on voluntariness.

[52] Mr. Buckley clearly understood his right to silence and was able to assert that right. The police did not always tread delicately after Mr. Buckley's assertions, although they did reiterate to him on multiple occasions that he had the right to maintain his silence.

The Derived Confessions Rule

[53] The Crown argues that the derived confessions rule does not apply if the prior statement was a Mr. Big confession. The Crown says that the derived confessions rule is limited to previous statements that were ruled involuntary. In doing so, the Crown relies on *R. v. Mildenberger*, [2015] S.J. No. 515, 2015 SKQB 27, a Mr. Big case, where Dawson J. stated:

> 153 Defence also suggests that the warned statement is subject to the derived confessions rule. However, I am of the view that the derived confessions rule, as

> that rule relates to subsequent statements that follow prior statements ruled inadmissible by lack of voluntariness, is not what is before me.

[54] The Supreme Court of Canada explained the derived confessions rule in three cases, all of which were based on very different facts. In *R. v. I. (L.R.) and T. (E.)*, [1993] 4 SCR 504, the accused was a young offender charged with the first-degree murder of a cab driver. The accused had provided two statements to the police. The first statement was given by E.T. on the day of his arrest. That first statement was not given voluntarily, was not given in compliance with s. 56 of the *Young Offenders Act* and was not given in compliance with s. 10(b) of the *Charter*. It was inadmissible and was excluded.

[55] The second statement given by E.T. was provided the day after the first statement. E.T. wanted to clarify the contents of the first statement. In excluding the second statement, Sopinka J., speaking for the court, explained:

> 28. The principles that govern the admissibility of the second statement when considered in conjunction with the first statement are directly influenced by the grounds for the exclusion of the first statement. As I have already stated I will assume the correctness of the finding of the trial judge that the first statement was not voluntary. This issue was not contested by the Crown. In addition, I have found that it was inadmissible by reason of the breach of s. 10(*b*) of the *Charter* as well as breach of the statutory right to counsel and the right to be advised thereof under the *YOA*. Section 56 both incorporates the common law of voluntariness and adds statutory grounds for exclusion. Each of these constitutes a possible basis for exclusion of the second statement. With respect to the breach of the *Charter*, s. 24(2) provides its own formula for exclusion. I propose to consider the principles that bear on the admissibility of the second statement on each of these bases.
>
> 29. Under the rules relating to confessions at common law, the admissibility of a confession which had been preceded by an involuntary confession involved a factual determination based on factors designed to ascertain the degree of connection between the two statements. These included the time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances. … No general rule excluded subsequent statements on the ground that they were tainted irrespective of the degree of connection to the initial admissible statement. In this regard I adopt the language of Laskin C.J. in *Hobbins*, *supra*, at p. 558, when he states:
>
> > There can be no hard and fast rule that merely because a prior statement is ruled inadmissible a second statement taken by the same interrogating

> officers must be equally vulnerable. Factual considerations must govern, including similarity of circumstances and of police conduct and the lapse of time between the obtaining of the two statements.

30. In applying these factors, a subsequent confession would be involuntary if either the tainting features which disqualified the first confession continued to be present or if the fact that the first statement was made was a substantial factor contributing to the making of the second statement. In *Cross on Evidence* (7th ed. 1990), the learned author summarizes the common law on this point and contrasts it with the provisions of the *Police and Criminal Evidence Act 1984*, 1984 (U.K.), c. 60, which was enacted in England and now governs the admissibility of confessions. At page 619, he states:

> It had become well-established in the old law that a confession which, considered in isolation, appeared to satisfy the conditions for being voluntary, might nevertheless be excluded if preceded by an earlier involuntary confession. It would be so excluded if either the factors tainting the earlier confession continued to apply, or if the fact of having made such a confession could itself be regarded as precipitating its successor. There is nothing in the new Act to displace so sensible an approach.

31. In these cases the fact that a caution or warning had been given or that the advice of counsel had been obtained between the two statements was a factor to be considered but it was by no means determinative. While such an occurrence went a long way to dissipate elements of compulsion or inducement resulting from the conduct of the interrogators, it might have little or no effect in circumstances in which the second statement is induced by the fact of the first. This point was made by Estey J. in *Boudreau*, *supra*, at p. 285, where he states:

> A warning under such circumstances, when already he had given information in reply to questions and when immediately after the warning he is further questioned by the same parties in a manner that directed his mind to the information already given, is quite different in its effect from a warning given before any questions are asked.

32. An explanation of one's rights either by a police officer or counsel may not avail in the face of a strong urge to explain away incriminating matters in a prior statement. Moreover, unless counsel knows that the first statement will be inadmissible, the best advice may not be to say nothing. In most cases, it is unlikely that counsel will be able to say with any assurance that the first statement will be adjudged inadmissible.

33. In view of the fact that s. 56 incorporates the common law of voluntariness, these principles apply to resolve the issue as to the admissibility of a confession which is made after a prior involuntary confession. … [Emphasis added]

[56] Justice Sopinka went on to explain that if the subsequent statement is simply a continuation of the prior statement, or if the prior statement is a substantial factor contributing to the making of the subsequent statement, the condition envisaged by s. 56 has not been attained and the statement is inadmissible:

> 35. In my opinion, the purpose of the requirement that the explanation prescribed by s. 56 precede the making of the statement is to ensure that the young person does not relinquish the right to silence except in the exercise of free will in the context of a full understanding and appreciation of his or her rights. A previous statement may operate to compel a further statement notwithstanding explanations and advice belatedly proffered. If, therefore, the successor statement is simply a continuation of the first, or if the first statement is a substantial factor contributing to the making of the second, the condition envisaged by s. 56 has not been attained and the statement is inadmissible.

[57] Justice Sopinka explained that once the first statement is given, the rationale for further restraint in self-incrimination may be gone.

[58] In *R. v. G. (B.)*, [1999] 2 S.C.R. 475, the accused provided a cautioned statement to the police. A year later, during a court-ordered psychiatric assessment, he was asked by a psychiatrist to comment on the first statement and made an incriminating comment. The first statement was ruled inadmissible due involuntariness. In commenting on the derived confessions rule, Bastarache J., speaking for the majority, stated:

> 21 The leading case on the question of the common law "derived confessions rule" is *R. v. I. (L.R.) and T. (E.)*, [1993] 4 S.C.R. 504, in which this Court, inter alia, set out the test for evaluating the degree of connection between the statements, in order to determine when the second statement must be excluded. According to that decision, the second statement must be excluded when it arose out of the first or when they are one and the same. …
>
> 22 In my view, it is not necessary here to analyse *I. (L.R.) and T. (E.)*, where Sopinka J. was dealing with a situation in which two confessions are made to persons in authority. It is sufficient to retain from it that the derived confessions rule applies where there is a sufficient connection between the two statements. This follows from the rationale for the rule. The Quebec Court of Appeal cited *Monette v. The Queen*, [1956] S.C.R. 400, in this regard, where the Court said of an inadmissible statement: "nothing more ought to be heard of it". The second statement is inadmissible because the first confession contaminated it. Therefore, it is not necessary to decide whether the second statement is a confession made to a person in authority in the present case. This interpretation also meets the requirements of the *Charter*, which entrenched certain aspects of the confessions rule in s. 7. A confession found to be inadmissible could not be introduced

> indirectly without affecting the right to silence and the principle against self-incrimination, which is what we would be doing by admitting a statement that was "contaminated" by an inadmissible confession.
>
> 23 Sopinka J. states clearly that the continued presence of the tainting features or the substantial contribution of the first statement to the making of the second may establish that the second statement was derived from the first. While that is true in the clearest cases, it will generally be easier to establish this when both conditions are present to some extent. Ultimately, what matters is that the court is satisfied that the degree of connection between the two statements is sufficient for the second to have been contaminated by the first.
>
> 24 In the case at bar, the admission made to Dr. Wolwertz resulted directly from the confrontation of the accused with his previous statement. No additional information which was not already included in the inadmissible prior statement was obtained during the meeting; the second admission is merely an assertion of the truth of the first statement. It is interesting to note in this regard that at common law, an admission by an accused during a *voir dire* confirming the truth of a prior confession is inadmissible at trial: *Erven v. The Queen*, [1979] 1 S.C.R. 926. As the respondent states, Dr. Wolwertz in fact cross-examined the accused on his first statement. [Emphasis added]

[59] Justice Bastarache noted at para. 25 of *G.(B.)* that, "Confirmation of the truth of the previous admission was therefore no more reliable than the admission itself." He continued on in this regard and stated:

> 26 It matters little that the declaration of inadmissibility was made after Dr. Wolwertz had used the original confession. This confession did not become inadmissible at that moment; it was inadmissible as soon as it was made. Knowledge of this inadmissibility by the person who obtains the second confession is not relevant. The second confession is inadmissible because it was derived from the first, not because it was used in bad faith by the person conducting the examination.

[60] The derived confessions issue was also considered in *R. v. S.G.T.*, 2010 SCC 20, where an initial cautioned statement (an apology letter) by an accused to the police was ruled inadmissible on the basis on lack of voluntariness, but a subsequent statement to a civilian (an apologetic email) was ruled admissible. In considering the difference between an admission and a confession, Charron J. stated, for the majority:

> [20] The distinction between an admission and a confession is apposite here. Under the rules of evidence, statements made by an accused are admissions by an opposing party and, as such, fall into an exception to the hearsay rule. They are admissible for the truth of their contents. When statements are made by an

> accused to ordinary persons, such as friends or family members, they are presumptively admissible without the necessity of a *voir dire*. It is only where the accused makes a statement to a "person in authority", that the Crown bears the onus of proving the voluntariness of the statement as a prerequisite to its admission. This, of course, is the confessions rule.
>
> [21] The Court affirmed in *R. v. Hodgson*, 1998 CanLII 798 (SCC), [1998] 2 S.C.R. 449, that the "person in authority" requirement is an integral component of the confessions rule and reviewed in considerable detail the law on persons in authority, including the trial judge's obligation to hold a *voir dire*. I will briefly reiterate those principles to the extent that they apply here.
>
> [22] A person in authority is typically a person who is "formally engaged in the arrest, detention, examination or prosecution of the accused": *Hodgson*, at para. 32. Importantly, there is no category of persons who are automatically considered persons in authority solely by virtue of their status. The question as to who should be considered as a person in authority is determined according to the viewpoint of the accused. To be considered a person in authority, the accused must believe that the recipient of the statement can control or influence the proceedings against him or her, and that belief must be reasonable. Because the evidence necessary to establish whether or not an individual is a person in authority lies primarily with the accused, the person in authority requirement places an evidential burden on the accused. While the Crown bears the burden of proving the voluntariness of a confession beyond a reasonable doubt, the accused must provide an evidential basis for claiming that the receiver of a statement is a person in authority.
>
> [23] As noted in *Hodgson*, "[i]n the vast majority of cases, the accused will meet this evidential burden by showing [his or her] knowledge of the relationship between the receiver of the statement and the police or prosecuting authorities" (para. 38). Thus, where the receiver of the statement is an obvious state actor, such as a police officer, the fact that the person's status was known to the accused at the time the statement was made will suffice to meet the evidentiary burden. Whenever the evidence makes clear that a *voir dire* into admissibility is required, the trial judge must conduct one even if none is requested unless, of course, the defence waives the requirement and consents to the statement's admission. When the receiver of the statement is not a typical or obvious person in authority, it usually falls on the accused, in keeping with the evidential burden, to raise the issue and request a *voir dire*.

[61] In reiterating that the derived confessions rule does not result in the automatic exclusion of a tainted statement, the court urged a contextual and fact-based approach to determining whether a subsequent statement is sufficiently connected to a prior, inadmissible confession such that it should also be excluded:

> [28] The leading case on the derived confessions rule is *R. v. I. (L.R.) and T. (E.)*, 1993 CanLII 51 (SCC), [1993] 4 S.C.R. 504. In brief, the derived confessions rule serves to exclude statements which, despite not appearing to be involuntary when considered alone, are sufficiently connected to an earlier involuntary confession as to be rendered involuntary and hence inadmissible. For example, in that case, a young offender was charged with second degree murder and gave an inculpatory statement to the police. The next day, after meeting with his lawyer, the accused came to the police, wishing to modify the statement that he had given the previous day. The trial judge excluded the first statement but admitted the second, and the accused was convicted by a jury. The accused appealed the conviction on the basis that the second statement should not have been admitted. His appeal was ultimately successful in this Court.
>
> [29] In outlining the principles applicable to derived confessions, the Court articulated a contextual and fact-based approach to determining whether a subsequent statement is sufficiently connected to a prior, inadmissible confession to also be excluded. In assessing the degree of connection, the Court outlined a number of factors to be considered, including "the time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances" (p. 526). The Court then held:
>
> > In applying these factors, a subsequent confession would be involuntary if either the tainting features which disqualified the first confession continued to be present or if the fact that the first statement was made was a substantial factor contributing to the making of the second statement. [p. 526]
>
> The Court was clear in adding that "[n]o general rule excluded subsequent statements on the ground that they were tainted irrespective of the degree of connection to the initial admissible statement" (p. 526).

[62] Justice Charron reiterated that statements made to a person in authority that are sufficiently connected to a previous involuntary confession are also deemed to be involuntary:

> [30] It is plain from the above principles that the "derived confessions rule" emanates from the common law confessions rule. As such, like its parent, it is clear that it applies to secondary *confessions*, that is, statements made to a person in authority that are sufficiently connected to a previous involuntary confession to be deemed also involuntary. Whether the derived confessions rule also applies in respect of subsequent admissions made to persons not in authority, however, is not so clear.

[63] More recently, in *R. v. D. (M.)*, 2012 ONCA 841, Watt J.A., speaking for the unanimous court, summarized the state of the law regarding the derived confessions rule:

> 53 The derived confessions rule is a common law rule that governs the admissibility of a confession that has been preceded by an involuntary, thus inadmissible confession. The derived confessions rule is not a per se or bright line rule that excludes all subsequent confessions on the ground that they are tainted, irrespective of the degree of their connection to the prior inadmissible statement: *R. v. I (L.R.) and T. (E.)*, [1993] 4 S.C.R. No. 504, at p. 526; and *R. v. Hobbins*, [1982] 1 S.C.R. No. 553, at p. 558.
>
> 54 To determine whether a subsequent statement will be excluded under the derived confessions rule because of the taint left by its involuntary and thus inadmissible predecessor, a trial judge must examine all the relevant circumstances to determine the degree of the connection between the two statements: *T. (E.)*, at p. 526. The Supreme Court of Canada has set out some of the relevant circumstances or factors to consider in determining the degree of connection between the two statements, and thus the influence of the antecedent taint: see *T. (E.)*, at p. 526; *Hobbins*, at p. 558; and *R. v. G. (B.)*, [1999] 2 S.C.R. No. 475, at para. 21. These include but are not limited to:
>
> * the time span between the statements;
>
> * advertence to the earlier statement during questioning in the subsequent interview;
>
> * discovery of additional information after completion of the first statement;
>
> * the presence of the same police officers during both interviews; and
>
> * other similarities between the two sets of circumstances.
>
> 55 The application of these factors will render a subsequent statement involuntary if either the tainting features that disqualified the first continue to be present, or if the fact that the first statement was made was a substantial factor that contributed to the making of the second statement: *T. (E.)*, at p. 526; *G. (B.)*, at paras. 21 and 23. It will generally be easier to establish that tainting affected the first when both these conditions are present. In the end, however, what matters most and mandates exclusion is that the connection is sufficient for the second to have been contaminated by the first: *G. (B.)*, at para. 23.
>
> 56 The inquiry required when the derived confessions rule is invoked to exclude a subsequent statement is essentially a causation inquiry that involves a consideration of the temporal, contextual, and causal connections between the proffered and earlier statements...

> 57 Despite its origins as a common law rule where lack of voluntariness is the contaminating factor, the derived confessions rule is of more general application. The contaminating factor may be constitutional infringement, say a breach of s. 10(b) of the *Charter*. There, the subsequent statement is tainted if the breach and impugned statement can be said to be part of the same transaction or course of conduct. The admissibility analysis in these cases is performed under s. 24(2) of the *Charter*...
>
> …
>
> 59 To determine whether the derived confessions rule will warrant exclusion of a subsequent statement, a trial judge must follow a contextual and fact-based approach: *S.G.T*, at para. 29. The nature of the inquiry and the findings required in the derived confessions analysis have implications for the scope of appellate review. The admissibility of a confession that has been preceded by an involuntary (or otherwise) inadmissible confession, in other words, the application of the derived confessions rule, involves a factual determination based on factors designed to ascertain the degree of connection between the two statements: *T. (E.)*, at p. 526. This determination … is largely a question of fact. Appellate review of the judge's decision is limited to deciding whether the judge erred in her assessment of the evidence, failed to consider relevant circumstances, or failed to apply the correct principles... [Emphasis added]

[64] According to *Watt's Manual of Criminal Evidence* at §37.04, the derived confessions rule applies to subsequent statements that follow prior statements rendered inadmissible by lack of voluntariness, constitutional infringement, or a breach of s. 146(2) *YCJA.*

[65] Mr. Big confessions are presumptively inadmissible. In *R. v. Buckley*, 2018 NSSC 1, I ruled that on a balance of probabilities, the probative value of Mr. Buckley's Mr. Big confession is outweighed by its prejudicial effect. A Mr. Big confession is not subject to the same admissibility scrutiny as a cautioned statement given by an accused to someone the accused knows to be a person in authority. The Crown must prove the voluntariness of that type of statement beyond a reasonable doubt. In the case of a Mr. Big statement, the onus on the Crown is only that of a balance of probabilities. Interestingly, a Mr. Big statement is not treated simply as an admission, nor is it on par with a traditional confession. In *Hart*, Moldaver J. placed a significant focus on reliability in determining the admissibility of a Mr. Big confession. Mr. Buckley's Mr. Big confession is not reliable. If Mr. Buckley's cautioned statement is sufficiently connected in context and in fact to his Mr. Big confession, the derived confessions rule applies.

Degree of connection between the two statements

Time span between the two statements

[66] The Mr. Big confession was obtained on April 6, 2016. The cautioned statement was obtained on April 8, 2016, and the re-enactment statements were obtained April 9, 2016.

Advertence to the earlier statement during questioning in the subsequent interview

[67] Mr. Buckley was steadfast in asserting his right to silence for hours of police questioning until the Mr. Big confession was shown to him twice. The cautioned statement started at 1:52 PM. Constable Rose-Berthiaume showed Mr. Buckley clips of the Mr. Big confession at 7:57 PM and again at 8:13 PM. He gave up his right to silence at 9:10 PM and began to confess at 9:23 PM.

Discovery of additional information after completion of the first statement

[68] No additional evidence was discovered between the Mr. Big confession and the cautioned statement.

The presence of the same police officers during both interviews

[69] Not only were different officers involved in the taking of the cautioned statement, but Mr. Buckley was not aware that the men involved in the Mr. Big operation were even police officers at the time he was speaking with them.

Other similarities between the two sets of circumstances

[70] During the Mr. Big confession, Mr. Buckley was free to come and go as he wished. During the cautioned statement Mr. Buckley was detained by the police.

The tainting features that disqualified the first statement continue to be present during the subsequent statement

[71] When he gave the Mr. Big statement, Mr. Buckley would have understood the inducements before him as follows: he was facing the revival of the murder charge against him, as well as the loss of his employment and friendships within the organization; the organization could eliminate his potential criminal charges

and offer him continued employment, and, potentially, promotion; and he need only confess to Mr. Big to bring this about.

[72] The inducements that were active during the Mr. Big confession were no longer realistic during the cautioned statement. By the time he gave his cautioned statement, Mr. Buckley could no longer be of the belief that if he confessed he would stay on and perhaps advance within the fictitious criminal organization. Additionally, by the time he gave the cautioned statement, Mr. Buckley no longer would have believed that an imprisoned biker would use the confession to take suspicion off of him. However, while not a *quid pro quo* inducement, Constable Rose-Berthiaume did tell Mr. Buckley that confessing to the police would not make his situation any worse. As such, while the material incentives that would have prompted the Mr. Big statement would generally have been gone when Mr. Buckley gave the police statement, he was nonetheless presented with the notion that he was not making his situation worse.

[73] Additionally, the prejudice that was identified in *Hart*, due to the bad character evidence that would necessarily be placed before the jury to put the Mr. Big confession into context, continues to be front and centre if the cautioned statement is admitted. Editing of the cautioned statement is not a solution as Mr. Buckley would not be able to explain to a jury how he came to make the inculpatory comments without introducing the inadmissible Mr. Big operation and confession.

The fact that the first statement was made was a substantial factor that contributed to the making of the second statement

[74] The Mr. Big confession was a substantial factor in the making of the cautioned statement. It was only at 9:10 PM that Mr. Buckley started speaking with the police in any significant way. Mr. Buckley then started making inculpatory statements at 9:23 PM.

[75] Although Mr. Buckley did not testify, having watched the video of his interview, it is clear that but for the playing of the Mr. Big confession, Mr. Buckley would have remained silent. He exercised his right to silence for hours until the Mr. Big confession was played for him. Reference by the police to the Mr. Big confession and the playing of clips of the Mr. Big confession led directly to Mr. Buckley's confession.

Conclusion

[76] Under the derived confessions rule, a subsequent statement will be inadmissible if either:

i. The tainting features that disqualified the first continue to be present during the subsequent statements; or,

ii. The fact that the first statement was made was a substantial factor that contributed to the making of the second statement.

[77] It is preferable, but not necessary, that both headings apply. In Mr. Buckley's case, some, but not all, of the tainting features that disqualified the first statement continued to be present during the subsequent statement. More significantly, the fact that the first statement was made was not only a substantial factor, but was an essential factor that contributed to the making of the second statement. The derived confessions rule applies.

[78] Noteworthy also is the fact that after many hours of interviewing Mr. Buckley, the police became frustrated and started speaking over him as he was asserting his right to silence. They told him not to bother asserting that right again. As a result, how can I assess how many more times, and in what circumstances, Mr. Buckley might have asserted his right to silence? At 8:58 PM of the interview Mr. Buckley was told he might as well confess since he had already provided a Mr. Big confession.

[79] The Crown must prove the voluntariness of Mr. Buckley's statement beyond a reasonable doubt. Based on the derived confessions rule alone, I have a reasonable doubt about the voluntariness of Mr. Buckley's April 8, 2016, cautioned statement.

[80] The additional issue of the police speaking over Mr. Buckley while he was asserting his right to silence, along with telling him that he might as well confess since he already provided a Mr. Big confession, adds to the constellation of factors that also contribute to a reasonable doubt about the voluntariness of that statement.

[81] Mr. Buckley's April 8, 2016, statement is not admissible.

Arnold, J.