R. v. Martin, [2018] O.J. No. 5381

Ontario Judgments

Ontario Superior Court of Justice

A.J. Goodman J.

Heard: January 2-5, 2018.

Judgment: April 4, 2018.

Court File No.: CR 17-002

[2018] O.J. No. 5381 | 2018 ONSC 1677

Between Her Majesty the Queen, Crown, and Devonte Martin, Applicant

(160 paras.)

Counsel

W. Milko and D. Wilson for the Crown.

J. Goldlist and J. Razaqpur, for the Applicant.

PRETRIAL RULINGS -- APPLICATION WITH RESPECT TO THE VOLUNTARINESS OF THE APPLICANT'S STATEMENT AND SS. 10(a), 10(b) & 24(2) OF THE *CHARTER OF RIGHTS AND FREEDOMS*

A.J. GOODMAN J.

1 The applicant, Devonte Martin ("Martin"), is charged along with two other accused with one count of first degree murder, contrary to s. 229 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. The offence is alleged to have occurred on January 8, 2015 in the City of Hamilton.

2 The Crown seeks a ruling that Martin's June 15, 2015 formal statement to Detective Ashbaugh ("Ashbaugh") of the Hamilton Police Service ("HPS") was voluntarily made and admissible at trial.

3 The applicant seeks an order that his formal statement to Ashbaugh was in violation of his ss. 10(a) and (b) rights and, therefore, should be excluded pursuant to s. 24(2) of the *Charter*.

4 A single *voir dire* was held with respect to all issues. The Crown called four police officers. The applicant did not testify and no affidavit was filed in support of his *Charter* applications.

Background:

5 The facts are taken from the facta and materials filed in this application and primarily from the *viva voce* evidence from the four officers who testified in this hearing.

6 On January 8, 2015, Nathan Miller was shot and killed in a residence located at 28 Madison Avenue in the City of Hamilton. Several suspects were involved and all fled the scene. A police investigation ensued and eventually Shamoiey Akindejoye and Jemaal Wilson were arrested and charged with the murder. The HPS investigation continued in relation to the applicant.

7 On June 25, 2015, the applicant was under surveillance by the HPS surveillance unit at 2501 Argentia Road in Mississauga. At 11:32 a.m., he was arrested at gunpoint by Detective Oxley and other plain clothes surveillance officers. Detective Callender ("Callender") arrived at the scene within several minutes. Callender formally arrested the applicant and read him his rights to counsel ("RTC") and caution. The applicant was then transported to Central Police Station in Hamilton. Later that same day, Ashbaugh conducted a lengthy interview of the applicant.

8 During the course of the interview, the applicant denied culpability for the homicide, but apparently acknowledged being at the residence on Madison Avenue proximate to the time of the shooting. A copy of the video and a transcript of the interrogation was filed as an exhibit in this application.

Voluntariness of the applicant's statement to Officer Ashbaugh:

Positions of the Parties:

9 Crown counsel submits that the prosecution has established beyond a reasonable doubt that Martin's statement to the police was voluntary. He submits that there was nothing in the conduct of the police which created an atmosphere of oppression unfairly overbearing Martin's choice to speak or not. Crown counsel submits that the officer's behaviour and use of various interview techniques, together with the Martin's responses and comments, all indicate an atmosphere of voluntariness. There was no issue of any inducements or threats to speak, nor was there any *quid pro quo* offered to elicit a confession.

10 The probative value of the statement given by Martin outweighs the prejudicial effect of its admission. Otherwise, any prejudice may be ameliorated by a jury caution or vetting of the statement, if necessary.

11 Counsel for Martin submits that Ashbaugh is a highly trained police interrogator, eminently familiar with the principles of psychological manipulation. During the course of the interrogation, Ashbaugh put these skills to work by using implied threats and inducements, veiled *quid pro quo* offers, unacceptable trickery and misleading statements, information manipulation, inductive mental and conversational devices, and coercion. It is submitted that the situation created by Ashbaugh was designed to wear down the mental resistance and operating mind of a very young and unsophisticated twenty year old, and to systematically dismantle and violate his right to silence. Eventually Martin's will was overborne and he made an involuntary statement. Further, no secondary caution was provided to Martin in this case.

12 Counsel submits that Ashbaugh's manner of conducting the interrogation, including the use of the

Reid technique, was oppressive. Martin submits that, although not overt, there were inducements, several *quid pro quo* offers, and an overall atmosphere that caused his will to be overborne. Martin's statement to police therefore ought to be excluded.

Legal Principles:

13 There is no real dispute between the parties as to the overarching admissibility rules and legal principles relating to the issue of voluntariness.

14 I have considered the leading authorities, including but not limited to the seminal cases of *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3; *R. v. Smith*, [1991] 1 S.C.R. 714; and *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405. An accused person's statement to a person in authority, whether inculpatory or exculpatory or a combination, is presumptively inadmissible. "Voluntariness is the touchstone of the confessions rule": *Oickle*, at para. 69. The prosecution must establish (beyond a reasonable doubt) that the statement was made voluntarily: *R. v. Spencer*, 2007 SCC 11, [2007] 1 S.C.R. 500, at para. 11.

15 The confession rule has developed, as its underlying rationale, concerns as to the reliability of the accused's statement in terms of its truthfulness, fairness to the accused, including the right to freely choose whether to speak to the authorities or not, and the repute or integrity of the criminal justice system itself. While all these aspects of the voluntariness rule often overlap and need to be assessed on the particular facts, the concern for reliability remains the "primary reason" for the confessions rule: *Singh*, at paras. 29-30; *R. v. Colson*, 2008 ONCA 21, 88 O.R. (3d) 752, at para. 34.

16 In *Oickle*, the Supreme Court of Canada made it clear that *Charter* protection did not subsume the common law voluntariness rule. The essence of the rule is that a confession by a suspect will be inadmissible if it is the result of "fear of prejudice or hope of advantage" exercised or held out by a person in authority. Threats or inducements made to obtain a confession become improper where a reasonable doubt exists as to whether the will of the subject has been overborne - that is, that the subject's will to resist and effectively control his right to choose to speak or remain silent has been sapped.

17 The appropriate legal test is of course a question of law; however, applying the voluntariness test of admissibility is essentially a question of fact or of mixed law and fact: *Oickle*, at para. 22. In assessing voluntariness, the court must be sensitive to the particularities of the individual suspect including his or her state of mind during police questioning: *Oickle*, at para. 42. In effect, the application of the confession rule "will by necessity be contextual": *Oickle*, at paras. 47 and 71. All relevant circumstances, the "entire context", must be examined: *Spencer*, at para. 17; *Oickle*, at paras. 47, 79 and 83. Thus, the admissibility rule effectively maintains a balance between individual and societal interests. In *Oickle*, Iacobucci J. dealt with the concept of oppression, at paras. 58 and 60:

> . . . 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.
>
> . . . Under inhumane conditions, one can hardly be surprised if a suspect confesses purely out of a desire to escape those conditions. . . . 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.

18 An accused in custody or under arrest cannot simply walk out of the room and away from police questioning. There is, undoubtedly, some vulnerability for the accused who undergoes custodial interrogation and a greater risk of abuse of power by the police: *Singh*, at paras. 32 and 45; *R. v.*

Hebert, [1990] 2 S.C.R. 151, at p. 176. Accordingly, close scrutiny of the police interviewers' actions is necessary in the context of the specific detainee and his or her personal circumstances.

19 There exists no right for an accused not to be spoken to by the authorities and "[t]he importance of police questioning in the fulfillment of their investigative role cannot be doubted": *Singh*, at para. 28. The authorities are entitled to use legitimate means of persuasion to have a suspect provide a statement: *Hebert*, at pp. 176-7 and 184; *Oickle*, at para. 33; *Singh*, at para. 47; *R. v. Smith*, [1989] 2 S.C.R. 368, at paras. 45-47.

20 A confession is powerful evidence for the prosecution. At the same time, the law has always viewed confessional evidence with a healthy degree of skepticism, given that some police investigators may, in their zeal to solve crimes, induce a confession from the lips of the accused. Recall that in *R. v. Rothman*, [1981] 1 S.C.R. 640, the Supreme Court of Canada held that police must sometimes of necessity, resort to tricks or other forms of deceit - as long as it is not conduct that shocks the community.

21 However, if the conditions created by the police are oppressive, it follows that this could overbear the subject's will to the point that the confession is induced and unreliable.

22 Again, depending on the facts of the specific case, an inducement to elicit a confession may be express or implicit. Not every inducement by a police interviewer is necessarily fatal to a finding of voluntariness. As mentioned, police actions become "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": *Oickle*, at paras. 57 and 68.

Legal principles applied to this case:

23 Turning to the circumstances of the present case, except for the first five to seven minutes where the police confronted Martin and initially effected his arrest, I observe that the entirety of Martin's interaction and utterances prior to, during, and following his formal statement were audio-recorded. During the interview, his formal statement to Ashbaugh was captured by audio and video.

24 In *R. v. Moore-McFarlane* (2001), 56 O.R. (3d) 737 (Ont. C.A.), Charron J.A. held, at para. 64, "I agree that there is no absolute rule requiring the recording of statements. It is clear from the analysis in both Hodgson [[1998] 2 S.C.R. 449] and Oickle that the inquiry into voluntariness is contextual in nature and that all relevant circumstances must be considered."

25 That said, the Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police. The absence of audio or videotaped evidence for a portion of the interaction does not automatically make such evidence inadmissible. All of the circumstances must be reviewed.

26 Here, I have testimony from the officers and a chronology of the interaction with the applicant and the police upon his arrest. In lieu of audio recordings, I have evidence from the officers who were at the scene, including Officers Oxley, Callender, and Hutton. Officer Court did not testify, but his notes were admitted into evidence on consent. None of these officers' accounts of the arrest were seriously challenged. They made notes contemporaneously or shortly after the events unfolded.

27 Juxtaposed with the audio captures of the interaction with the applicant, I am satisfied that the entire interaction of the police with Martin is before me.

<u>The absence of a secondary caution:</u>

28 Martin was provided with the primary caution. At no time during his interaction with the police was he provided with a secondary caution.

29 The absence of a secondary caution is not fatal to the issue of voluntariness or the admissibility of a statement. However, it is an important consideration as to the issue of voluntariness pertaining to the potential for direct or subtle promises, inducements, or threats. While prudence directs that such a caution be considered when an offender has consequential contact or interaction with various persons in authority, each case must be considered on its own particular facts.

30 I find the police officers' evidence to be credible and I accept their testimony, which in turn permits a reasonable conclusion that during their entire interaction with Martin, no offers, inducements, threats, promises, conversations, or otherwise were offered that would impact upon his subsequent interaction with Ashbaugh.

31 During the early stages of the formal interview, Ashbaugh began to provide Martin with the secondary caution. Accordingly, as Ashbaugh began to caution Martin, he was interrupted in mid stride when the interviewee sneezed and requested a tissue. Ashbaugh never formally completed the secondary caution.

32 In cross-examination, Ashbaugh testified that he considered the utility of a secondary caution given Martin's prior interaction with several officers. However, after viewing the audio/video interview he acknowledged that he failed to follow through. Ashbaugh conceded that he missed completing the secondary caution after the interruption. In my review of the video statement, there is no fault to be attributed to the officer. It appeared that there was an inadvertent interruption of the flow of information that apparently threw Ashbaugh off track.

33 As mentioned, while it is preferable that a secondary caution be read when an offender has contact with various persons in authority prior to providing a statement, in my opinion, it is not fatal to the admissibility of Martin's statement to Ashbaugh in the circumstances of this case. Again, I have no qualms about the police interaction with Martin prior to the formal interview.

The search incident to arrest:

34 Upon his arrest, Martin was subjected to a search incident to arrest for approximately five to seven minutes. Martin was subjected to a subsequent, albeit brief, secondary search at the scene prior to transport to Central Station of the HPS. Various officers explained that the secondary search of a detainee may not be policy or a practice, but by virtue of their training, such a procedure is undertaken for both officer and offender safety when an offender is transferred into the custody of another officer. Here, Martin was exposed to a momentary secondary search prior to being transported by another officer. I accept the officers' rationale for the search. I find that all of the aforementioned complaints regarding the police activity at the scene and prior to the commencement of the interview, including the lack of a secondary caution and employing a second search, did not breach the applicant's rights or cause any concern with respect to the voluntariness issue.

35 I find that there was neither conversation, substantial or otherwise, nor eliciting of information with Martin at any time during his arrest or prior to his encounter with Ashbaugh that would give rise to any inducements, threats or promises, which the secondary caution is meant to address.

The interview and formal statement:

36 Ashbaugh interviewed Martin at the HPS Central Station commencing at 2:18 p.m. on June 25, 2015.

37 In submissions, Mr. Razaqpur detailed concerns about the use of the Reid technique employed in this case. This includes direct positive confrontation, body positioning in relation to the interviewee, touching of the interviewee, acknowledged deceit by the interviewer, convincing the interviewee to tell the truth, displaying sympathy and understanding, suggesting themes to appeal to the interviewee's moral conscience, minimization of the interviewee's role, condemning others, presenting alternatives, apologies, and lengthy monologues.

38 In support of his position, counsel referred extensively to the Alberta Queen's Bench case of *R. v. Minde*, 2003 ABQB 797, 343 A.R. 371. In *Minde* at para. 32, the trial judge canvassed the use of the Reid technique in that case.

39 At the outset, I find that *Minde* is factually distinguishable in that the conduct of the police in that case can be described as creating an atmosphere of significant or overwhelming deceit. In *Minde*, the police appeared to have fabricated acute evidence by promoting the falsity that the deceased provided a dying declaration. Further, the accused was advised that the officers would provide him with assistance to avoid being charged with murder if he told his side of the story: para. 87. None of this conduct arises here.

40 That said, the trial judge in *Minde* was highly critical of the Reid technique employed by the police in that particular case.

41 On my review of *Minde*, it seems that, at times, the trial judge did not relate or link all her concerns or disapprovals about certain segments of the Reid technique to the question of its impact, if any, on the subject's will or operating mind. For example, there is no discussion in *Minde* of the impact on the accused of reproaches about moral and spiritual inducements, direct positive confrontation, praise and flattery, physical contact, or lengthy monologues.

42 In any event, I do not share the same overall observations provided by the learned jurist in

Minde. With respect, I am not persuaded that employing the Reid technique, in whole or in part, has such disutility in conducting police interrogations, even bearing in mind its potential impact on the legal question of voluntariness.

43 Further, I do not subscribe to counsel's blanket criticisms such that the use of the Reid technique during the course of an interrogation, in and of itself, ought to make his client's statement inadmissible. In other words, the use of some or all of the Reid technique by a police interrogator, *per se,* does not make a statement involuntary based on the considerations listed in *Oickle* and its progeny.

44 What is critical in an assessment of voluntariness when the Reid technique or any other interrogation strategy is employed by the police is the resulting effect upon the interviewee's operating mind and whether it overbears his choice to speak. In some circumstances, this strategy can translate to an inducement or coerciveness. If so, the statement must be ruled involuntary.

45 To this point, Martin identifies specific areas of concern about the circumstances of the taking of the statement and the police conduct in this case.

46 The entire June 25, 2015 interrogation was just over three and a half hours long. A transcript was filed in these proceedings. The relevant portion of the interview is captured in the first 81 pages. [1]

47 **Direct confrontation**: Ashbaugh is a highly articulate, experienced, and skilled interrogator. He had no other involvement in the case and was tasked with the interrogation. He did not physically threaten the accused. He engaged in lengthy monologues and called Martin by his first name. The officer testified that his method of interrogation is an amalgam of his experiences in interviewing many accused persons over a number of years.

48 The officer conceded that he utilized and adapted some features of the Reid technique. Ashbaugh verbally confronted the applicant by using phrases such as "I know you were in the residence" or changing the inflection in his voice. Ashbaugh showed video captures and other photographs. At one point, Ashbaugh pointed his finger and hand at the applicant in the pretext of firing a pistol.

49 The officer believed that Martin was present at the scene of the homicide. He knew that the accused was youthful and polite. Martin was offered food and beverage. During the interview, Martin made no complaint to the officer about the treatment accorded him. Quite the contrary, the interviewee and officer were cordial and polite. The officer never raised his voice to the extent that was demonstrably assertive. Frequent interview interruptions occurred. While becoming tired, Martin did not show any signs of distress during the audio/video interview. In fact, the entire interaction can be described as respectful even in these trying circumstances.

50 I do not find that any direct confrontation caused Martin's will to be overborne. I agree with the Crown that during the bulk of the interview, Martin provided virtually no answers to any important or substantive questions, but used the interview to question the officer.

51 **Denigration of counsel**: Ashbaugh confirmed with Martin that he was provided with his RTC and caution. It is at this point that the following exchange took place [pages 22-23]:

> TA: So, we're going to talk about a group of people that were at this house, 28 Madison Avenue in January of this year. Now, 28 Madison Avenue, do you know where that is, in Hamilton?
>
> DM: I'm sorry, I don't mean to disrespect you or anything. I just want to exercise my right of silence. I don't mean to disrespect you in any way and I hope you don't see it as disrespect or anything.
>
> TA: Devonte, I want you to listen to me, I don't take it as disrespect at all, I don't. It's your right, your right to remain silent is very important. It's very, very important in Canadian law, but what I want you to think about is this; is, you have the right to choose. So, when somebody gives you advice, you have the right to take it, or you have the right

to not take it, does that, do you understand that choice?

DM: [nods yes].

TA: So it's not a rule that you have to, it's a right that you have and you can decide whether you want to take it or not. And I always think about when making choices, who's the most important person in your life?

DM: Other than myself?

52 Ashbaugh then provided an anecdote to Martin, citing his grandfather as having been the most important person in his life to go to for advice. Ashbaugh explained that on one occasion there was a benefit to not taking his grandfather's advice [pages 23-24].

53 I accept the Crown's position that the officer did not in any way denigrate counsel, legal advice, or Martin's choice to remain silent by reference to the officer's grandfather. Rather, Ashbaugh offered the latter as an example of a respected advisor. Ashbaugh's analogy simply spoke to the fact that the interviewee was free to follow advice, or not, as was his choice. I am not persuaded that at any time during the interview, Ashbaugh belittled the lawyer's role in providing advice to a client.

54 In the context of the entirety of the statement, these and other similar words used by the officer in commenting on Martin's choices or referring to the lawyer or legal process, were legitimate means of persuasion aimed at encouraging Martin to talk. From all of his comments, I do not find that Ashbaugh denigrated counsel of choice at any time.

55 The following exchange demonstrates that the officer was being forthright concerning the interview process; Martin, who in turn, acknowledged his understanding [page 26]:

DM: I'm just talking to myself. Sorry, did you ask me a question? I'm so sorry.

TA: That's okay. I know you're thinking about a lot of things and that's why I'm not interrupting and talking when you're thinking**.** Because a lot of the time, I ask a question for one of two reasons, one, I want to find out information or *two, I want to deal with a situation that I already know the answer to*.

DM: I know.

TA: Right? And that's not being tricky or that's not, that's just the way I do my interviews.

DM: Yes.

56 I accept that after posing questions about the factual and legal basis for the charges, and having been made to understand the legal basis for his culpability for murder, Martin was still very interested

in finding out about the case against him. Up to this point in the interview, Martin was engaged and acknowledged what he was being told by Ashbaugh. He was reminded as to his freedom to speak to the officer or not, and that their conversation was being recorded and could be used in evidence. There was no "soliloquy". The fact of Martin repeatedly posing questions and making inquiries of Ashbaugh speaks to his free will and his intentions concerning his participation in the interview.

57 **Deceit**: During his cross-examination, Ashbaugh conceded telling the applicant certain lies. Ashbaugh admitted that he used deceit as part of his interview technique in order to foster rapport with the accused. He said that he sometimes uses lies (for example, the victim's mother praying for her son and "the boys" involved [page 43]), personal stories, or other individualized inroads to establish a rapport with the interviewee and gain his confidence.

58 In these circumstances, Ashbaugh engaged in permissible deception. There is no community shock arising from his use of deceit. Martin was not inexperienced with the criminal justice system. As mentioned, it is abundantly clear to me that Martin, at times, controlled the interview process, posing questions and only responding in an attempt to elicit further information seemingly in the possession of the police. In my view, nothing in Ashbaugh's confrontational technique was improper.

59 **Moral responsibility**: Ashbaugh told Martin during the interview, "I know you were there" [page 44], and "you want nothing to do with this" [page 72]. Ashbaugh referred to judgment by God and a theme of forgiveness [page 73], and belief in God [page 43], amongst other entreaties.

60 In my opinion, there is nothing problematic or objectionable about police, when questioning suspects, downplaying or minimizing the moral culpability of the alleged criminal activity, or enhancing the complicity of co-accused. At no time did Ashbaugh suggest that a confession would result in reduced or minimal legal consequences.

61 The statement and questions posed by the officer did not minimize the offence anywhere close to the extent of oppression within the meaning of *Oickle* and other authorities. In suggesting that "this is your opportunity" to tell your story, and otherwise encouraging Martin to tell the truth, Ashbaugh was making an appeal to the applicant's conscience.

62 Further, in describing the difference in levels of culpability for murder in what the officer described as in "layman terms", he did not, viewed objectively, purport to provide legal advice to the applicant as a persuasive means to lever him from remaining silent. These, and other questions or statements like them, were neither oppressive nor impermissible trickery.

63 **Downplaying the applicant's role**: There is no doubt that Ashbaugh minimized the applicant's role in the offence in his discussions with him. The officer drew a distinction between Martin and the other suspects. He claimed that he was not dealing with the shooter, but rather believed the interviewee to be a party to the offence.

64 Having reviewed the videotape of the interview, the overall tenor of the officer's approach was to suggest that the accused was not a bad person, but that he had been present at the time of the offences and maybe got too involved or events went too far; essentially that he made a mistake.

65 As Iacobucci J. held in *Oickle*, insofar as the police merely downplay the moral culpability of the offence, their actions are not problematic. The real concern is whether the police suggest that a confession will result in legal consequences being minimal: para. 74.

66 In my view, Ashbaugh did no more than downplay the applicant's culpability for the offence. Clearly, Martin understood that he was charged with a serious criminal offence. His concern about jail time supports the conclusion that the applicant knew there might be serious consequences, including jail time, if he was convicted of the offence.

67 **Moral inducements**: It is alleged that Ashbaugh spoke to Martin about legal or moral culpability and there were subtle inducements offered throughout the course of the interview.

68 In accordance with the prevailing jurisprudence, the use of moral inducements will not generally produce an involuntary confession because police officers are not capable of controlling such inducements. Neither these nor any other transcript statements dealing with alleged moral inducements were improper in this case.

69 After oral submissions but prior to release of these Reasons, Ms. Goldlist on behalf of Martin, sought and was granted permission to make further brief arguments related to a very recent decision from the Court of Appeal in *R. v. Wabason*, 2018 ONCA 187.

70 In addressing an issue of voluntariness, in *Wabason*, Pardu J.A. stated at paras. 17-19:

> In *Oickle*, at paras. 53-54, Iacobucci J. held that phrases like "it would be better if you told the truth" do not automatically require exclusion, but rather require exclusion only where, in the entire context of the confession, the circumstances reveal an implicit threat or promise. Here, the comments made by the officer were far more coercive than words to the effect of "it would be better" to talk. In the entire context of the appellant's interrogation and statement, the officer's comments went beyond spiritual exhortations, or appeals to conscience and morality. They amounted to both threats and promises.
>
> The application judge erred in discounting the inducements and threats on the basis that no police or court action was promised in return. Properly conceived, the interviewing officer's veiled inducements of decreased jeopardy for speaking and threats of increased jeopardy for silence gave rise to an implicit *quid pro quo*.
>
> Given this *quid pro quo*, the application judge should have gone on to assess whether, in all the circumstances, the inducements and threats "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": *Oickle,* at para. 57.

71 Ms. Goldlist submits that Pardu J. has now expanded the notion of voluntariness beyond *Oickle* to capture implicit inducements that may arise in the course of an interrogation. For example, at one point Ashbaugh says; "It will make a difference if you tell me today". The cumulative effect in this case from the multiple subtle and implicit inducements caused her client's will to be overborne.

72 Ms. Goldlist provides various examples where she says such implicit inducements arise. Aside from exercising his rights to silence, no less than 15 examples were advanced by counsel. [2] Many of these have already been adduced by Mr. Razaqpur during his submissions in this application.

73 I return to Ashbaugh's statements to the effect that "it does make a difference if you were to tell the truth today and that the best thing to do is to tell the truth. He said that you are being co-operative with me and I appreciate that." Taken in isolation, this statement and others may well leave the impression that it would look good to the authorities if Martin were to confess and that it would make a difference to his future.

74 Mr. Milko on behalf of the Crown responds that it was always made crystal clear that there was no *quid pro quo* or inducements offered, explicitly or implicitly. In fact, it was Martin who controlled the interview, consistently and repeatedly making inquiries and testing the officer's knowledge. From his responses, it is clear that Martin was on a fact finding trek. Ashbaugh clearly spelled out the jeopardy that Martin faced. Martin knew the jeopardy he faced during the interview, just prior to his admission and especially at its conclusion. Mr. Milko submits that police are entitled to vigourously pursue an investigation through an interrogation of a suspect. Here, there was nothing that can suggest Martin's will was overborne.

75 There is no dispute that Ashbaugh never offered any explicit inducements. The question remains however, where is the line drawn with respect to implicit inducements by an officer? The answer lies in the contextual assessment of the entire interview and whether the interviewee's will was overborne.

76 On this question, suffice it to state that I agree entirely with Mr. Milko's submissions and his assessment of the evidence. Put into context, I believe that all of the impugned references in the transcript are more accurately viewed as an appeal to Martin's morality or conscience.

77 Ashbaugh repeated his request for Martin's side of the story. Indeed, Martin questioned the

officer at times about the nature of the evidence being relied upon by the police. Martin repeatedly engaged the officer to tease out this information. The officer replied in kind. Ashbaugh only asked for the truth that would ultimately emerge after the completion of the investigation. Ashbaugh assured the interviewee that the police had spoken to others and were going to talk to everyone involved and evaluate the entire situation. Whether the "truth" being sought was the police theory of the case or not, is of no moment.

78 In any event, having carefully considered the interview as a whole, it appears to me that the officer made a successful appeal to morality or conscience. I have not forgotten that the appeal to conscience took place in the context of a strong confrontation in which Ashbaugh repeatedly told Martin that he knew the offence had taken place and some false suggestions of certain evidence.

79 At no time did Ashbaugh implicitly suggest that a confession by the applicant would result in reduced or minimal legal consequences. Quite the contrary. Again, towards the end of the interrogation, Martin acknowledged that he is facing a first degree murder charge, "no matter what": p.65. This is followed up with similar references throughout the interrogation up to its termination.

80 In assessing this important evidence with a mind to the comments raised by the Court of Appeal in *Wabason*, when I consider the entirety of the interview, I find that standing alone or in combination with other factors, the alleged implicit inducements are not strong enough to raise a reasonable doubt about whether Martin's will was overborne.

81 **Right to silence**: Martin also submits that the officer breached his right to silence. During the course of the interrogation, he asserted his right to silence approximately four times. As mentioned, the interview was approximately 3.5 hours long with a few brief intervals.

82 It is settled law that there is a right for a police officer to continue to speak to the interviewee in the face of the subject's right to remain silent: *Singh.*

83 That said, police persistence in conducting an interview in the face of repeated refusals to speak may raise a strong argument that the statement is not the product of a free will. However, in my view, that did not occur here. Despite asserting his right to silence, Martin engaged the officer and posed questions. There is nothing in relation to this case and complaint that gives rise to any criticism under this heading.

84 ***Quid pro quo***: One of the significant themes under this segment of the application was Martin's assertion that the officer offered a *quid pro quo* in order to induce him to talk. Much time was spent on this issue during the cross-examination of the officer, and it was referred to at great length during submissions.

85 In *Oickle*, the Supreme Court of Canada held that the existence of a *quid pro quo* is the most important of the considerations, but is still not by itself determinative of voluntariness. Recall that in *Spencer*, the Supreme Court of Canada held that the *Oickle* test is "sensitive to the particularities of the individual" and that its application "will by necessity be contextual": *Spencer*, at para. 13.

86 Threats or promises, oppression, and the requirement of an operating mind are factors that are to be considered together. When assessing inducements, which are squarely in issue in this application, the most important consideration is the existence of a *quid pro quo.* It is not, however, a necessarily determinative factor. Ultimately, "it is the strength of the inducement, having regard to the particular individual and his or her circumstances that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement": *Spencer*, at para. 15.

87 As I read *Oickle,* the decision does not state that any *quid pro quo* held out by a person in authority, regardless of its significance, will necessarily render a statement involuntary. It is important to consider that inducements are improper only when, standing alone or in combination with other factors, they are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne.

88 I have already touched upon this theme several pages earlier in these Reasons. However, it bears some repetition due to Martin's counsel focusing on this point during the initial argument on voluntariness. Martin submits that during the interview, Ashbaugh provided subtle or covert comments that would give rise to an inference or conclusion that a *quid pro quo* was offered.

89 Mr. Razaqpur alleged several instances of such veiled or subtle *quid pro quo* offers by pointing out examples of Ashbaugh's comments at pages 25, 26, 37, 44, 59, 61, 65, and 67 of the transcript.

90 Was there a *quid pro quo*? In considering Ashbaugh's remarks at the pages referenced by counsel

and in the context of the entire interrogation - including comments that were capable of being misunderstood - could it be said that those statements had the potential to be perceived by Martin as an inducement or coercion?

91 Again, it is true that Ashbaugh's statements were not "explicit offers" by the police to a *quid pro quo*. The applicant emphasizes that they were implicit or subtle offers to induce a confession.

92 Martin did not testify on the *voir dire.* From the words found in various parts of the transcript, I am satisfied that Ashbaugh was neither attempting to hold out nor did hold out any inducement to Martin. I find that none of the words that Martin complains of had the potential to be perceived as an inducement or a *quid pro quo*.

93 Instead, I am persuaded that Ashbaugh was attempting to invite Martin, who throughout the interview was claiming that he had not been involved in the murder whatsoever, to provide a story that would clear him of liability or minimize his liability. During this interview, Martin repeatedly asked what information the officer had that caused him to be arrested for first degree murder. Ashbaugh did provide information during the course of the interrogation. When Martin suggests that certain of the officer's comments are problematic, viewed in context, rather than in isolation, I believe it was clear to the interviewee that no inducement or *quid pro quo* was being offered and his statement would not make any difference to the charge. The suggestions would not have, and in fact did not, convince Martin to make his statements or that any protestations of innocence would be futile.

94 Even if a police interrogation contains subtle coercive elements, this will not necessarily result in a finding that the confession was involuntary and inadmissible. For a ruling of inadmissibility, it must be apparent that there was some clear, causal connection between the alleged police misconduct and the subsequent confession. None exists here.

95 Ashbaugh also referred to Martin's redeeming qualities. During interrogations, it is common practice for police to try to engage the suspect in a reassuring conversation, which has the result of building a trusting relationship between interviewer and accused. There is generally nothing improper in police use of this interview technique, and there was nothing improper in the questions of that nature that were used in this case.

96 At no time did Ashbaugh inform Martin that if he felt he wanted to get this off his conscience, the officer could make promises. Even if there was some implicit suggestion that leniency would result from a confession, this is distinct from *Wabason*. Here, there is no nexus to the comments and any *quid pro quo* or inducement to confess. First, Ashbaugh made it clear that this was certainly not the case. Second, from Martin's own responses, there is no doubt in my mind that he knew that the officer was not promising him any leniency if he confessed.

97 I have considered the entirety of the circumstances in which the statement was obtained, the seriousness of the charge, the degree to which, if at all, the police breached societal values, and the jurisprudence. I am satisfied beyond a reasonable doubt that Martin's statement to the police was entirely voluntary.

Sections 10(a), 10(b), and 24(2) of the *Charter*:

Positions of the Parties:

98 Mr. Razaqpur on behalf of the applicant submits that his client's rights were not provided in a meaningful manner to bring them into alignment with constitutional standards. Mr. Razaqpur submits that prior to the interview and during the course of the interrogation, his client was not afforded the appropriate reasons for the arrest on this very serious charge in order to fulfil s. 10(a) of the *Charter.* It is submitted that Ashbaugh violated the applicant's s. 10(b) rights, including denigrating and undermining the advice of counsel, failing to facilitate the applicant's understanding of his RTC, and refusing reasonable requests to re-consult counsel where it was clear the applicant did not understand. The police violated the applicant's s. 10(b) rights in numerous ways during the interrogation.

99 The Crown responds that there was no violation of the applicant's ss. 10(a) or 10(b) *Charter* rights. The applicant was provided with the information and implementation components of his rights as required under s. 10(b). The police informed the applicant of his RTC in a way that was comprehensible and they facilitated his consultation with counsel appropriately. The Crown submits that the applicant fully exercised his RTC when he spoke with counsel of choice.

100 The Crown submits that in the event that a s. 10(b) Charter violation is found, the applicant's statement ought not to be excluded pursuant to s. 24(2) of the *Charter.*

Sections 10(a) and (b) of the *Charter*:

101 Sections 10(a) and (b) of the *Charter* read as follows:

> Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefore;
>
> (b) to retain and instruct counsel without delay and to be informed of that right.

102 Once engaged, s. 10(a) obliges the police to provide the reasons for the arrest or detention. Section 10(b) imposes both an informational and implementational duty on the police. The informational duty requires that the detainee be informed of the right to retain and instruct counsel without delay. The implementational duty requires that police provide the detainee with a reasonable opportunity to retain and instruct counsel. This obligation also requires the police to refrain from eliciting incriminating evidence from the detained person until he or she has exercised RTC and has been provided with a reasonable opportunity to reach a lawyer or has unequivocally waived his or her rights.

103 It is settled law that in order for an accused person to be able to exercise his RTC in a meaningful way, he must be aware of the extent of his jeopardy. In *R. v. Evans,* [1991] 1 S.C.R. 869, the Supreme Court of Canada held, at p. 888, as follows:

> When considering whether there has been a breach of s. 10(a) of the *Charter*, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all of the circumstances of the case, was sufficient to permit him to make a reasonable decision ... to undermine his right to counsel under s. 10(b).
>
> In effect, what is required is that an accused be possessed of sufficient information to allow him to assess the seriousness of his situation and on that basis to determine whether or not he requires the advice of counsel. Police are clearly under an obligation to re-advise an accused person of their rights to counsel where, during the course of an interview, the focus of the investigation being pursued has changed.

Legal principles applied to this case:

104 In my opinion, there was an important piece of the informational component missing from the series of events that unfolded here.

105 At 11:32 a.m., the applicant was arrested at gunpoint by HPS plainclothes officers at a hotel parking lot in Mississauga. He was initially arrested for first degree murder by Officer Oxley, assisted by Detective Constable Court. Detective Constable Court read the applicant his RTC. At 11:41 a.m., the arrest was continued by Callender, who again formally arrested the applicant and provided him with his RTC. The applicant was specifically advised that he could call a lawyer "right now" however he responded that he would call one "when we get wherever we're going, I guess," indicating that he would wait until they got to the police station. He was advised that everything was being audio-recorded. In addition, Callender read a standard caution. The applicant expressed his understanding to all of the above.

106 At 12:16 p.m., Callender, accompanied by Detective Hutton, transported the applicant to Hamilton, with no conversation and no questioning undertaken by the officers.

107 From 1:06 to 1:24 p.m., the applicant spoke to his lawyer in private.

108 At 1:57 p.m., Callender provided the applicant with a sandwich, which was not consumed, along with water. At 2:18 p.m., he escorted him into an interview room and transferred custody of him to Ashbaugh.

109 Early on in the interview, Ashbaugh put two direct questions to the applicant. First, "do you know Nathan Miller?", and second, "did you kill him?" The applicant responded, "No, I don't know no one named Nathan Miller" and "I ain't killed nobody in my life, Officer" [page 24].

110 The interview then proceeded with an important exchange [pages 36-37]:

TA: Why do you ask me that?

DM: ...want to make a statement.

TA: You want to make a statement?

DM: No, I don't, I don't know what's going on right now.

TA: Okay. Well...

DM: I don't know how I'm -- my name's up here. I don't know why I'm in this police station getting questioned for murder.

TA: Okay.

DM: And I'd really like to know.

TA: And we'll...

DM: And now you're, you're asking me questions and I don't, I'm not answering nothing.

I want to know before like, how, like how am I being charged with a murder?

TA: Okay.

DM: That's my whole concern right now because you can't just -- I understand you can't just charge someone for a murder.

TA: No, no, there has to be evidence, right?

DM: Yes, so that's, that's my concern right now, how...

TA: What the evidence is.

DM: How am I being charged for a murder?

111 After about an hour, the applicant's stated priority was to be told how and why he was being charged for first degree murder. At no time from his entire interaction with officers at the scene of the arrest until approximately 32 minutes into the interview with Ashbaugh was the applicant advised of the name of the deceased, or the location and date of the alleged murder.

112 Frankly, I have reduced concerns about the specifics of location or date not being furnished to the applicant. It is settled law that the police are not obliged to provide all details related to the exercise of one's s. 10(a) *Charter* rights.

113 However, the jeopardy in this case relates to first degree murder. Does the omission of the deceased's name in the circumstances of this case give rise to a breach of the applicant's s. 10(a) rights? Was the applicant promptly informed of the reasons for his arrest in order to properly contact and instruct counsel?

114 While Mr. Razaqpur criticizes this portion of the transcript for other reasons, in summing up the evidence, Ashbaugh shows the applicant a photo of shell casings which prompts a request to speak to his lawyer again [pages 69-70]:

DM: Why do you say that?

TA: Because he killed somebody in cold blood. What do you think each one of these numbers in this picture are?

DM: Circled. Looks like shell casings.

TA: Shell casings. One, two, three, four, five, six, seven, eight, nine shell casings. It means somebody pulled the trigger. That somebody [demonstrates]. You're in bed with these guys. You're there with them. You're in the house. I can put you in the house. You think about if you've got something you want to talk to me about, okay?

DM: Can I, can I -- sorry, would it be possible to call my lawyer again, or no?

TA: That's that?

DM: Would it be possible to call my lawyer again?

TA: Your jeopardy hasn't changed at all here, Jemaal.

DM: I know, I know. Devonte.

TA: So, so -- what did I say? Sorry, Devonte.

DM: What do you mean, my je -- sorry sir.

TA: So, what jeopardy means, is when you get to call a lawyer is when you've been arrested and you're charged with something like assault.

DM: Mm-hmm.

TA: You get your right to counsel, you get your right to call your lawyer. You got to call your lawyer, you were charged with first degree murder.

DM: That's it, no more.

TA: ...You were arrested on first degree murder, so you were properly informed by your lawyer, you were given your instructions. You can decide whether you want to follow these instructions or not follow these instructions.

115 The applicant made the following comment about his decision not to follow his lawyer's advice [page 78]:

DM: I didn't do nothing and I don't know nothing. Just, I didn't know, I didn't know nothing. That's what I've been telling you, Officer. I'm still gonna to get charged for...

TA: Well...

DM: ...first degree murder, no matter what I tell you. That's why I didn't want to tell you nothing. My lawyer told me not to talk. She's probably not gonna to represent me no more. This is why I didn't want to do...

116 In *Evans,* at p. 891, the Supreme Court of Canada established that an accused who does not understand his RTC cannot be expected to exercise them. Where there is an indication that an accused does not understand his rights, "the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding."

117 In support of his client's position, Mr. Razaqpur also provided the case of *R. v. MacLean*, 2013 ABQB 60, 551 A.R. 274, a decision from the Alberta Court of Queen's Bench. Aside from the exercise of the accused's RTC, the facts in *MacLean* are strikingly similar to the events that unfolded here.

118 In *MacLean*, the accused was arrested and advised of the charges. MacLean was not informed as to when or where the offence occurred, or who the victim was. He was arrested in a city different than where the alleged offences occurred, some three months after the incident that gave rise to the charges.

119 Here, the applicant was arrested over five months after the homicide occurred. He was arrested in a different city (Mississauga as opposed to Hamilton). He was arrested by several police officers in a hotel parking lot at gunpoint in what can be can only be described as a high-risk takedown. Although always polite and cordial, he was, at times, in a state of upset.

120 As mentioned, during the early stages of the interview, the applicant expressed some confusion as to the details of why he had been arrested for first degree murder. He stated to Ashbaugh that he did not know the deceased or the name revealed to him. Whether or not Ashbaugh believed the applicant's lack of awareness or knowledge regarding the deceased at that stage is of no moment.

121 In *MacLean*, at para. 38, the learned trial judge held:

> I am of the view that merely providing the nature of the allegation without providing any time frame, or where the alleged offence have occurred would not allow an individual to exercise their s. 10(b) rights in any meaningful way because they would not have any idea of what jeopardy they may be facing.

122 I agree with this statement. It is the substance of the information provided by the police and what an accused can be reasonably supposed to have understood that determines whether or not the requirement of the s. 10(a) right has been met: *MacLean*, at para. 33. As mentioned, it is true that a

detainee need not be informed about the specific details of the charges. The closer in time and proximity of location to the allegations, the less detail that may be required to be provided by the investigating officer to satisfy s. 10(a): *MacLean*, at para. 58.

123 In the recent case of *R. v. Gonzales*, 2017 ONCA 543, 136 O.R. (3d) 225, at paras. 124 and 125, Watt. J.A. had occasion to comment on s. 10(a) as it relates to s. 10(b) of the *Charter:*

> The right to prompt advice of the reasons for detention is rooted in the notion that a person is not required to submit to an arrest if the person does not know the reasons for it. But there is another aspect of the right guaranteed by s. 10(a). And that is its role as an adjunct to the right to counsel conferred by s. 10(b) of the Charter. Meaningful exercise of the right to counsel can only occur when a detainee knows the extent of his or her jeopardy: R. v. Evans, [1991] 1 S.C.R. 869, at pp. 886-887.
>
> To determine whether a breach of s. 10(a) has occurred, substance controls, not form. It is the substance of what an accused can reasonably be supposed to have understood, not the formalism of the precise words used that must govern. The issue is whether what the accused was told, viewed reasonably in all the circumstances, was sufficient to permit him to make a reasonable decision to decline or submit to arrest, or in the alternative, to undermine the right to counsel under s. 10(b): Evans, at p. 888.

124 While I do not have direct evidence from the applicant on this point, I am satisfied that his *Charter* rights in this regard were compromised in respect of his jeopardy and the extent of that jeopardy.

125 Frankly, it is difficult to understand why a police officer would not provide at least the information contained in the formal charging document. Providing this very basic bare-boned information surely would not hinder or curtail the investigating officer in seeking to obtain more information or a confession. Without this information, it would be next to impossible for an accused to provide meaningful responses to a police officer in the event of a potential alibi, or to make an informed decision on whether or not to participate in the interview: *MacLean,* at para. 59. See also *R. v. Koivisto*, 2011 ONCJ 307.

126 During the early stages of the interview, the applicant purported to have no knowledge of and limited or non-existent contact with the deceased. He appeared to be speculating, questioning his involvement, and asking questions about why he had been arrested.

127 At the very minimum, in my opinion, at least one of the officers ought to have at least provided the name of the deceased in order to adequately furnish the applicant with the reasons for his arrest on this serious charge.

128 In this case, the mere recitation of the bare bones of the charge without more was insufficient, especially in the context of first degree murder. As such, I am persuaded that the applicant was unable to fully instruct counsel. The dearth of reasons were insufficient for the applicant to fully exercise his RTC and instruct counsel prior to providing his formal statement. Once provided with some details after 32 minutes into the interview, the applicant's legitimate and ensuing request to speak to counsel of choice about the alleged murder was denied.

129 The jurisprudence clearly provides that a violation of s. 10(a) rights informs a breach under s. 10(b) of the *Charter*. Advising an accused of the reasons for their detention is more than a formal requirement. It is necessary because an individual can only meaningfully exercise their s. 10(b) rights if they know the extent of the jeopardy they are facing: *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Prosper*, [1994] 3 S.C.R. 236.

130 In my opinion, the applicant has established a breach of his ss. 10(a) and 10(b) rights under the *Charter*. It is now prudent to turn to s. 24(2) of the *Charter*.

Section 24(2) of the *Charter*:

131 Section 24 of the *Charter* states:

> (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

132 The onus is on the applicant to establish on a balance of probabilities that the admission of the evidence would bring the administration of justice into disrepute. [3]

133 In the seminal case of *R. v. Grant,* 2009 SCC 32, [2009] 2 S.C.R. 535, the Supreme Court of Canada held that the purpose of s. 24(2) is to maintain the good repute of the administration of justice. The provision focuses not on immediate reaction to the individual case, but rather on the overall repute of the justice system. The court is tasked with maintaining the integrity and public confidence in the justice system. Section 24(2) requires an objective inquiry and it asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter,* would conclude that the admission of the evidence would bring the administration of justice into disrepute.

134 In *Grant,* at para. 75, the court stated that ignorance of *Charter* standards must not be rewarded or encouraged, and negligence or wilful blindness cannot be equated with good faith. In *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22, the Supreme Court of Canada pointed out that a reviewing court should be concerned and disassociate itself in cases where the police knew or ought to have known that their conduct was not *Charter*-compliant. The approach to s. 24(2) requires consideration of the long-term, probable effect of admission of the evidence from the perspective of society at large. The focus is not on punishing the police or compensating the accused: *Harrison*, at para. 70.

135 At para. 71 of *Grant*, the Supreme Court of Canada outlined the following three lines of inquiry to take into consideration when determining whether the admission of the evidence brings the administration of justice into disrepute. They are:

> (1) the seriousness of the *Charter*-infringing state conduct;
>
> (2) the impact of the breach on the *Charter*- protected interests of the accused; and
>
> (3) society's interest in the adjudication of the case on its merits.

136 The main concern of the court is to preserve public confidence in the rule of law and its processes. Even a finding that a *Charter* breach falls at the most serious end of the spectrum is not dispositive of the s. 24(2) inquiry. An accurate assessment of the seriousness of a *Charter* breach requires an inquiry into where the police conduct falls on the continuum between good faith, lack of good faith, and bad faith.

Application of these principles to the case:

137 As mentioned, there are three lines of inquiry at play under s. 24(2) of the *Charter.* I must

consider each of the three factors and then determine whether, on balance, the admission of the evidence obtained by the *Charter* breach would bring the administration of justice into disrepute. Each factor is of equal import.

The seriousness of the *Charter*-infringing state conduct:

138 In considering the seriousness of the *Charter*-infringing state conduct, the court must ensure that it is not, in effect, condoning state deviation from the law. This is to be determined by looking at the breach on a spectrum, where inadvertent or minor violations will be viewed differently from wilful or reckless disregard of *Charter* rights: *Grant*, at para. 74.

139 The question under this first inquiry is whether admission of the evidence would bring the administration of justice into disrepute. Police conduct that shows a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law: *Grant*, at paras. 74 and 75.

140 An officer's subjective belief that an accused's rights were not affected does not make the violation less serious unless the belief was reasonable. The police conduct in this case was not deliberate; however, the police did adopt a cavalier attitude towards the applicant's rights. While careless, I do not find that the actions of the police give rise to a systemic disregard of the applicant's rights. That said, in my view, the admission of this evidence would send a message that the justice system is somehow condoning serious state misconduct and would greatly undermine public confidence in the justice system. In my view, this factor weighs in favour of exclusion.

The impact of the *Charter* violation on the *Charter*-protected interests of the accused:

141 The second branch of the test is outlined in *Grant*, at paras. 76 and 78:

> This inquiry focuses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* right however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.
>
> . . . .
>
> Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity is more serious than one that does not.

142 In *Grant,* the Supreme Court described this line of inquiry as "the danger that admitting the evidence may suggest that *Charter* rights do not count": para. 109. The seriousness of the intrusion upon the rights of an accused may vary greatly. The measure of seriousness then is a function of the deliberate or non-deliberate nature of the violation by the authorities, circumstances of urgency and necessity, and other aggravating or mitigating factors.

143 I find that that the failure to inform the applicant of the reasons for his arrest (specifically the name of the deceased) beyond a mere recitation of the offence was a very serious *Charter* violation. I am persuaded that the applicant was not able to fully instruct counsel prior to giving his statement to the police. My consideration of the second factor weighs in favour of exclusion.

Society's interest in the adjudication of the case:

144 In considering this factor, the question to be asked is "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion". The reliability of the evidence is an important factor in this line of inquiry. If the breach in question undermines the reliability of the evidence, that militates in favour of exclusion. In *Grant*, at para. 83, the Supreme Court of Canada discussed how the importance of the evidence to the Crown's case is also a relevant consideration.

145 This aspect of the inquiry considers whether the truth-seeking function of the criminal trial process would be better served by admission or exclusion of the evidence. As the Supreme Court of Canada stated in *Grant*, at paras. 79 and 82:

> Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law." Thus the Court suggested in *Collins* that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of failing to admit the evidence.
>
> . . . .
>
> The Court must ask "whether the vindication of the specific *Charter* violation through exclusion of the evidence exacts too great a toll on the truth-seeking goal of the criminal trial." [Citations omitted.]

146 Indeed, there is a societal interest in ensuring that those who break the law are brought to trial and dealt with according to the rule of law. There is no doubt about society's interest in prosecuting offences related to homicide with the use of a firearm.

147 As Crown counsel readily concedes, should the statement be excluded, the prosecution will still have a viable circumstantial case against the applicant. While I must be cautious not to place too much emphasis on this point, society's interests in the adjudication of the case on its merits are best served by not excluding evidence even if it was obtained by means of a *Charter* breach. A consideration of this public interest factor militates in favour of admission of this evidence.

148 The final step is a balancing of all of these factors. In *Harrison,* the Supreme Court provided some guidance to trial judges, at para. 36:

> The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether; having regard to all of the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

149 A declaration of a breach of s. 10 *Charter* rights tends to ring hollow if there is no remedy pursuant to s. 24(2). It is well established that "[t]he use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should

generally be excluded": *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 212, quoting *R. v. Collins*, [1987] 1 S.C.R. 265. See also *Clarkson v. The Queen*, [1986] 1 S.C.R. 383. A breach of s. 10(b) rights will generally go to the fairness of the trial and will rarely be admitted pursuant to s. 24(2) even in cases such as this one, where the police acted in good faith.

150 The impact on the *Charter*-protected interests of the applicant was very serious as it was of fundamental import that the applicant exercise his RTC with full knowledge of the jeopardy and the reasons for the arrest. Mr. Milko stresses that the breach here was merely "technical" in nature and that the applicant must surely have known the jeopardy he faced. With respect, I must disagree.

151 Here, the applicant is facing the most serious crime known to Canadian law: first degree murder. In this case, the police ought to have afforded a further opportunity to re-contact counsel. Given the circumstances of the arrest, the passage of time and the unfolding of the interview, it was especially critical that the police provide the applicant with more than just a mere recitation of the offence.

152 Notwithstanding the applicant's ensuing request to speak with counsel was denied, I agree with the Crown that the police conduct in this case did not demonstrate bad faith or a deliberate systemic disregard for *Charter* rights. However, in context, the actions of the police would invite a negative impact on the public confidence in the administration of justice and the rule of law. The evidence is of some probative value to the Crown's case considering the truth-seeking goal of the trial process and the public interest in the prosecution of serious crime.

153 The prevailing jurisprudence suggests that an accused's statement or conscriptive evidence arising from such a serious violation of his ss. 10(a) and 10(b) *Charter* rights would rarely, if ever, be admitted into evidence pursuant to the factors to be considered under s. 24(2) of the *Charter: Grant* at paras. 90-92 and 95. See also *Bartle,* and *R. v. Burlingham*, [1995] 2 S.C.R. 206.

154 After careful consideration, I find that the balancing of all of the s. 24(2) factors militates in favour of exclusion of the applicant's statement to Ashbaugh.

Conclusion:

155 I do not find any fault whatsoever with Ashbaugh's conduct in taking the statement. Ashbaugh's use of his own adapted version of the Reid technique in this case did not create an atmosphere in which Martin's will was overborne. I find that there was no causal connection between the alleged *quid pro quo* or police misconduct and Martin providing relevant information in the course of the interrogation. Neither the length of the questioning, nor any of the conditions under which it was conducted, nor the police conduct in obtaining the statement, considered both separately and cumulatively, affect its admissibility.

156 In my opinion, the combination of these or other factors mentioned in *Oickle,* is not present here. More importantly, at no point would I conclude that there were any threats, promises, trickery, or inducements that were sufficiently strong as to overbear Martin's operating mind.

157 For all of the aforementioned reasons, I am satisfied beyond a reasonable doubt that the Crown has established the voluntariness of Martin's June 25, 2015 formal statement to the police.

158 I find that the applicant has discharged his onus on a balance of probabilities to demonstrate a breach of his ss. 10(a) and 10(b) rights under the *Charter*.

159 Considering the arguments advanced in support of the applicant's position, I find that the applicant was not fully and properly advised of the reasons for his jeopardy and for his arrest during his RTC in a way that permitted him an opportunity to exercise those rights and fully instruct counsel, even with the opportunity to speak with a lawyer of choice prior to commencement of the interview with Ashbaugh. In this case, once apprised of certain information during the course of the interview and the applicant having requested to re-contact counsel of choice, which opportunity ought to have been afforded to him.

160 In respect of the balancing of relevant factors pursuant to s. 24(2) of the *Charter,* the admission into evidence of the applicant's statement in these circumstances would bring the administration of justice into disrepute. Accordingly, the applicant's formal statement to the police is to be excluded at the behest of the Crown.

A.J. GOODMAN J.

[1] Reference to pages in this ruling refers to the transcript of Martin's interview filed in this application.

[2] For example, Transcript of interview at pp. 25, 26, 33, 37, 38, 44, 45, 55, 59, 62, 65, 65 - 70,72, 73.

[3] On March 29, 2018, I provided my ruling to the parties with respect to the voluntariness issue and my finding of a breach of s. 10(a) of the Charter. As the Crown attorney had not fully addressed s. 24(2) in their original submissions, I invited further oral argument.

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