SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Butcher*, 2018 NSSC 75

Date: 2018 03 01
Docket: HFX No. 455873
Registry: Halifax

Between:

Her Majesty the Queen

v.

Nicholas Jordan Butcher

DECISION: *VOIR DIRE* 2
Voluntariness and 911 Call-takers

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	February 22, 26; and March 1, 2018, in Halifax, Nova Scotia
Written Decision:	March 29, 2018
Counsel:	Carla Ball and Tanya Carter, for the Crown Peter Planetta and Jonathan Hughes, for the Defence

By the Court:

Overview

[1] This decision deals with whether Jordan Masters, a 911 call-taker, is a person in authority.

[2] On March 26, 2016, through 911, Mr. Masters received a call from Nicholas Butcher. The first exchanges between Mr. Masters and Mr. Butcher were:

> 911 CALL TAKER: 911, what is your emergency?
>
> MR. BUTCHER: I need -- I need help.
>
> 911 CALL TAKER: Okay. And what's going on there?
>
> MR. BUTCHER: I killed my girlfriend and I tried to kill myself, I cut off my hand. I think I'm dying.
>
> 911 CALL TAKER: And where are you at?
>
> MR. BUTCHER: I'm at 17 Ocean -- Oceanview Drive in Purcell's Cove.
>
> 911 CALL TAKER: 7 -- 73 Oceanview?
>
> MR. BUTCHER: 17. You're going to have to breakdown the door, it's locked. I need help please.
>
> 911 CALL TAKER: Okay. And you're saying 73 Oceanview?
>
> MR. BUTCHER: No, 1-7. Help. I'm dying.
>
> 911 CALL TAKER: I can't hear the number that you're telling me. Where -- what...
>
> MR. BUTCHER: 17, 1-7.
>
> 911 CALL TAKER: 1-7? Okay.
>
> MR. BUTCHER: Yeah. I'm dying.
>
> 911 CALL TAKER: Okay. So 17 Oceanview Drive in Halifax, Halifax County?
>
> MR. BUTCHER: Yeah.
>
> 911 CALL TAKER: And you phone number 902 430-4135?
>
> MR. BUTCHER: Yeah.
>
> 911 CALL TAKER: Okay. Just stay on the line, I'm going to bring you right over to ambulance.

[3] Mr. Masters put the call through to ambulance dispatch and stayed on the line. Paramedics and police were dispatched to the address where the telephone call originated.

[4] Once on scene, the first responders eventually came upon Mr. Butcher who appeared to have a fresh amputation of his right hand, as well as other injuries to his neck and left arm. They also found Kristin Johnston in a bedroom, deceased, surrounded by blood, and with a pillow over her face. In the bedroom was a mitre saw and a freshly severed right hand.

[5] A *voir dire* was conducted to determine the admissibility of the 911 statement. Mr. Butcher says Mr. Masters, acting as a 911 call-taker, is a person in authority and that his statements to Mr. Masters were akin to a confession. He argues that a full voluntariness *voir dire* must be conducted to determine the admissibility of his statements on the 911 call.

[6] The Crown says that Mr. Masters is not a person in authority, that anything said by Mr. Butcher is an admission, and therefore admissible without a voluntariness *voir dire*.

[7] In keeping with the decision in *R. v. Hodgson,* [1998] 2 S.C.R. 449, counsel request a ruling as to whether the defence have met the evidential burden of showing that Mr. Masters was a person in authority prior to proceeding to a full *voir dire.*

Facts

[8] Three pre-trial *voir dires* are being conducted simultaneously in relation to this trial. Due to the sporadic availability of witnesses for both Crown and defence, and in keeping with the direction in *R. v. Cody,* 2017 SCC 31, whereby trial judges have been directed to move court along as efficiently as possible, we have jumped in and out of the three pre-trial *voir dires*. Counsel for both sides have stated on the record that certain evidence from each *voir dire* can be applied to the other. There was some disagreement between counsel as to what facts had been agreed upon in relation to this *voir dire*.

[9] The Crown had filed a brief on this issue on March 1, 2017, almost one year before the actual *voir dire*. The original trial dates of April 24 to May 24, 2017, had been adjourned due to a change in counsel by Mr. Butcher. In that brief, the

Crown listed a number of facts they thought had been agreed to by Mr. Butcher's previous counsel, including:

> - the authenticity of the 911 recording;
>
> - that the accused is in fact the 911 caller;
>
> - that the victim, Kristen [sic] Johnston who was his girlfriend, was deceased at the time of the 911 call;
>
> - the phone the accused used was found in the bedroom that the deceased was in;
>
> - that Nicholas Butcher's date of birth is April 13th, 1982;
>
> - that Kristen [sic] Johnston's date of birth is September 17th, 1983; and
>
> - that Nicholas Butcher's mother, Dale, lives at 24 Forrest Hill Drive and her phone number is 902-422-2769.

[10] On February 20, 2018, at the outset of the three *voir dires,* the following exchange occurred:

> MR. PLANETTA: And the other discussion we had, I was asked to make a series of admissions for the purposes of the *voir dire.* I have agreed. I've discussed with my client and have his consent to agree to those admissions. They are issues that are not controversial which may save us a little bit of time. I can put them on the record now or we can, I can provide them in writing. I don't have them in writing at that moment.
>
> THE COURT: Why don't you put them on the record now and then we'll get them in writing as the next day or two.
>
> MS. BALL: And they are on, at paragraph 8 of the Crown's brief of the person in authority brief. Do you have that with you cause we have…
>
> …
>
> MS. BALL: Okay. So that in addition to a couple of others which my friend and I will have to prepare a list for Your Lordship.
>
> MR. PLANETTA: What I'll probably, what I'll do My Lord is I'll after court today I'll prepare a list and I'll sign it and have my client sign it and then I'll submit it to the court.
>
> THE COURT: Okay.
>
> MS. BALL: Identification is among the admissions that my friend is making for the purpose of the *voir dire* so that the civilian witnesses testifying on the ante mortem portion, well any portion I guess, don't have to point out the accused. Is that correct Mr. Planetta?
>
> MR. PLANETTA: Yes.

[11] On February 22, 2018, Mr. Hughes, speaking for Mr. Butcher on this *voir dire* stated the defence was not calling evidence to support their position that Mr. Masters was a person in authority. Mr. Hughes stated:

> MR. HUGHES: Well My Lord, from my perspective, I mean, it doesn't particularly make one difference or another. I certainly understand what my friend is saying and in her defence and to her fairness, I am somewhat proposing a somewhat novel issue here. I didn't expand on it a whole lot in my brief, but I thought it was somewhat obvious. The typical stage under Hodgson for a person in authority is the subjective belief of the individual and then determine whether or not that subjective belief is a reasonably held belief. In a situation like this, the reason why I say it's all blended together is that, as we'll hear in the 911 video and this again relates to the issue of voluntariness and the reliability of the statement under the principled approach is that to me it doesn't really make a difference because even if the 911 operator aren't a person in authority, it's still that the 911 call itself still goes to that principled approach because confessions are just an exception to the hearsay rule. So the issue of his subjective belief, I would suggest, given the circumstances and the injuries he suffered is somewhat dispensed with in that this isn't a situation where it's a statement made to an undercover officer or someone who wouldn't be immediately, I guess, knowable to be a person in authority and just move to the, I guess, objective reasonableness of that held belief and that's why I included the cases from Ontario and Alberta just indicating about the reasonableness of 911 operators as persons in authority. So effectively the only difference is that I'm suggesting that this is a unique situation in which the subjective belief of the, of Mr. Butcher in this case, isn't absolutely necessary in order to proceed to the reasonably, or I guess the objectively reasonably held belief. In terms of the way to proceed on it and what have you, even if Your Lordship were to hold that a 911 operator wasn't a person in authority, to me that doesn't really change a whole lot in the way the evidence comes out because we'll still need to hear the 911 tape just because the elements of what is said and the way that the 911 tape comes out goes to that issue of reliability under the principled approach. So I'm not sure if that helps Your Lordship at all, but…
>
> THE COURT: Well, I can hear what you're saying. You're not abandoning your position that the 911 operators are persons in authority.
>
> MR. HUGHES: That's correct.
>
> THE COURT: Okay. Then I'm going to need full argument.
>
> …
>
> THE COURT: You're proposing in your brief and briefly stated here that 911 operators are akin to what the Supreme Court of Canada recognized in Hodgson as police officers and prison guards and that is that those are so obviously persons in authority that voluntariness *voir dire* should be entered into

in every occasion and that even though the Supreme Court of Canada indicates that otherwise, subjectively, the individual is usually the person who's going to provide the evidence that they believe that this person had some authority over their prosecution, that in this case, objectively, your client doesn't need to do that.

MR. HUGHES: Absolutely.

THE COURT: Correct? That's what you want to argue.

MR. HUGHES: Yes My Lord.

[12] During Mr. Hughes' initial address to the court on this issue, the following exchange occurred:

MR. HUGHES: 911 is effectively the agency or the organization that sends and dispatches the police out. Without the call to 911 the police may not respond to those situations.

THE COURT: Well, I have you saying that, but I don't have any evidence of that. How... So again we're not too deep into this *voir dire* and you've chosen not to call evidence. You can't give evidence.

MR. HUGHES: And I take Your Honour or Your Lordship's point with that.

THE COURT: So before we go further. We've started. You've elected not to call evidence. This is a homicide trial. Do you need time to consider your position here or are you content to keep moving forward?

MR. HUGHES: I'm content to keep moving forward My Lord.

THE COURT: Do you want to take some instructions before you do that?

MR. HUGHES: Sure, I would be happy to My Lord.

THE COURT: Okay. So we're going to stand down for 15 minutes so that you can go downstairs and have a chat and let me know whether or not you're content to proceed forward once you've received those instructions.

MR. HUGHES: Thank you My Lord.

THE COURT: Because you cannot give evidence. You can make inferences. You can make suggestions based on other cases. You can't give evidence. Okay?

MR. HUGHES: Absolutely My Lord.

COURT RECESSED

COURT RECONVENED

MR. HUGHES: Thank you My Lord. I took that time to speak to my colleague and my client and receive instructions. We will be calling evidence. We'll be seeking to call Jordan Masters the 911 operator. Given the time of day

though, My Lord, and I'm a little bit out of order with this based on the order that I thought things would be progressing in, so I would just ask that we just start again afresh in the morning.

[13] Mr. Butcher was provided with an opportunity to prepare to call evidence and on February 26, 2018, the defence called Jordan Masters on the *voir dire*. The following discussion occurred regarding whether the 911 call and transcript could be relied upon with respect to VD2:

MS. CARTER: So I don't know if you have any questions about the fact that the call wasn't played, but I, you know, I'm leading from everything that my friend said that he didn't feel there was anything in there in particular that would be of assistance, but I think that's where we're at.

THE COURT: Well, I do have a question about that.

...

THE COURT: Both Crown and defence included the transcript of the call in their materials, but the call itself wasn't played. So, normally, the call would be evidence and transcripts would be an aid if the matter was put into evidence. In this case, both parties have forwarded the transcripts to me, but the call hasn't been played. What am I to do with the transcript? Is this somehow part of this *voir dire* and, if so, how? And, if not, why do I have it?

...

THE COURT: And so I've got a few questions that relate to that, not your substantive argument, I understand your, but just the transcript itself. Is this something I should be considering or not considering and why don't I have the call and should I have the call and what's going on with all that?

MS. CARTER: Okay, so, no you shouldn't have the call is my first answer to that, but I'm going to tell you the background of why I feel that way.

...

MS. CARTER: On related to *voir dire* 3 we're going to use the call on that and if this proceeds further maybe we'll have to. Right now, so, when Mr. Burrill brought this up argument at the pre-trial conference like I said, I ended up filing a brief first which may or may not have been the right procedure for that, but we didn't know what the nature of the argument was, right? So we attached the call assuming that there'd be a standard application that set out the basis based on Hodgson where saying people are people in authority. So I assumed when we originally put it in that the call would be relevant, right? So when he changed his mind and made these arguments, at least with respect to the person in authority, based on the defence brief in my mind what was said on the call was not relevant, right, because they were just asking you to change him as a class person based on their job, so I don't see how the call is relevant to that particular argument. Now,

if you agree to use the principled approach it would have to be played obviously somehow.

THE COURT: That's for a later argument.

MS. CARTER: Yes, right.

THE COURT: But for this aspect, right now, I have it from both counsel and what you're indicating to me is one, it was put in pre-emptively not knowing what was coming…

MS. CARTER: Right.

THE COURT: Two, now that you know what's coming and the evidence that's been heard, it may relate to other aspects of a *voir dire*, but not to this aspect. Is that correct?

MS. CARTER: Yes. That's how I…

THE COURT: Well you don't need to say anymore because Mr. Hughes is behind you nodding in agreement. So if that's the case and both counsel agree then I won't ask any more questions about it.

MS. CARTER: I have to say one other thing. There was a reason I asked a few limiting questions about what was in the call which the call-taker remembered. If there is a change or something different and I can't recite all, you know, the question and the answer you had earlier with my friend, you know, I'm suggesting that he didn't say anything that would give rise to a subjective belief just to cover it off, but if that's not the argument that it doesn't even matter.

THE COURT: You can't… it's not the argument because the call isn't in evidence so…

MS. CARTER: Right, so I don't see it as being important at all.

THE COURT: Well I don't think that would be the argument because the call isn't in evidence, so…

MS. CARTER: Right.

THE COURT: Okay, thank you. Ms. Hughes, any reply and do you want to comment for the record about the transcript?

MR. HUGHES: I'll just start with the transcript, My Lord, because it's exactly as my friend said, it's more for the purposes of the voluntariness issue. I don't think that there's anything in the contents of the call that are necessarily relevant to the issue of the person in authority argument.

THE COURT: Well, whether there are relevant things or there aren't relevant things, the issue is you didn't put the call into evidence.

MR. HUGHES: That's correct.

> THE COURT: Okay. So, is it your position that this transcript should not be examined by me or considered by me for the purpose of this aspect of, sorry, for the purpose of *voir dire* 2?
>
> MR. HUGHES: Yes, that's correct My Lord.
>
> THE COURT: Thank you.

[14] The Crown chose to call no evidence on this aspect of the *voir dire* and counsel proceeded to make argument on February 26, 2018. Mr. Butcher advised during the *voir dire* that he was abandoning his alternate position regarding the necessity of a principled approach analysis should the 911 call-taker not be found to be a person in authority. I reserved my decision.

[15] The other *voir dires* continued. On March 1, 2018, immediately before the Crown called Mr. Masters to testify in relation to VD3 (the *voir dire* relating to the admissibility of statements made by Mr. Butcher to the police during his arrest), counsel advised that an agreed statement of facts was being provided to the court. The agreement is signed by Nicholas Butcher, Peter Planetta, Jonathan Hughes, Carla Ball and Tanya Carter, and states:

> R. v. Nicholas Butcher
>
> For the purposes of the *Voir Dires* held between February 20 – March 5, 2018, the defence admits the following:
>
> 1. The authenticity & continuity of the 911 recording;
>
> 2. That the accused, Nicholas Butcher, is the 911 caller;
>
> 3. That the victim, Kristen [sic] Johnston, who was his girlfriend, was deceased at the time of the 911 call;
>
> 4. That the phone the accused used was found in the bedroom that the deceased was in;
>
> 5. That Nicholas Butcher's date of birth is April 13th, 1982;
>
> 6. That Kristen [sic] Johnston's date of birth was September 17, 1983; and
>
> 7. That Nicholas Butcher's mother, Dale, lives at 24 Forrest Hill Drive and her phone number is 902-422-2769.
>
> 8. The defence admits the identification of Nicholas Butcher.

[16] Mr. Masters testified and the 911 recording and transcript were put into evidence. Some disagreement arose between counsel as to whether the 911 recording and transcript should now be relied on by the court in considering the

outstanding threshold person in authority question. The following discussion occurred:

> MR. HUGHES: ... we were copied on an email to Ms. Murphy on February 8, indicating the order that the Crown intended to call witnesses... It says that the intention was to call evidence on the hearsay ante mortem stuff first, then the voluntariness, *Charter*, 911, followed by argument on each issue... I prepared my arguments on the basis that on February 22 the Crown was going to call Jordan Masters as a witness. When we were presented with the.. agreed statement of facts that was presented to us at the open of the *voir dires*, it was my understanding that, in agreeing to the fact that Mr. Butcher was the 911 caller, was all predicated on this issue of the Crown calling these witnesses for these purposes. So in preparing for it, it was my understanding that as part of the Crown's evidence Mr. Masters would have had to been called as their witness and made my preparations from there. ...I honestly was not expecting to make any legal argument until after all of the evidence had been heard based on...
>
> ...
>
> THE COURT: Well, we need a proposed solution. The Crown's proposed solution, as I understand it is, and maybe I'm misunderstanding things, is that whatever occurred this morning is not applied to your argument that relates to whether or not Mr. Butcher has met the evidential burden to show that the 911 operators are persons in authority. That's their proposed solution. I think. Ms. Carter, without getting you, I'll give you a chance to reply, but do I understand your position?
>
> MS. CARTER: Yes you do.
>
> ...
>
> MR. HUGHES: And I indicated for my position My Lord that if I had known that the, I guess, the road map that we were going to take in this position had been different than the one that I had relied on I would have had some hesitation in making the admission that Mr. Butcher was the 911 caller. And I'm, that's not necessarily speaking for Mr. Planetta, but at least in my preparation for it, if I had known that this was going to be the way that that would have unfolded that very well may not have been...
>
> ...
>
> THE COURT: So you don't have a proposed solution?
>
> MR. HUGHES: Unfortunately I don't My Lord.
>
> MR. PLANETTA: If I could just, I think what our position is is what I said earlier, is that...
>
> THE COURT: Apply the evidence from this morning to your, Mr. Hughes' aspect, give counsel a further opportunity to call evidence and or argue,

ie reopen *voir dire* 2 if there's some misunderstanding, that's what you're suggesting.

MR. PLANETTA: Or let the evidence cross over rather than just doing it again. That's…

THE COURT: Okay. Thank you. Ms. Carter?

MS. CARTER: I don't have very much to say. I do find it quite odd that my friend would say that, Mr. Hughes in particular, would say that he was relying on hearing the Crown evidence and making argument at the end and in the same breath tell you that no evidence was relevant to his argument. Like, those are two completely opposite situations. You know, he might have wanted to wait until the end. I understand why that may be appealing, but if he's going initially stand up and say that this is a straight up legal issue and the evidence doesn't matter and then turn around and say he relied on the Crown calling all their evidence cause it does matter. I mean, they're two completely different things. I still haven't heard how or why the information on the call is relevant in light of him saying that all people in authority across Canada are people, I'm sorry, call-takers across Canada are people in authority.

…

THE COURT: Well, if, if, I'll just say this, if I determine that either the evidence that was heard this morning can be applied to the threshold of *voir dire* 2, then I would certainly give counsel further opportunity to either, if the Crown wants to call evidence in reply to that, to call evidence or to make argument or both so that you wouldn't have this new evidence injected into the mix without being given an opportunity to comment on it.

…

MS. CARTER: My Lord, might be helpful for us to hear from Mr. Hughes and confirm that it's the actual call itself he wants in and not the particularly the cross examination of Mr. Masters today for our consideration without saying anything.

…

MS. CARTER: And maybe some indication of why it's relevant today and it wasn't, because keep in mind, since Monday we've sort of been talking about when we're going to get a decision and no one's said please wait to hear the call, right?

…

THE COURT: … So do you understand the question Mr. Hughes? You're asking for some of the evidence that was heard today or all of the evidence that was heard today to be applied to your argument on the threshold test. The Crown wants to know, and so do I, are you asking that the 911 call and the transcript be considered? Or are you also suggesting that Mr. Masters testimony today and

your cross examination of him which, in fairness, you called him as your witness and then cross examined him today as the Crown witness. What are you asking to be considered by the court? And do you need time to think about this or are you just ready to answer it?

MR. HUGHES: No, I'm ready to answer. I think his evidence today should be considered as well. I mean... and again, I'll reference the agreed statement of facts. It was my understanding as again from yesterday, there was no qualification as to what goes into where. There was no discussion when we were talking about this on the telephone conference yesterday that the agreed statement of facts will apply to everything but that portion of it.

...

MR. HUGHES: So in speaking with Mr. Planetta, My Lord, we're happy to just have the call and the transcript go in. I'll concede the issue of Mr. Masters' evidence today.

THE COURT: Okay, and was there another question, Ms. Carter, beyond that one. I think that there was, but I can't...

MS. CARTER: I just, we've already made arguments and I didn't hear any reference to the relevance of the call, so I want to know where this is going and I don't want to be caught off guard, do you know what I mean? Or does he think this is a technical issue and he's worried that you need that before you? I'm not sure what, why it is, why the change, cause like I said, we've been waiting for, not to say that to rush you, but we've kind of been waiting for a decision without the call, right? So, what is it?

THE COURT: Okay. So really, the question is are you in a position, Mr. Hughes, to advise that if I allow that evidence to be considered, whether or not you want to make further argument now that those call and transcript or are you indicating that you are content with your original argument, and if you want to make further argument, what does that argument pertain to and are you prepared to answered that now or do you need a minute?

MR. HUGHES: No, I'm prepared to answer that now, My Lord. I don't think I need to make further argument on it.

THE COURT: So then it was a technical issue, is that, that you're concerned that some of what you had said wouldn't have any foundation or basis without that being part of the case. Is that correct?

MR. HUGHES: Yes, My Lord.

THE COURT: I'm not trying to put words in your mouth, I just want to make sure that I understand what you're saying. I really am not. So...

MR. HUGHES: And I appreciate that, My Lord. And again, it comes I guess from my confusion on the issue of blending these two *voir dires*.

[17] The parties eventually agreed that the 911 recording and transcript, along with the agreed statement of facts, should now be considered by the court in determining the threshold question.

[18] Mr. Butcher did not testify on this *voir dire*.

Framework

[19] In discussing the rationale and practical considerations when exploring the issue of statements against interest made by an accused person, Cory J. stated for the majority in *Hodgson*:

> 25 On a practical level, the Crown would obviously face an overwhelming burden if it had to establish the voluntariness of every statement against interest made by an accused to any person... In particular... the elimination of the person in authority requirement would have serious consequences for undercover police work and for the admissibility of wiretap evidence, where the identity of the receiver of the accused's statement is often unknown. For example, if the Crown were to intercept a phone call between an accused and a confederate who is senior to him in a criminal hierarchy, the Crown would obviously have difficulty tendering the requisite evidence if it were forced to prove beyond a reasonable doubt that the statements were made without "fear of prejudice or hope of advantage". Moreover, all statements to undercover police officers would become subject to the confessions rule, even though the accused was completely unaware of their status and, at the time he made the statement, would never have considered the undercover officers to be persons in authority.
>
> 26 Practical considerations alone lead to the conclusion that the person in authority requirement should remain a part of the confessions rule. Yet there can be no doubt that there may well be great unfairness suffered by the accused when an involuntary confession obtained as a result of violence or credible threats of imminent violence by a private individual is admitted into evidence...

[20] In setting out the test to determine whether someone is a person in authority such that a voluntariness *voir dire* must be undertaken, Cory J. explained:

> 32 "Person in authority" typically refers to those persons formally engaged in the arrest, detention, examination or prosecution of the accused... However, it may take on a broader meaning. Canadian courts first considered the meaning of "person in authority" in *R. v. Todd* (1901), 4 C.C.C. 514 (Man. K.B.). In that case, the accused made a statement to two men he believed to be fellow prisoners, but who were in fact acting as agents of the police. It was held, at pp. 526-27, that:

> A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. . . . [T]he authority that the accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe, and so in some degree to overcome the powers of his mind. . . . [Emphasis added.]

Thus, from its earliest inception in Canadian law, the question as to who should be considered as a person in authority depended on the extent to which the accused believed the person could influence or control the proceedings against him or her. The question is therefore approached from the viewpoint of the accused. ...

33 The subjective approach to the person in authority requirement has been adopted in this Court. ... The approach adopted by McIntyre J.A. (as he then was) in *R. v. Berger* (1975), 27 C.C.C. (2d) 357 (B.C.C.A.), at pp. 385-86 is, in my view, a clear statement of the law:

> The law is settled that a person in authority is a person concerned with the prosecution who, in the opinion of the accused, can influence the course of the prosecution. The test to be applied in deciding whether statements made to persons connected in such a way with the prosecution are voluntary is subjective. In other words what did the accused think? Whom did he think he was talking to? . . . Was he under the impression that the failure to speak to this person, because of his power to influence the prosecution, would result in prejudice or did he think that a statement would draw some benefit or reward? If his mind was free of such impressions the person receiving this statement would not be considered a person in authority and the statement would be admissible.

34 However, to this statement I would add that the accused's belief that he is speaking to a person in authority must also be reasonable, in the context of the circumstances surrounding the making of the statement. If the accused were delusional or had no reasonable basis for the belief that the receiver of the statement could affect the course of the prosecution against him, the receiver should not be considered a person in authority. Since the person in authority requirement is aimed at controlling coercive state conduct, the test for a person in authority should not include those whom the accused unreasonably believes to be acting on behalf of the state. Thus, where the accused speaks out of fear of reprisal or hope of advantage because he reasonably believes the person receiving the statement is acting as an agent of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her, then the receiver of the statement is properly considered a person in authority. In other words, the evidence must disclose not only that the accused subjectively believed the receiver of the statement to be in a position to control the proceedings against the accused, but must also establish an objectively reasonable basis for that

> belief. For example, if the evidence discloses a relationship of agency or close collaboration between the receiver of the statement and the police or prosecution, and that relationship was known to the accused, the receiver of the statement may be considered a person in authority. In those circumstances the Crown must prove beyond a reasonable doubt that the statement was made voluntarily.

[21] Because Mr. Butcher did not testify on this *voir dire*, his lawyers argue that, in this case, the 911 call-taker should presumptively be considered a person in authority because:

- The 911 call-taker is a civilian employee of the Halifax Regional Police;
- 911 calls are recorded;
- The 911 call-taker puts calls that might be of a criminal nature through to the police computer;
- The 911 call-taker might dispatch ambulance, fire or police, or any combination of those first responders, to a scene depending on the nature of the call;
- If a 911 caller hangs up, the 911 call-taker will attempt to call the person back;
- 911 call-takers might ask a caller questions that concern public or police safety; and
- It is "well-known" that 911 calls are often played in criminal trials.

[22] While not discussed in the context of 911 call-takers, Cory J. did provide some direction for the proposition raised by Mr. Butcher, in *Hodgson*:

> 35 Over the years, the courts have determined when and in what circumstances a person will be deemed a person in authority for the purposes of the confessions rule. See, e.g., *R. v. Trenholme* (1920), 1920 CanLII 461 (QC CA), 35 C.C.C. 341 (Que. K.B.) (complainant's father was held to be a person in authority where he has control over the prosecution of the accused); *R. v. Wilband*, 1966 CanLII 3 (SCC), [1967] S.C.R. 14 (psychiatrist is not a person in authority where he cannot control or influence the course of the proceedings); *R. v. Downey* (1976), 32 C.C.C. (2d) 511 (N.S.S.C.A.D.) (victim is a person in authority if the accused believed that the victim had control over the

> proceedings); *A.B.*, *supra* (a parent is not, in law, a person in authority if there is no close connection between the decision to call the authorities and the inducement to a child to make a statement); *R. v. Sweryda* (1987), 1987 ABCA 75 (CanLII), 34 C.C.C. (3d) 325 (Alta. C.A.)(a social worker is a person in authority if the accused knew the social worker was investigating allegations of child abuse and believed it could lead to his arrest). These cases have not departed from the governing rule that defines a person in authority in relation to the accused's perception of the receiver's involvement with the investigation or prosecution of the crime nor have these decisions defined a person in authority solely in terms of the personal authority that a person might wield in relation to the accused. Moreover, in concluding that the receiver of the statement was a person in authority, the courts have consistently found the accused believed the receiver was allied with the state authorities and could influence the investigation or prosecution against the accused.
>
> 36 The important factor to note in all of these cases is that there is no catalogue of persons, beyond a peace officer or prison guard, who are automatically considered a person in authority solely by virtue of their status. A parent, doctor, teacher or employer all may be found to be a person in authority if the circumstances warrant, but their status, or the mere fact that they may wield some personal authority over the accused, is not sufficient to establish them as persons in authority for the purposes of the confessions rule. As the intervener the Attorney General of Canada observed, the person in authority requirement has evolved in a manner that avoids a formalistic or legalistic approach to the interactions between ordinary citizens. Instead, it requires a case-by-case consideration of the accused's belief as to the ability of the receiver of the statement to influence the prosecution or investigation of the crime. That is to say, the trial judge must determine whether the accused reasonably believed the receiver of the statement was acting on behalf of the police or prosecuting authorities. This view of the person in authority requirement remains unchanged. [Emphasis added]

[23] 911 call-takers are not presumptively persons in authority.

[24] Generally, based on the evidence of Mr. Masters, in the Halifax Regional Municipality, 911 call-takers do not wield any personal authority over the accused, they have no control over the investigation or prosecution of an accused and they have no ability to influence or control the course of the proceedings. While in this case, Mr. Masters is a civilian employee of the Halifax Regional Police and forwards appropriate calls to the police, those elements do not carry the day in relation to this analysis.

[25] Because 911 call-takers are not presumptively persons in authority, an analysis must be undertaken to determine whether the specific facts of this case are

such that Mr. Masters should be considered a person in authority. In discussing the appropriate burden in this situation, Cory J. stated, in *Hodgson*:

> 37 Finally, something must be said about the respective burdens which must be borne by the accused and the Crown on a *voir dire* to determine whether a statement of the accused to a person in authority should be admitted. The Crown, of course, bears the burden of proving beyond a reasonable doubt that the statement was made voluntarily. However, in relation to the person in authority requirement, the evidence required to establish whether or not a person should be deemed a person in authority will often lie primarily with the accused. The accused therefore must bear some burden in relation to this aspect of the confessions rule. The burden should be an evidential and not a persuasive one. ... John Sopinka, Sidney N. Lederman and Alan W. Bryant, in *The Law of Evidence in Canada* (1992), at pp. 56-57, explain the difference between the two burdens:
>
> > The term evidential burden means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue. . . . In contrast, the term legal burden of proof means that a party has an obligation to prove or disprove a fact or issue to the criminal or civil standard. The failure to convince the trier of fact to the appropriate standard means that party will lose on that issue.
>
> The evidential burden on an accused in a criminal case is described as follows (at p. 138):
>
> > Where an evidential burden for an issue rests on the defendant in a criminal case, for example self-defence, the accused has the obligation to ensure that there is some evidence on the record to make it a live issue. The evidence necessary to satisfy an evidential burden may arise in the case for the Crown or the defence.
>
> 38 In the vast majority of cases, the accused will meet this evidential burden by showing the accused's knowledge of the relationship between the receiver of the statement and the police or prosecuting authorities. For example, the fact that the statement was made to a police officer who was in uniform or identified himself or herself as a peace officer will satisfy the accused's evidential burden in relation to the person in authority requirement. ... Once the accused satisfies this evidential burden, the ultimate burden of proof rests with the Crown. ... In *R. v. Postman* (1977), 1977 ALTASCAD 92 (CanLII), 3 A.R. 524, at p. 542, the Alberta Supreme Court, Appellate Division held, correctly in my view, that where a witness is not *prima facie* a person in authority (in that case, a doctor), "it is open to defence counsel to challenge the *prima facie* case and require evidence to be given to determine the facts of the matter". Thus, once the defence discharges its burden and establishes that there is an evidential basis to the claim that the receiver of a statement made by the accused is a person in

> authority, the burden shifts to the Crown to establish beyond a reasonable doubt either that the receiver is not a person in authority, or, if this burden cannot be discharged, that the statement was made voluntarily.
>
> 39 The receiver's status as a person in authority arises only if the accused had knowledge of that status. If the accused cannot show that he or she had knowledge of the receiver's status (as, for example, in the case of an undercover police officer) or close relationship to the authorities (as in the case of persons acting on behalf of the state), the inquiry pertaining to the receiver as a person in authority must end. It is therefore appropriate to consider at the outset the reasonable belief of the accused. It may not be useful to have the trial judge undertake a full analysis of the objective relationship between the receiver of the statement and the authorities, as Justice L'Heureux-Dubé suggests (para. 83), only to have those findings vitiated if the accused is later found to have no knowledge of this relationship. In addition, it is important to recognize that focusing the trial judge's inquiry on the reasonable belief of the accused accords with the allocation of the burden of proof on the *voir dire*. [emphasis added]

[26] Counsel rely on various cases from other jurisdictions to either support or refute Mr. Butcher's position that he has met the evidentiary burden of showing that Jordan Masters was a person in authority. If Mr. Butcher has met the evidential burden, then the burden shifts to the Crown to prove beyond a reasonable doubt that the 911 call-taker was not a person in authority and then (possibly), to prove beyond a reasonable doubt that the statement is voluntary.

[27] In *R. v. Paquette,* 1999 CarswellOnt 982, [1999] O.J. No. 1277 (Ont. Ct. J.), the accused was charged with second-degree murder. The Crown sought to introduce a recorded 911 conversation at trial. The defence admitted the 911 calls were admissible, but the judge held a precautionary *voir dire* nonetheless. The accused testified on the *voir dire.* In admitting the 911 calls at trial, Whalen J. stated:

> 71 It is not difficult to conclude that Mr. Paquette's call to the 911 operator offends neither the common law confessions rule nor the *Charter*.
>
> 72 The statements in this conversation were not made to a person in authority. The defence conceded that the emergency operator was not an agent of the police or otherwise involved in the arrest, detention, examination or prosecution of the accused. Nor was there any evidence to suggest the accused reasonably believed the 911 operator was a person in authority. Furthermore, Mr. Paquette himself placed the call, of his own accord, and apparently out of concern that Ms. Foley receive medical attention.
>
> 73 It is difficult to imagine that this call and the ensuing conversation could have been anything but voluntary when Mr. Paquette himself initiated it. Nor is

there anything in the content of the conversation, either in the words spoken or the tone, to suggest coercion, inducement or oppression of any kind.

74 Therefore, I conclude that the statements made by Mr. Paquette in the course of this call were of his own free will and did not offend the confessions rule.

75 Similarly, the reception of this call did not violate any right under the *Charter* because it was not made to an agent of the state or while Mr. Paquette was being detained by the state.

[28] In *R. v. Soikie*, [2003] O.J. No. 3134 (Ont. Ct. J.), the accused requested permission to cross-examine a 911 call-taker as a person in authority at his preliminary inquiry on a charge of second-degree murder. During the admissibility *voir dire*, the only evidence was the *viva voce* testimony of the 911 call-taker on the preliminary inquiry and the transcript of the 911 call. The accused did not testify on the *voir dire*. In denying the defence request, Cleary J. stated:

8 In both *Hodgson* and cases that have followed it, it is clear that few people are persons in authority merely by virtue of their status, e.g.: police officers (identifiable as one), prison guards. The crucial test is whether there is evidence upon which the Judge can find that the accused reasonably believe the receiver of the statement was acting on behalf of the authorities. *R. v. Hodgson* (para. 36) For example, evidence that a person wore a police uniform or identified themselves as a police officer is sufficient to reasonably infer that an accused "reasonably believed them to be a person in authority".

9 Where the recipient does not fit that category, then there must be some evidence that the accused reasonably believed them to be able to influence the course of the prosecution.

10 This required finding of fact only need be shown by evidence which positively bears on the issue. It is an evidential burden and not a persuasive one.
...

11 A persuasive burden is one which must be met by evidence that proves a fact or issue beyond a reasonable doubt (or the Crown) or on a balance probabilities (the accused). An evidential burden means the responsible party must point to evidence of a fact or issue to pass a threshold test.

12 In this preliminary hearing, a *voir dire* was held to determine if the 911 operator or the ambulance worker who spoke to Soikie are persons in a position of authority to him. Evidence on the *voir dire* was agreed by counsel to be the *viva voce* evidence of Cheryl Dinner on the preliminary hearing and exhibit #4, the transcript of his call to 911. The first nineteen of forty pages have some comments of Soikie.

13 There was no specific *viva voce* evidence on the *voir dire*.

14 The evidence established these facts:

(1) The call began at 8:05 hours on Saturday, October 19, 2002;

(2) Soikie is the only "caller";

(3) The 911 operator, Cheryl Dinner, answers "Emergency, can I help you" (p. 1)

(4) When Soikie says he has "... a dead body on my hands". (p. 1) He is told she will be putting him through to the ambulance because that is their procedure;

(5) Another person is recorded as saying "Toronto Ambulance. Where do you need us?" (p. 2)

(6) After obtaining the address and exact location of Soikie, the ambulance person asks to be told exactly what happened;

(7) That ambulance worker then tells Soikie to stay on the line because someone has some questions for him and some help is being sent;

(8) The 911 operator comes on the line again and talks to Soikie asking him what happened;

(9) A short while later in the recording, a male ambulance personnel asks Soikie about the condition of the victim: "We just wanna make sure that if there's anything we could do for him ..." (p. 14)

Soikie: "No"

Ambulance Worker: "That we do that ..."

Soikie: "Police would be good".

(10) Cheryl Dinner testified that she is a communications operator, a civilian employee of the Toronto Police Force, and that she was asking questions with officer safety and investigation in mind.

15 As there was no *viva voice* evidence from the accused on the *voir dire*, the evidence which can be used to determine his subjective view of the voices on the phone is that of his words during the call, any reasonable inferences from them and the factual situation before this Court.

16 I find no admissible evidence from which it can even be reasonably inferred that the accused reasonably believed the 911 operator or the ambulance worker to be persons in a position of authority.

17 The only evidence that bears on this issue shows that Soikie could not have had a reasonable belief:

(1) the call placed by Soikie was answered: "Emergency, can I help you".

(2) Because he was not in their presence, no inference can be drawn from clothing, location or body language of them.

> (3) Cheryl Dinner's action of "I have to put you through to ambulance, sir ... but we have our procedure" cannot reasonably be viewed as an exercise of authority when Soikie is claiming he "... got a dead body on my hands".
>
> (4) The ambulance worker's first words are: "Toronto Ambulance. Where do you need us?"
>
> (5) When, on page 14 of the transcript, a male ambulance worker indicates "We just wanna make sure that if there's anything that we could do for him ...", Soikie responds "Police would be good". This infers that he doesn't think he is talking to the police or agents of them.
>
> 18 These support the conclusion that in all these circumstances there is no evidence that he reasonably believes the 911 operator or the ambulance worker to be person in authority who "could influence the investigation or prosecution against the accused." *R. v. Hodgson*, para. 35.

[29] In *R. v. Hersey,* 2006 ABQB 734, the accused was charged with second-degree murder. A *voir dire* was held to determine the admissibility of statements made by the accused to several people, including a member of the Edmonton Fire Department, an EMS paramedic, the arresting police officer and a police detective. The accused did not testify on the *voir dire.* In admitting the statement made to the member of the Edmonton Fire Department, Moreau J. stated:

> 10 In response, Crown counsel referred to *R. v. M.R.B.* (1998), 51 B.C.L.R. (3d) 158, [1998] B.C.J. No. 1197 (C.A.), where paramedics arrived at the scene of a fatal collision and asked the driver if she had consumed alcohol. Her response was relayed by the paramedic to the police on their arrival. The Court held that the purpose of the paramedic's question was not to solicit an admission but to fulfill the requirements of his job.
>
> 11 Crown counsel noted that Hersey did not testify in the *voir dire*. She argued that he failed to meet his evidentiary burden to persuade the Court that he reasonably viewed McAvoy as a person in authority.
>
> 12 The failure of the accused to testify is not determinative of this issue as there may be cases where the Crown's evidence is such as to make the determination of whether a receiver of a statement is a "person in authority" a live issue. However if the evidence does not show that the accused had knowledge of a close relationship to the authorities, the inquiry as to whether the receiver of the statement was a person in authority must end there.
>
> 13 I find that the evidence does not raise a live issue as to Hersey having a reasonable belief that McAvoy was part of a police or prosecutorial "team" such as to shift the persuasive burden to the Crown to establish that McAvoy was not a person in authority. Mr. Hersey made the 911 call himself which resulted in the arrival of emergency personnel at the scene. I find that the fire department crew

> identified themselves as such on their arrival as did the identifying badges on their uniforms. Some members of the crew who entered the residence with McAvoy wore distinctive firemen's bunker pants. Police personnel had not yet arrived so as to create confusion as to whom Mr. Hersey might have thought he was speaking to nor is there evidence that Hersey was under the influence of intoxicating substances. McAvoy made a general inquiry about the infant's medical history and medications, one appropriate to his duties, to which Hersey responded by explaining the cause of her injuries.
>
> 14 I also reject defence counsel's argument that there was an implicit *quid pro quo* in McAvoy's request to Hersey for medical information. There is no evidence either from the tone or content of McAvoy's questioning as he described it or in the surrounding circumstances to sustain this suggestion.
>
> 15 As to the policy argument raised by the defence, consistent with the view of the majority of the Court in *Hodgson* (at para. 29) as to the appropriateness of judicial elimination of the "person in authority" requirement from the confessions rule, the inclusion of emergency personnel generally in the category of "persons in authority" is a matter for Parliament. In the meantime, whether emergency personnel can be considered "persons in authority" is a case-by-case determination.

[30] Similarly, Hersey's comment to the EMS paramedic was held to be admissible by Moreau J.:

> 22 I find that the circumstances do not give rise to a live issue as to whether Hersey may have confused Jeschke for a police officer or for one closely associated with the police. Jeschke and his partner were wearing uniforms clearly identifying themselves as emergency personnel and, in the absence of any evidence to the contrary, I accept that Jeschke introduced himself as such when seeking information from Hersey. Their exchange was calm, and Hersey did not appear to be affected by intoxicating substances. Jeschke made inquiries consistent with his treating role. While there were officers present at the scene by that time, Jeschke testified that Hersey had been observing what was going on. In the absence of any evidence to the contrary, I find that Hersey would have observed Jeschke involved in treating the child. There is insufficient evidence on the record before me to make the existence of an association between Jeschke and the police a live issue.
>
> 23 Nor do the circumstances bear out defence counsel's suggestion that ongoing treatment by EMS depended on Hersey's cooperation, an implicit *quid pro quo*, Jeschke having already provided medical attention to the infant in Hersey's presence before questioning him.

[31] In *R. v. Glessman*, 2013 ABCA 86, a sexual assault case, the accused had made three statements: to the complainant and her boyfriend, the complainant's

boyfriend alone and the police. The accused did not testify on the *voir dires*. In discussing the possibility of private citizens being considered persons in authority, Crighton J.A. stated for the court:

> 9 Statements made to private citizens are *prima facie* admissible, subject to any other evidentiary rules that may justify their exclusion: *R v SGT*, 2010 SCC 20, [2010] 1 S.C.R. 688 at para 20. The confessions rule requires that a statement be made to persons in authority for the purpose of controlling coercive state conduct: *Hodgson* at para 34. For this reason, the term "person in authority" usually applies to "those persons formally engaged in the arrest, detention, examination or prosecution of the accused": *Hodgson* at para 32. However, "this definition may be enlarged to encompass persons who are deemed to be persons in authority as a result of the circumstances surrounding the making of the statement": *Hodgson* at para 16. Accordingly, a person in authority may also include someone whom the accused reasonably believes is "acting on behalf of the police or prosecuting authorities **and** could therefore influence or control the proceedings against him or her": *Hodgson* at para 48 [emphasis added]. In other words, to be deemed a person in authority, the accused must subjectively believe that the individual receiving the statement (i) has the ability to influence or control the proceedings; and (ii) is allied with the police or prosecuting authorities: *Hodgson* at paras 33-35. Though these criteria are judged from the accused's perspective, the accused's belief that he or she is speaking to a person in authority must be reasonable: *Hodgson* at para 34, *SGT* at para 26. If the accused cannot show that he or she had knowledge of the receiver's "close relationship to the authorities ..., the inquiry pertaining to the receiver as a person in authority must end": *Hodgson* at para 39.

[32] The court in *Glessman* determined that the statements made to the complainant and her boyfriend were admissible as those individuals were not persons in authority:

> 11 Without necessarily accepting the appellant's interpretation of the minority's reasons in *Hodgson*, we find that the trial judge did not err in the application of the test. She did not find that the complainant could not be a person in authority simply because of her status as a complainant. Rather, the trial judge examined the evidence. While the appellant may have believed that the complainant had the ability to influence the proceedings against him, in the sense that she could decline to report the incident to the police and ensure that proceedings were never initiated, there was no indication that the appellant believed the complainant was connected to the police or the prosecution. In fact, he did not know at that time that the incident had even been reported, and the complainant testified that he specifically asked her not to contact the police. The appellant did not testify on the *voir dire*, so there was no direct evidence that he believed her to be a person in authority, and the balance of the evidence did not compel that inference. Accordingly, the trial judge did not err in concluding that the appellant failed to

meet his evidential burden of establishing that he reasonably believed that the complainant was connected to the state.

12 Similarly, we are not persuaded that the trial judge erred in her conclusion regarding the boyfriend. He testified that he made it very clear to the appellant that the choice whether to alert the authorities was the complainant's alone. As the trial judge observed, there was no evidence that the appellant was aware of any police contact by the boyfriend before the two conversations. The trial judge was entitled to infer that it was not reasonable to believe that there was any collaboration between the boyfriend and the police. This ground of appeal is dismissed.

[33] In *R. v. Louangrath*, 2014 ONSC 1126, Aitken J. discussed the issue of whether a call-taker at the Ottawa Police Reporting Center was a person in authority. Aitken J. stated:

19 In each of *R. v. Latham*, [1993] O.J. No. 4534 (Gen. Div.) and *R. v. Paquette* (1999), 94 O.T.C. 182 (Gen. Div.), the accused called 911 to report a shooting. In both cases, the court determined that the 911 operator was not a person in authority. The 911 operator was not considered to be an agent of the police. In addition, the operator was not otherwise involved in the arrest, detention, examination, or prosecution of the accused. Nor was there any evidence to suggest that the accused reasonably thought that the 911 operator was a person in authority.

20 The circumstances of this case are slightly different in that Mr. Vezina was not a 911 operator but was, instead, a civilian call-taker working for the Ottawa Police Services. It is arguable that someone would think that Mr. Vezina was, in some fashion, an agent of the police.

21 Furthermore, some of the information volunteered by Mr. Louangrath to Mr. Vezina could be interpreted as an attempt on his part to reduce any suspicion that might exist regarding his involvement in the offences against Messrs Morrice and Fradette. He claimed to have parked his vehicle at a locale more distant from The Drink than other witnesses could place it. He claimed that he had left his car parked in the Market overnight because he had consumed too much alcohol and could not drive home safely. He claimed not to have seen the damage to his vehicle until shortly before he called the police on April 24, 2011 at approximately noon. He suggested that the damage to the vehicle had likely occurred overnight. He claimed not to be aware of any potential suspects. During the course of the trial, the Crown will be tendering evidence to contradict these assertions. This raises the question as to whether Mr. Louangrath's call to the police was for the purpose of having a police report created for insurance purposes or whether it was, in fact, an effort to mislead the police. Based on the reasoning in *Grandinetti* at paras. 39-44, the concept of a "person in authority"

> does not include someone who "seeks to sabotage the investigation or steer the investigation away from a suspect that the state is investigating".
>
> 22 Although the question of whether Sacha Vezina is a person in authority is an interesting one, I do not see the need to determine it conclusively. As outlined below, even assuming that the Crown has not proven beyond a reasonable doubt that Mr. Vezina was not a person in authority, the answer to the third question is so patently obvious so as to be determinative of this application.

[34] Justice Aitken then went on to add:

> 24 In the circumstances of this case, there is no evidence whatsoever of any factors suggesting the exercise of coercive powers on the part of the state.
>
> 25 Mr. Louangrath initiated the telephone call to the Ottawa Police. He volunteered information as to why he was calling. The stated purpose for his call was to have a police report completed about the vandalism done to his vehicle so that he could provide the number of the police report to his insurance company. He willingly provided personal details and details about the vehicle in question. He provided additional information about subjects not raised by Mr. Vezina, such as his having had too much to drink the night before and his leaving his car in the Market area overnight. At no time did Mr. Vezina make any threats or promises. It was clear from the conversation that Mr. Louangrath had an operating mind and was communicating in an efficient and precise manner. No police trickery was employed to get any information from Mr. Louangrath.

[35] In *R. v. Ziegler*, 2016 ABQB 150, Renke J. held a *voir dire* to decide whether two 911 call-takers were persons in authority, and if so, whether the 911 calls were admissible. The accused testified on the *voir dire.* In discussing this testimony, Renke J. stated:

> 110 After Mr. Schafers was shot, Mr. Ziegler called 911. He spoke to two operators in succession. The recording of that call was tendered by the Crown as proof of the truth of its contents. The authenticity of the CD recording was conceded. Mr. Ziegler confirmed that he was the person who spoke to the 911 operators as recorded on the CD tendered as an exhibit. The admissibility of the 911 call was not challenged under the *Charter*, but was challenged under the common law voluntariness rules. A *voir dire* was held. Mr. Ziegler testified in the *voir dire*. I concluded that the 911 call was admissible and admitted the recording as an Exhibit. A summary of my reasons for admitting the 911 call follows.
>
> ...
>
> 114 I referred to *R v Hodgson*, [1998] 2 SCR 449 and *R v SGT*, 2010 SCC 20, [2010] 1 SCR 688. I found that, in the circumstances, Mr. Ziegler believed that he was talking to the police when he was speaking with the 911 operator. That claim was not undermined through cross-examination. No evidence was tendered that

> undermined that conclusion. Mr. Ziegler, then, satisfied the "subjective" element of the evidential burden he carried. But was it reasonable to believe that the 911 operator was a person in authority? See *R v Louangrath*, 2014 ONSC 1126, Aitkin J at paras 15 - 21.

[36] In deciding that the 911 call-takers were persons in authority, Renke J. stated:

> 116 However, the manner in which the first 911 operator identified himself ("fire, ambulance, police") provided a basis for the reasonable inference that the operator was connected with the police service. The second 911 operator identified himself as being connected with the police only, which provided a stronger basis for the conclusion that the operator was part of the police apparatus. See *R v Glessman*, 2013 ABCA 86 at para 11. Mr. Ziegler had called about a shooting, he was providing details about the incident, and he believed -- I find reasonably -- that what he communicated would be relayed to the police. He was trying to cooperate, to provide the necessary information to the authorities, and to make the situation as safe for all involved as he could.
>
> 117 As Justice Iacobucci emphasized in *Oickle* at para 71, the voluntariness assessment must be contextual, not categorical. Persons in authority include not only those involved in arrest, detention, examination or prosecution, but individuals who can influence the prosecution or investigation of the crime. That is to say, the trial judge must determine whether the accused reasonably believed the receiver of the statement was acting on behalf of the police or prosecuting authorities or was allied with the state authorities and could influence the investigation or prosecution against the accused: *Hodgson* at para 35.
>
> 118 I therefore found that the 911 operators were persons in authority. The Crown then was required to establish, beyond a reasonable doubt, the voluntariness of Mr. Ziegler's communications with the 911 operators.

[37] Having determined that the 911 call-takers were persons in authority in *Ziegler*, Renke J. went on to consider whether the Crown had proven the statements were given voluntarily. In admitting the statements, the court found:

> 126 Mr. Ziegler testified to the emotions and thoughts one might expect in the circumstances -- panic, thoughts of suicide, despair at what the future might hold.
>
> 127 Mr. Ziegler testified that in his communications with the 911 operator he was trying to make situation safe, to ensure that the police had all information they needed, so that the danger of the situation would be minimized when they responded.
>
> 128 Mr. Ziegler testified that he had understood the instructions of the police during the arrest process.

> 129 I therefore concluded that Mr. Ziegler had an operating mind when making the 911 call. He had the cognitive ability to understand what he was saying and to comprehend that the evidence may be used in proceedings against him. The *Oickle* and *Whittle* tests for operating mind were satisfied by the evidence relating to Mr. Ziegler.

Analysis

[38] Mr. Butcher did not testify, so his subjective belief is unknown. Having no direct evidence of his subjective belief, I must consider the evidence I did hear to infer Mr. Butcher's subjective belief. Mr. Butcher bears the evidential burden of showing that he felt the 911 call-taker was allied with the state authorities and could influence an investigation or prosecution against him. If subjectively he did have such a belief, was such a belief reasonable? Objectively, did the 911 call-taker have authority or control over Mr. Butcher or over the proceedings or the prosecution against him?

[39] There is no doubt that the 911 call-taker is a civilian member of the Halifax Regional Police.

[40] During the 911 call it is obvious that Mr. Butcher was calling for medical assistance for himself.

[41] The following is a significant portion of the 911 call:

> 911 CALL TAKER: 911, what is your emergency?
>
> MR. BUTCHER: I need -- I need help.
>
> 911 CALL TAKER: Okay. And what's going on there?
>
> MR. BUTCHER: I killed my girlfriend and I tried to kill myself, I cut off my hand. I think I'm dying.
>
> 911 CALL TAKER: And where are you at?
>
> MR. BUTCHER: I'm at 17 Ocean -- Oceanview Drive in Purcell's Cove.
>
> 911 CALL TAKER: 7 -- 73 Oceanview?
>
> MR. BUTCHER: 17. You're going to have to breakdown the door, it's locked. I need help please.
>
> 911 CALL TAKER: Okay. And you're saying 73 Oceanview?
>
> MR. BUTCHER: No, 1-7. Help. I'm dying.
>
> 911 CALL TAKER: I can't hear the number that you're telling me. Where -- what...

MR. BUTCHER: 17, 1-7.

911 CALL TAKER: 1-7? Okay.

MR. BUTCHER: Yeah. I'm dying.

911 CALL TAKER: Okay. So 17 Oceanview Drive in Halifax, Halifax County?

MR. BUTCHER: Yeah.

911 CALL TAKER: And you phone number 902 430-4135?

MR. BUTCHER: Yeah.

911 CALL TAKER: Okay. Just stay on the line, I'm going to bring you right over to ambulance.

(Dial tone, phone ringing.)

AMBULANCE DISPATCH: Ambulance dispatch.

911 CALL TAKER: Regional 911, we have a call for EMC Metro and District.

AMBULANCE DISPATCH: Okay, go ahead.

911 CALL TAKER: It's going to be 17 Oceanview Drive in Halifax, Halifax, County.

AMBULANCE DISPATCH: Copy.

911 CALL TAKER: Call back 902 430-4135.

AMBULANCE DISPATCH: Copy. Thank you, 911. Okay, tell me exactly what happened.

MR. BUTCHER: I killed my girlfriend and I tried to kill myself, and I cut off my hand, and I'm dying.

AMBULANCE DISPATCH: Okay. Sorry, can you say that again.

MR. BUTCHER: I -- I -- I need help. I'm dying.

AMBULANCE DISPATCH: Okay, just slow your breathing down, okay?

MR. BUTCHER: I -- I can't. I'm dying. I cut off my hand.

AMBULANCE DISPATCH: Okay. The paramedics are on the way, okay? What's your name?

MR. BUTCHER: I'm dying. I killed by girlfriend.

AMBULANCE DISPATCH: Okay, listen, listen. The paramedics are on the way, okay? What's your name?

MR. BUTCHER: I -- I'm dying.

AMBULANCE DISPATCH: What is it?

MR. BUTCHER: I'm dy -- I'm dying.

AMBULANCE DISPATCH: Listen, we're coming to help you, okay? But I need you to calm down.

MR. BUTCHER: I can't, I'm…

AMBULANCE DISPATCH: I need to get some information…

MR. BUTCHER: I'm bleeding to death. I cut off my hand.

AMBULANCE DISPATCH: You cut off your hand, I know, I -- I hear what you're saying.

MR. BUTCHER: And I killed my girlfriend. She's dead.

AMBULANCE DISPATCH: You're girlfriend is dead?

MR. BUTCHER: I killed her.

AMBULANCE DISPATCH: Okay.

MR. BUTCHER: I killed her and then I tried to kill myself.

AMBULANCE DISPATCH: Okay. What's you name, sir?

MR. BUTCHER: I'm – I'm dying.

AMBULANCE DISPATCH: Sir, can you tell me your name so I can talk to you? How old are you? Hello? Sir, how old are you?

[Automated Voice: March 26th, 2016, 7 hours, 46 minutes, 46 seconds.]

AMBULANCE DISPATCH: Sir, are you there?

MR. BUTCHER: I'm dying.

AMBULANCE DISPATCH: Okay. Listen to me. Okay, you've got to slow your breathing down, okay? Take some nice deep breaths. Okay, listen, I'm sending the paramedics to help you now, okay? Just stay on the line. I'll tell you exactly what to do next. Is there an apartment number there? Can you talk to me at all? So you talk to me there, okay? Tell me what's going on.

MR. BUTCHER: I'm dying.

AMBULANCE DISPATCH: Okay, we're coming to help you. Okay, so listen carefully. I'm going to tell you how to stop the bleeding, okay?

MR. BUTCHER: I don't -- I don't want to die.

AMBULANCE DISPATCH: Okay, we're going to help you.

MR. BUTCHER: No, I don't want to die.

AMBULANCE DISPATCH: So listen to me. Get a clean, dry cloth or towel and place it right on the wound, press down firmly, and don't lift up to look.

MR. BUTCHER: I cut my hand off completely.

AMBULANCE DISPATCH: Yeah. Can you do that for me?

MR. BUTCHER: No.

AMBULANCE DISPATCH: Why not?

MR. BUTCHER: I'm dying.

AMBULANCE DISPATCH: What -- what did you use to cut your hand?

MR. BUTCHER: It's off, it's completely off.

AMBULANCE DISPATCH: Yeah, I -- I -- I know what you mean. But what did you use to cut it off?

MR. BUTCHER: I'm tired.

AMBULANCE DISPATCH: I know. I'm going to help you through this. I just need you to give me...

MR. BUTCHER: No.

AMBULANCE DISPATCH: ... some information, okay?

MR. BUTCHER: No. No.

AMBULANCE DISPATCH: Is the bleeding controlled now?

MR. BUTCHER: No, no.

AMBULANCE DISPATCH: No? So did you -- did you -- did you put a towel on?

MR. BUTCHER: No. No. No.

AMBULANCE DISPATCH: Okay, I need you to do that, okay? We need to control the bleeding.

MR. BUTCHER: No. No. Oh God.

[Automated Voice: March 26th, 2016, 7 hours, 49 minutes, 19 seconds.]

AMBULANCE DISPATCH: How -- how old are you? Can you tell me how old you are? Take some nice slow, deep breaths for me, okay?

MR. BUTCHER: No.

AMBULANCE DISPATCH: Listen, we need to get that bleeding controlled.

[42] Mr. Butcher called 911 for emergency medical assistance.

[43] Once Mr. Butcher told him that there was a medical emergency, Mr. Masters confirmed the civic address and call back telephone number for Mr. Butcher, passed the call to Ambulance Dispatch, and then monitored the line for several minutes. Mr. Butcher spontaneously told Mr. Masters that he had killed his girlfriend and that he tried to kill himself, had cut off his own hand, was dying, and

needed help. He repeated this to Ambulance Dispatch as soon as they became involved in the call.

[44] Toward the end of the call Mr. Masters attempted to determine the location of Mr. Butcher inside the residence and to ascertain whether he had a weapon, as the police were arriving on scene and he wanted to ensure public safety and the safety of the police.

[45] There is absolutely nothing about Mr. Butcher's interaction with the 911 call-taker that would suggest in any way that Mr. Butcher subjectively believed that Jordan Masters had some sort of influence over his prosecution. Even if he did have that subjective belief, objectively, such a belief was entirely unsupported.

[46] There is no evidence that the 911 call-taker had authority or control over Mr. Butcher or over the proceedings or the prosecution against him, or that he could influence the investigation or prosecution against Mr. Butcher. Based on the words spoken by Mr. Butcher to the 911 call-taker, and then to Ambulance Dispatch, medical personnel (ambulance and paramedics) were dispatched to the scene. Police were also dispatched. Mr. Butcher received emergency medical attention and was placed under arrest.

Conclusion

[47] 911 call-takers are not presumptively persons in authority. There is no evidence that Mr. Butcher subjectively believed that Jordan Masters, the 911 call-taker, was a person in authority. Objectively, even if there was such subjective evidence, Mr. Butcher's belief in this regard would not be reasonable.

[48] Mr. Butcher has not met the evidential burden required to show that Jordan Masters, the 911 call-taker, was a person in authority.

Arnold, J.