



SUPREME COURT OF CANADA

CITATION: R. v. Tessier, 2022
SCC 35

APPEAL HEARD: December 6,
2021

JUDGMENT RENDERED: October
14, 2022

DOCKET: 39350

BETWEEN:

His Majesty The King
Appellant

and

Russell Steven Tessier
Respondent

- and -

**Attorney General of Ontario, Attorney General of New Brunswick and
Canadian Civil Liberties Association**
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 112)

Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Côté,
Rowe and Jamal JJ. concurring)

JOINT DISSENTING Brown and Martin JJ.

REASONS:

(paras. 113 to 214)

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His Majesty The King

Appellant

v.

Russell Steven Tessier

Respondent

and

**Attorney General of Ontario,
Attorney General of New Brunswick and
Canadian Civil Liberties Association**

Interveners

Indexed as: R. v. Tessier

2022 SCC 35

File No.: 39350.

2021: December 6; 2022: October 14.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer
and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

*Criminal law — Evidence — Admissibility — Confessions rule —
Voluntariness — Caution — Police not cautioning individual during interviews in*

connection with murder investigation about right to remain silent and consequences of speaking to authorities — Individual later charged with first degree murder and seeking exclusion of statements made to police as involuntary — Trial judge admitting statements as voluntary despite lack of caution — Whether absence of caution during police questioning of individual affected voluntariness of statements under confessions rule — Whether statements admissible at trial.

Constitutional law — Charter of Rights — Detention — Right to counsel — Police questioning individual at police station in connection with murder investigation — Police not informing individual of right to obtain and instruct counsel without delay — Individual claiming psychological detention and seeking exclusion of statements at first degree murder trial as having been obtained in violation of right to counsel — Whether individual was psychologically detained such that statements should be excluded at trial — Canadian Charter of Rights and Freedoms, s. 10(b).

When the victim was found dead in a ditch by a rural road, the police immediately sought out several individuals connected to him for interviews, including his friend, the accused, who agreed to come to the station. The police did not caution the accused that he had the right to remain silent or that his statements could be used in evidence, nor was he informed of the right to retain and instruct counsel under s. 10(b) of the *Charter*. Over the course of the interview, the accused provided details about the victim, his relationship to him, and his own movements in the days leading up to the death. During a second interview later that same day, the accused revealed having

recently retrieved a firearm from a shooting range. The accused asked the police to come to his apartment to confirm that the firearm was still in his bedroom closet, but the police found that it was not and the accused was read his rights and cautioned. He was eventually charged with first degree murder. While he did not confess, his answers to police questions included comments that the Crown sought to introduce at trial to show that he committed the crime.

A pre-trial *voir dire* was held to determine whether the accused's statements were voluntary and thus admissible under the common law confessions rule, and whether the police had breached his *Charter* rights to silence and to counsel such that the evidence should be excluded. The trial judge found that the accused was not a suspect when he was interviewed by the police, and that his statements were made voluntarily. Moreover, his *Charter* rights were not engaged as he was not psychologically detained by the police. He accordingly held that the statements were admissible at trial. The Court of Appeal observed that the trial judge made legal errors with respect to the confessions rule. It found that the trial judge did not address whether the accused made a meaningful choice to speak to the police as a condition of voluntariness, and therefore ordered a new trial. It did not resolve the psychological detention issue.

Held (Brown and Martin JJ. dissenting): The appeal should be allowed and the conviction restored.

Per Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe, **Kasirer** and Jamal J.J.: Despite the absence of a caution, the accused's statements to the police were voluntary under the confessions rule. The accused exercised a free or meaningful choice to speak to the police and was not unfairly denied his right to silence. Given that there was a reasonable basis to consider the accused a suspect at the time of questioning, the absence of a caution raised *prima facie* evidence that the accused's statements were involuntary. However, the Crown discharged its burden by proving that the absence of a caution was without consequence and that the statements were, beyond a reasonable doubt and in view of the context as a whole, voluntary. Further, the accused was not psychologically detained, such that his *Charter* rights were not triggered. There was accordingly no breach of his right to counsel.

In accordance with the modern confessions rule, a statement will not be admissible if it is made under circumstances that raise a reasonable doubt as to whether the statement was given voluntarily. The Crown bears the persuasive or legal burden of proving voluntariness beyond a reasonable doubt. The inquiry is to be contextual and fact-specific, requiring a trial judge to weigh the relevant factors of the particular case. It involves consideration of the making of threats or promises, oppression, the operating mind doctrine, and police trickery. The operating mind consideration, for instance, requires proof that the accused was capable of making a meaningful choice to speak to the police and that the choice was not improperly influenced by state action. The language of meaningful, free or active choice emphasizes the overall voluntariness of the statement, rather than a minimum level of actual subjective knowledge that the

accused did not have to say anything to the police and that anything said could be taken down in evidence. These factors are not a checklist: ultimately, a trial judge must determine, based on the whole context of the case, whether the statements made by an accused were reliable and whether the conduct of the state served in any way to unfairly deprive the accused of their free choice to speak to a person in authority.

The confessions rule strives for a balance between the rights of the accused to remain silent and against self-incrimination and the legitimate law enforcement objectives of the state relating to the investigation of crime. These interests share a common preoccupation in the repute of the administration of criminal justice. Justice mandates a recognition that the rights of the accused are important but not without limit; it also insists that the police be given leeway in order to solve crimes but that their conduct not be unchecked. In seeking this balance, the law imposes the heavy burden on the Crown to prove voluntariness beyond a reasonable doubt, which serves as substantial protection for the accused at all stages of a criminal investigation.

The confessions rule is animated by both reliability and fairness concerns, and it operates differently depending on context. The police caution is typically understood as speaking to fairness, as the absence of a caution may unfairly deprive someone of being able to make a free and meaningful choice to speak to police when they are at risk of legal jeopardy. However, the caution does not resolve all of the concerns addressed by the confessions rule. The absence of a caution is an important but not a decisive factor in the voluntariness inquiry. A caution is designed to rectify

an informational imbalance when a detained or arrested individual is in a state of heightened vulnerability, whereas voluntariness extends to a broader complex of values animated by both reliability and fairness. Though fairness plays an important role in the modern rule, it cannot dominate the analysis to the exclusion of other values. The confessions rule is also about protecting innocent defendants from false confessions and protecting suspects from abusive police tactics, which are distinct purposes reflected in their own ways in the threats or inducements, oppression and trickery factors. These concerns persist even where a caution has been properly delivered and understood. Contextual analysis is thus required to extend adequate protections to suspects beyond what the caution provides on its own.

In deciding that the absence of a caution is an important but not a decisive factor in the voluntariness inquiry, the Court in *Boudreau v. The King*, [1949] S.C.R. 262, confirmed that the confessions rule should also remain flexible to account for the complex realities of police investigations. To make the absence of a police caution determinative of voluntariness by way of a bright-line rule would risk inhibiting legitimate investigative techniques while ignoring the other protections provided by the rule. The confessions rule accepts in its design that statements resulting from police questioning are valuable, provided they are reliable and fairly obtained; accordingly, even where a caution is not given, the circumstances may nevertheless indicate that a person has freely chosen to speak and no fairness concerns arise.

Furthermore, although a caution can contribute to ensuring that an investigation is conducted fairly, fairness considerations are unlikely to arise in the same way where the person is not suspected of being involved in the crime under investigation. Fairness concerns only really manifest once an individual is targeted by the state; where a mere witness or uninvolved individual is questioned, introducing a caution requirement as a condition of voluntariness could exact a cost on the administration of justice, notwithstanding the fact that no unfairness has arisen in obtaining the statement. To call for cautions in all circumstances would unnecessarily inhibit police work, and could even chill investigations where a person faces no apparent legal jeopardy and the intentions of police are merely to gather information. Accordingly, it is preferable to allow courts to take measure of the true circumstances of the police encounter flexibly.

The weight to be given to the absence of a caution falls on a spectrum. At one end, the significance attached to the failure to caution an uninvolved individual will typically be negligible. The relative lack of vulnerability of an uninvolved individual or witness who is questioned by police means that a caution is generally not necessary to show that the statements were voluntary. At the other end of the spectrum, the vulnerability and legal jeopardy faced by detainees cement the need for a police caution. Fairness commands that they know of their right to counsel and, by extension, of their right to remain silent so that they can make an informed choice whether to participate in the investigation. The weight attached to the absence of a caution in these circumstances will be at the highest end. In between these two extremes, where police

interview a suspect who is not detained and do not provide a caution, the lack of caution is not fatal but is an important factor in determining voluntariness.

The heightened jeopardy and consequential vulnerability faced by a suspect thus warrants special consideration in the analysis to ensure adequate and principled protections under the confessions rule. When an accused brings a voluntariness claim with respect to police questioning that did not include a caution, the first step is to determine whether or not the accused was a suspect. The test is whether there were objectively discernable facts known to the interviewing officer at the time of the interview which would lead a reasonably competent investigator to conclude that the interviewee was implicated in the criminal offence being investigated. If the accused was a suspect, the absence of a caution is *prima facie* evidence of an unfair denial of choice but not dispositive of the matter. It is credible evidence of a lack of voluntariness that must be addressed by the court directly. Depending on the circumstances, the denial of choice may be relevant to the voluntariness analysis. However, the absence of a caution is not conclusive and the Crown may still discharge its burden if the totality of the circumstances allow. The Crown need not prove that the accused subjectively understood the right to silence and the consequences of speaking, but where it can, this will generally prove to be persuasive evidence of voluntariness. If the circumstances indicate that there was an informational deficit exploited by police, this will weigh heavily towards a finding of involuntariness. But if the Crown can prove that the suspect maintained their ability to exercise a free choice because there were no signs of threats or inducements, oppression, lack of an operating mind or police

trickery, that will be sufficient to discharge the Crown's burden that the statement was voluntary and remove the stain brought by the failure to give a caution. This framework does not displace the ultimate burden on the Crown to prove voluntariness beyond a reasonable doubt. Rather, it emphasizes the legal significance of the absence of a caution as a potential sign of involuntariness where a person is a suspect.

In the instant case, the trial judge's statements of the law relating to confessions did not reflect legal errors that warranted appellate intervention. A finding of voluntariness calls for deference unless it can be shown that it represents a palpable and overriding error. Although the trial judge committed errors in concluding that the accused was not a suspect, they were not overriding mistakes. The trial judge's conclusions that the accused's statements were voluntary and that he exercised a free choice to speak should not have been disturbed.

Furthermore, the trial judge's conclusion that the accused was not psychologically detained should be confirmed. Psychological detention exists where an individual is legally required to comply with a direction or demand by the police, or where a reasonable person in that individual's position would feel so obligated and would conclude that he or she was not free to go. Three factors are to be considered and balanced: first, the circumstances giving rise to the encounter as they would reasonably be perceived by the individual; second, the nature of the police conduct; and third, the particular characteristics or circumstances of the individual where

relevant. In the instant case, the factors weigh against finding that the accused was detained.

Per Brown and Martin JJ. (dissenting): The appeal should be dismissed and the Court of Appeal's order of a new trial confirmed. The statements made by the accused during the two police interviews should have been excluded at trial.

The majority introduces a salutary change to the law by stating that the absence of a warning to suspects speaking to police is *prima facie* evidence that they were unfairly denied their choice to speak to the police. The majority can be understood as adopting a presumption of inadmissibility when statements are elicited from suspects without a warning. The rationale underlying the majority's presumption is that the absence of a caution may unfairly deprive individuals of making a free and meaningful choice to speak to police when they are at risk of legal jeopardy. There is agreement with this rationale, but the majority falls short by failing to carry it to its logical conclusion: that is, in order to ensure that individuals are making a free and meaningful choice to speak to police, police should provide a warning at the outset of all interviews — and not just interviews of suspects.

Such a rule follows from the Court's jurisprudence, which has progressed beyond a negative inquiry into police inducements, trickery, and oppression. Since at least the Court's decision in *R. v. Hebert*, [1990] 2 S.C.R. 151, confirmed more recently in *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, it has been clear that voluntariness exists only where the accused made a meaningful choice to speak with police. This

reflects the confessions rule's concern for a person's right to choose whether to speak to police, a concern that underlies the privilege against self-incrimination and the right to silence. Voluntariness requires the court to scrutinize whether the accused was denied the right to silence under the *Charter* or the common law. The inquiry focuses predominantly on the accused's ability to make a meaningful choice whether to speak with police. A meaningful choice is an informed choice. The modern conception of meaningful choice goes beyond an operating mind. The operating mind doctrine does inquire into an accused's cognitive capacity, but an accused's cognitive capacity to choose between alternatives is meaningless without information about those alternatives. Interviewees cannot make a meaningful choice without knowing that the choice is between speaking and not speaking with police and knowing of the consequences of choosing to speak.

Voluntariness is therefore premised on the assumption that the interviewee should have actual knowledge of the legally available options. It cannot merely be assumed that people interacting with the police know that they may remain silent and that whatever they say can be used in evidence. Accordingly, unlike what is proposed by the majority, the importance of a warning should not be limited to circumstances where an accused is a suspect or detainee. A warning should be given at the outset of all interviews, and its importance increases with the objective risk of self-incrimination.

The role of a warning in the voluntariness analysis requires greater clarity, brighter lines and increased protection for individuals. The Court's approach to a

warning, stated in *Boudreau*, has not been reviewed to account for later recognition by the Court of the need for an informed choice. Furthermore, the instruction in *Boudreau* that a failure to warn a suspect is “a factor and, in many cases, an important one” in assessing the voluntariness of the suspect’s statement has led to little consistency in how courts approach the failure to warn a suspect. The Court should therefore adopt a new approach to warnings. The complex of values guiding the notions of fairness and the administration of justice has evolved since *Boudreau* in 1949. A more stringent approach to a warning is needed in the voluntariness analysis, one that better upholds the confession rule’s modern protections for the common law right to silence and the principle against self-incrimination.

Since the voluntariness inquiry focuses on whether the accused made a meaningful (and therefore informed) choice to speak to police, it follows that the Crown carries a burden to prove an informed choice. The Crown must show that police warned an interviewee of the right to silence and the consequences of speaking where the police initiate contact with a person to secure information about a crime they were investigating. Absent that warning, a presumption of involuntariness arises which, if not rebutted, renders any statement inadmissible, since police cannot assume interviewees understand their rights or their risks. The Crown may rebut the presumption by establishing, based on some other objective source of information, that interviewees otherwise knew they had a right to remain silent and that anything they said could be used in evidence. The presumption will be more difficult to rebut where the risk of self-incrimination is objectively heightened whether or not the investigating

officer subjectively views the individual being questioned as a witness, suspect, or detainee. The risk is objectively heightened, for instance, when a person is invited to conduct a recorded interview at the police station, when the police take an adversarial approach during an interview, or when there is information that, objectively viewed, would raise a reasonable suspicion that the individual was involved in the crime. The presumption will not arise whenever an accused makes a statement to a person in authority, or to every interaction that an individual has with police; it arises only where police investigate a crime and initiate contact with a person to secure information about the crime.

A warning — one simple sentence — by the authorities at the outset of an interview — that the person is not obliged to say anything, but that anything said can be used in evidence, sets the necessary foundation for voluntariness and enhances the fairness of the process. Replacing the dubious assumption of universal knowledge with a simple and direct communication corrects any informational asymmetry to the benefit of all concerned. First, interviewees, having been informed of their choice, understand that they may lawfully remain silent. Secondly, police are given a clear, bright-line rule which does not rely on a cumbersome framework directing them to consider the perceived status of the interviewee at any particular point in time. Interviews are so dynamic and fluid that it has proven exceedingly difficult to pinpoint with any confidence when an interviewee becomes a potential suspect, a person of interest, a real suspect, or a detainee. Providing basic and necessary information from the outset, which is when the voluntariness requirement arises, allows authorities to proceed

without fear that an interviewee's misunderstanding about whether to speak or not will result in their carefully conducted interviews yielding involuntary (and therefore inadmissible) statements. Finally, it follows that the Crown will benefit from such information having been given to the accused at the outset, since it can therefore more easily establish the meaningful choice at the heart of the voluntariness inquiry.

This approach promotes the confessions rule's animating concern with fairness and the administration of justice, provides a strong incentive for police to warn individuals before questioning them, and helps alleviate the informational deficit and coercive element inherent in police interrogations. It will not unduly interfere with police investigations. An approach that effectively invites police to exploit the murky lines around psychological detention and rely on individuals' ignorance of their rights to extract statements where they are at risk of incriminating themselves should not be endorsed.

Applying this restated test in the instant case, the accused did not speak to police voluntarily with awareness about what was at stake. The Court of Appeal was correct in holding that the trial judge made legal errors in assessing the voluntariness of the accused's statements. The police initiated contact with the accused to secure information about a homicide investigation. This alone triggered the need for a warning. The Crown therefore had to demonstrate that the accused made an informed choice to speak to the police. Since the police warned the accused only upon seeing that his firearm was missing, the accused's prior statements were presumptively

inadmissible. With the police's questioning turning adversarial and the accused becoming a suspect partway through the first interview, the risk of self-incrimination was objectively heightened, making the presumption of inadmissibility more difficult to rebut. The Crown failed to adduce clear and compelling evidence demonstrating that the accused's statements were voluntary and thus failed to rebut the presumption of involuntariness.

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By Kasirer J.

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By Brown and Martin JJ. (dissenting)

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Matthew W. Griener, for the appellant.

Pawel J. Milczarek and *Kelsey Sitar*, for the respondent.

Frank Au and *James V. Palangio*, for the intervener the Attorney General of Ontario.

Patrick McGuinty, for the intervener the Attorney General of New Brunswick.

Samara Sectar, for the intervener the Canadian Civil Liberties Association.

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe, Kasirer and Jamal JJ. was delivered by

KASIRER J. —

I. Overview

[1] When questioned at a police station in connection with a murder investigation, Russell Steven Tessier was not told that he had the right to remain silent. He was not cautioned that, if he did speak to the authorities, what he said could be taken down and used as evidence in court. While he did not confess, Mr. Tessier's answers to police questions included comments that the prosecution sought to introduce at trial to show that he committed the crime. At the time of the interviews, Mr. Tessier was not under arrest and he was not physically detained. The parties disagree whether he had become a suspect over the course of the interviews and whether he had been psychologically detained by reason of the police conduct at the station.

[2] The statements were admitted after a *voir dire* at trial. Mr. Tessier was later convicted of first degree murder. The Court of Appeal decided that the trial judge committed legal errors when considering whether the statements had been made voluntarily, in particular by misapprehending the fairness rationale of the confessions

rule, the operating mind doctrine associated with voluntariness and the proper test for determining whether Mr. Tessier was a suspect at the time. The conviction was set aside and a new trial ordered.

[3] The principal issue raised on appeal to the Court is whether the Crown met its heavy burden to show, beyond a reasonable doubt, that Mr. Tessier's statements were voluntary pursuant to the common law confessions rule. The Court of Appeal said the trial judge failed to address the key question in this case: whether, in the absence of a caution, Mr. Tessier had been denied a meaningful choice to speak to the police "*knowing that he was not required to answer police questions, or that anything he did say would be taken down and could be used in evidence*" (2020 ABCA 289, 12 Alta. L.R. (7th) 55, at para. 54 (emphasis in original)). The appeal bears upon two related doctrinal questions under the confessions rule: first, the requirements of the operating mind doctrine and, second, the impact of the absence of a caution on voluntariness prior to detention or arrest.

[4] It has often been said that the proper application of the confessions rule aspires to strike the right balance between the individual and societal interests at play in police questioning: on the one hand, protecting the accused from improper interrogation by the police and, on the other, providing the authorities with the latitude they need to ask difficult questions to investigate and solve crime (*R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, at para. 33). Understanding the impact of the absence of a

caution on voluntariness in the pre-detention phase, and in particular on the fairness considerations that underlie the confessions rule, is integral to that balance.

[5] In *R. v. Singh*, 2007 SCC 48 [2007] 3 S.C.R. 405, Charron J. provided helpful guidance for persons in authority undertaking criminal investigations: “Even if the suspect has not formally been arrested and is not obviously under detention, police officers are well advised to give the police caution . . .” (para. 33). One understands Charron J.’s sensible intuition. While a proper caution will not guarantee that statements given thereafter are voluntary, it stands to reason that proving the accused made a free choice to speak to the authorities will be easier for the Crown if a caution is given. Because a suspect is more vulnerable to making involuntary statements than a mere witness or a person not involved in the crime, the presence or absence of a police caution is an “important” factor in answering the question of voluntariness upon which the admissibility of statements will turn (*Boudreau v. The King*, [1949] S.C.R. 262, at p. 267).

[6] What happens when the police question a suspect without providing the caution recommended in *Singh*? Mr. Tessier argues here that the trial judge should have recognized that he was subject to a degree of control by the authorities that mandated a caution to guard against an unfair denial of his free and meaningful choice to speak to the police.

[7] Charron J. was careful to say only that the police are “well advised” or should provide suspects with a caution; her remark was not in the order of a bright-line

mandatory rule which, one infers, she sensed would upset the balance struck by the confessions rule. The failure to provide a caution is not in itself fatal to admissibility (see M. Vauclair and T. Desjardins, in collaboration with P. Lachance, *Traité général de preuve et de procédure pénales 2022* (29th ed. 2022), at No. 38.28). But that this Court took the step to recommend a caution for suspects in *Singh* is an indication at common law that this lack of a caution is not without consequence on the type of proof required of the Crown to establish the voluntariness of the statements given.

[8] As part of its persuasive burden to prove voluntariness beyond a reasonable doubt at trial, the Crown must, in my view, show that the absence of a caution did not undermine the suspect's free choice to speak to the police as part of the contextual examination of voluntariness. It is an important factor that must be addressed by the Crown by pointing in particular to circumstances that prove beyond a reasonable doubt that the suspect possessed an operating mind and voluntariness was not otherwise impugned. Generally, the operating mind doctrine requires the Crown to show that the accused possessed the limited cognitive ability to understand what they were saying and to comprehend that the statement might be used as evidence in criminal proceedings (*R. v. Whittle*, [1994] 2 S.C.R. 914, at p. 939). Where the police do not provide a caution in the circumstances in which, as Charron J. says, they would be well advised to do so, the Crown must show further that the police conduct did not unfairly frustrate the suspect's ability to understand that what they were saying could be used in evidence, that they were not subject to police trickery and that there were no circumstances that would otherwise cast doubt on voluntariness.

[9] Drawing on scholarly commentary on the burden of proof relating to the operating mind dimension of voluntariness, I would recognize that the absence of a caution for a suspect constitutes *prima facie* evidence that they were unfairly denied their choice to speak to the police (see S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶8.119). In circumstances in which the accused has raised credible evidence that their status at the time of questioning was that of a suspect, the presence or absence of a caution takes on meaningful significance. Where the accused further puts the lack of a caution and their increased legal jeopardy into evidence — by cross-examining Crown witnesses or otherwise — they have met their evidentiary burden that raises the issue as to whether their statements were freely given. It then falls to the Crown to discharge its persuasive burden by proving either that the accused was not in legal jeopardy, in that they were a mere witness and not a suspect, or that the absence of a caution was without consequence and that the statements were, beyond a reasonable doubt and in view of the context as a whole, voluntary. This would give substance to the recommendation formulated by Charron J. in *Singh* for trial judges seeking to weigh the importance of a lack of caution.

[10] Beyond merely showing that the person questioned had an operating mind, there may also be circumstances in which the absence of a caution is in point of fact a willful failure by the police to give a caution. This might reflect a deliberate tactic by the police to manipulate the individual into thinking that they are a mere witness and not a suspect so that, in making a statement, their jeopardy is not at risk. Where the

failure to caution a suspect amounts to trickery, the effect of the police conduct may have an impact on voluntariness and should be analyzed in that light (see *Oickle*, at paras. 67 and 91).

[11] As Charron J. observed in *Singh* on the question of voluntariness, “the focus is on the conduct of the police and its effect on the suspect’s ability to exercise his or her free will” (para. 36). If the Crown cannot prove that the absence of a caution had no impact on voluntariness, the *prima facie* evidence of involuntariness raised by the absence of a caution will lead to a conclusion of inadmissibility. The absence of a caution weighs heavily because, where unaddressed, it represents *prima facie* evidence that the suspect has been unfairly denied their choice to speak to the police and that, as a consequence, the statement cannot be considered voluntary. This does not displace the ultimate burden on the Crown to prove voluntariness beyond a reasonable doubt. Rather, it emphasizes the legal significance of the absence of a caution as a potential sign of involuntariness where a person is a suspect.

[12] But to be clear: insisting on a caution in all circumstances where a suspect is questioned by police, or requiring that the Crown prove what amounts to a waiver of that caution, are not conditions of voluntariness. In my respectful view, the Court of Appeal mistakenly imposed this high standard based on proof of actual, subjective knowledge. Where knowledge can be shown, courts have forgiven the lack of caution, but just as the caution is not obligatory, proof of actual knowledge of the right to silence or the consequences of speaking to prove voluntariness is not either. That high standard

applied in all cases in the pre-detention phase of an investigation could upset the balance of individual and social interests upon which the confessions rule rests.

[13] For the reasons that follow, I propose to restore Mr. Tessier's conviction for first degree murder rendered by the jury. I agree with the Court of Appeal that some of the trial judge's explanations of the voluntariness rule were incomplete. However, with the utmost respect, I disagree that these amounted to reviewable legal errors that undermined the finding at trial that Mr. Tessier's statements to the police were voluntarily made. Even in the absence of a caution, and even if one were to consider Mr. Tessier to have been a suspect at the time of questioning, the record confirms that the trial judge's determination on voluntariness should not have been disturbed on appeal.

II. Background

[14] Allan Berdahl was found dead in a ditch by a rural road close to Carstairs, Alberta, on March 16, 2007. The police immediately sought out several individuals connected to the deceased for interviews, including Mr. Berdahl's friend, Mr. Tessier. On the morning of March 17, 2007, Mr. Tessier received several phone calls from the police seeking to arrange an interview at the RCMP detachment at Didsbury, near Carstairs. Mr. Tessier, who was staying with friends in Didsbury, agreed to come to the station. He had a friend drive him there and wait for him outside.

[15] Sgt. Alexander “Sandy” White first met Mr. Tessier at the detachment counter at 12:55 p.m. and escorted him to a room with a closed, unlocked door for the interview. Sgt. White was an experienced homicide officer. He was dressed in plainclothes and unarmed. Mr. Tessier was not searched. Sgt. White did not caution Mr. Tessier that he had the right to remain silent or that his statements could be used in evidence. Nor did he speak of the right to retain and instruct counsel under s. 10(b) of the *Canadian Charter of Rights and Freedoms*. Mr. Tessier was told and he understood that the interview was being audio and video recorded.

[16] The first interview lasted about 105 minutes. Prior to the meeting, Sgt. White had some information about the victim and his connection to Mr. Tessier. Notably, Mr. Berdahl was found with severe head trauma. Tire tracks, blood spatter, footprints and two cigarette butts had been found nearby. He knew what kind of truck Mr. Tessier drove. He was aware that Mr. Tessier had recently been in the company of Mr. Berdahl and was thought to be the last person to have seen the victim alive. He knew that the tire imprints found at the scene indicated a wheel diameter compatible with several types of vehicle, one of which could have been the make owned by Mr. Tessier. Sgt. White also had learned from the victim’s ex-girlfriend that Mr. Tessier had “a falling out” with Mr. Berdahl about a car and money (A.R., vol. II, at pp. 26-27).

[17] Mr. Tessier was advised that the RCMP was investigating the homicide of Mr. Berdahl. The purpose of the interview, he was told, was to obtain a biography of

the victim. Sgt. White did not expressly say that Mr. Tessier was free to leave when he wanted.

[18] Over the course of the first interview, Mr. Tessier provided information about Mr. Berdahl, his relationship to him, and Mr. Tessier's movements in the days leading up to the death. Mr. Tessier volunteered that Mr. Berdahl's ex-girlfriend "hate[d]" the victim (A.R., vol. IV, at p. 102). He said that Mr. Berdahl was a drug user, that he owed "a lot of people" money and was involved in illegal activities (p. 103). Mr. Tessier had been with Mr. Berdahl until the evening of March 15, he said, at which time they parted ways as Mr. Berdahl was leaving for Winnipeg. Sgt. White challenged Mr. Tessier, noting he appeared "mixed up" and "bothered" and should "[t]ell the truth" (p. 117). He asked if there was any reason why Mr. Tessier's DNA would be on the side of the road south of Didsbury. Mr. Tessier answered no. He told Sgt. White the make and model of his car, as well as the brand of cigarettes he smoked, noting that he and Mr. Berdahl often exchanged cigarettes. On more than one occasion, Mr. Tessier asked what happened to Mr. Berdahl. At one point Sgt. White said "I'm only here looking for the truth and that's – that's my job. . . . And you hold the truth as far as I'm concerned, Steve" (p. 127). Mr. Tessier answered that he did not know.

[19] About mid-way through the interview, Sgt. White asked Mr. Tessier for a DNA sample so the police could compare it to any DNA found at the crime scene which, he said, was a technique used as a matter of course to eliminate people from investigation. Providing the DNA sample was voluntary, noted Sgt. White. He then

asked Mr. Tessier if he thought the murder was planned and what happened in between Mr. Berdahl being at the house and turning up dead on the side of the road, to which Mr. Tessier said, “I’m scared to answer questions, I don’t know what to do” (p. 126). Sgt. White asked Mr. Tessier if he killed Mr. Berdahl. “No I didn’t”, Mr. Tessier responded (p. 127). Sgt. White asked if Mr. Tessier could “prove” he did not do it (p. 127). Sgt. White again requested a DNA sample. Mr. Tessier stated, “Why wouldn’t I?” (p. 129). Mr. Tessier then asked to go outside for a smoke, which he did unattended. While outside, Mr. Tessier consulted with his friend, who advised him not to provide the sample. He was observed by an officer while outside. Upon returning, Mr. Tessier declined to provide the sample as he did not want to be “painted into a corner” (p. 130). He explained, “I’m the only person that you guys got and that’s not good. . . . [T]his is bothering me” (p. 130). Mr. Tessier did allow Sgt. White to take a photograph of the sole of his shoe.

[20] Sgt. White then accompanied Mr. Tessier outside and, soon after, the interview concluded with Mr. Tessier inviting police to his home in Calgary to inspect and collect some of Mr. Berdahl’s possessions, as he had been staying with Mr. Tessier recently. Mr. Tessier then asked if he was free to go. Even though his friend was present with a car, Mr. Tessier asked Sgt. White to drive him back to his truck. Following the interview, a briefing was held at the detachment and a police surveillance team was put in place to observe Mr. Tessier.

[21] Soon after the first interview, Mr. Tessier called Sgt. White and left him several voice messages, seeking to provide him with additional information. Receiving no response, Mr. Tessier returned that same day to the Didsbury detachment at about 5:10 p.m. looking for Sgt. White. A second interview began. Sgt. White informed Mr. Tessier that he was turning the recorder on again. Mr. Tessier said that he had recently retrieved a firearm from a shooting range, and he wanted a police officer to come to his apartment in Calgary to confirm that it was still in his bedroom closet. Sgt. White and another officer followed Mr. Tessier to his apartment. Once there, Mr. Tessier showed officers the gun case, but there was no gun inside of it. Mr. Tessier asked Sgt. White if he should call a lawyer, to which Sgt. White responded that they were there “to investigate Al’s death” (A.R., vol. II, at pp. 129-30). Sgt. White then read Mr. Tessier his rights and cautioned him.

[22] Mr. Tessier was charged with first degree murder in 2015 when his DNA was matched to a cigarette butt found near the scene.

III. Proceedings Below

A. *Voir Dire Ruling, 2018 ABQB 387 (Yamauchi J.)*

[23] A pre-trial *voir dire* was held to determine whether the Crown had met its burden to show that Mr. Tessier’s statements were voluntary and thus admissible under the common law confessions rule. The trial judge also considered Mr. Tessier’s

argument as to whether the police had breached his *Charter* right to silence and right to counsel and that, as a result, the evidence should be excluded under s. 24(2).

[24] In respect of the confessions rule, the trial judge concluded that the statements had been made voluntarily.

[25] He wrote that the policy rationale for the right to silence and the confessions rule “is to prevent the state from receiving false confessions” (para. 16, reproduced in A.R., vol. I, at p. 16). The evaluation of voluntariness is contextual and a court must consider all the relevant factors relating to how the state authorities obtained the statement, including the existence of threats, promises, or inducements; oppressive conditions; the lack of an operating mind; and police trickery (para. 18, citing *Oickle*, at paras. 47-71).

[26] Based on a review of the relevant evidence, including the recordings of the interviews, the trial judge observed there were no threats, promises or inducements by the police and that no inadmissible or non-existent evidence was used when speaking to Mr. Tessier (paras. 36-37).

[27] The trial judge considered whether Mr. Tessier lacked an operating mind during the interviews. Pointing to *Whittle*, he wrote that the operating mind “does not imply a higher degree of awareness than knowledge of what the accused is saying”, and that they are speaking to police officers who can use it to their detriment (para. 39, citing *Whittle*, at p. 936). Noting that Mr. Tessier was neither impaired by reason of

drugs or alcohol, nor suffering from a mental disability, the trial judge concluded that he had the limited degree of cognitive ability associated with an operating mind on the date of the interviews (para. 41).

[28] At the time, Mr. Tessier was not a suspect, nor was he arrested or detained. Even if he were a suspect, there was no duty to provide a caution. The failure to caution a suspect could unfairly deny the suspect the choice to speak with authorities, which is a factor courts must consider when deciding whether a suspect made a statement voluntarily (para. 45, citing *R. v. Morrison*, [2000] O.J. No. 5733 (QL), 2000 CarswellOnt 5811 (WL) (S.C.J.)). Unfairness did not arise here because there was no misconduct on the part of Sgt. White. Mr. Tessier was not treated oppressively. Sgt. White allowed Mr. Tessier to leave the interview room when he requested to go outside for a cigarette.

[29] The trial judge concluded the pointed questions asked by Sgt. White were neither aggressive nor intimidating within the meaning of *Oickle* and that, as such, they did not mean that Mr. Tessier was a suspect. He considered Charron J.'s comments in *Singh* that a police caution should be given to a suspect, but noted that it was not a direction (para. 47). Based on the information he had at that point in the investigation, Sgt. White's belief that Mr. Tessier was not culpably involved in the murder of Mr. Berdahl was objectively reasonable (para. 51).

[30] The trial judge further held that Mr. Tessier was not detained and, as a result, the rights under s. 10 of the *Charter* did not arise. He specifically rejected the

argument that Mr. Tessier had been psychologically detained. Mr. Tessier's presence at the detachment was a response to a police request rather than to a command (para. 66). He arrived by his own means (para. 69). Mr. Tessier had been free to go and, when he did leave, he himself chose to ride with Sgt. White to his truck (para. 71). Informing Mr. Tessier of the right to counsel at this juncture was not required (paras. 82-83).

[31] Given the conclusions that Mr. Tessier's statements were made voluntarily and that he was not psychologically detained, the statements were admissible at trial.

B. *Court of Appeal of Alberta, 2020 ABCA 289, 12 Alta. L.R. (7th) 55 (Schutz, Khullar and Antonio JJ.A.)*

[32] The Court of Appeal observed that the trial judge made "legal errors" with respect to the confessions rule. On that basis, the appeal was allowed. While the trial judge's decision that the statements were voluntary was a factual one deserving of deference on appeal, the Court of Appeal wrote that "if all of the relevant circumstances are not considered, the [c]ourt owes no deference to the trial judge's conclusion on voluntariness" (para. 23).

[33] By reason of an erroneous understanding of the modern confessions rule, the trial judge did not turn his mind to whether, in the absence of a caution as to the right to silence, Mr. Tessier understood that what he said to police could be used against him, and that he was not obliged to say anything (para. 46). That legal error was traced

to the trial judge's failure to recognize the fairness rationale for the confessions rule and the relevance of the repute of the administration of justice. For a statement to be considered voluntary, the Crown must show the accused had a meaningful right to remain silent when questioned by police. Instead, the trial judge wrongly focussed on avoiding false confessions (at para. 47) and failed to undertake the contextual analysis of the relevant factors mandated by the jurisprudence (para. 48).

[34] This was most evident in the trial judge's treatment of the operating mind doctrine. It was erroneous, the court said, to conclude that an operating mind requires only a limited degree of cognitive ability to understand what is being said. *Whittle* does not provide a full account of the factors to consider in deciding whether someone has made a meaningful choice to speak to the police (para. 51). Beyond an operating mind, voluntariness also implies "an awareness about what is at stake in speaking to persons in authority, or declining to assist them" (para. 52, citing *R. v. Worrall*, [2002] O.J. No. 2711 (QL), 2002 CarswellOnt 5171 (WL) (S.C.J.), at para. 106). It was never in dispute that Mr. Tessier possessed minimal cognitive capacity. However, the trial judge did not address whether Mr. Tessier "made a meaningful choice to speak to the police *knowing that he was not required to answer police questions, or that anything he did say would be taken down and could be used in evidence*" (para. 54 (emphasis in original)).

[35] The trial judge also erred by elevating the "suspect" rule of thumb to a legal test, in particular in respect of the relevance of the absence of a caution. Undue

emphasis was placed on the fact that Sgt. White did not subjectively perceive Mr. Tessier as a suspect, and thus was not required to provide a caution (para. 55).

[36] A new trial was thus required to consider whether, in the absence of a caution, Mr. Tessier had made a meaningful choice to speak to the police (para. 60).

[37] The court briefly discussed the psychological detention issue, but chose not to resolve it. It noted that it was not necessarily an error to consider the factors outlined in earlier cases, provided full consideration is given to the factors in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, in answering the key question: Would the police conduct cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction (para. 69)?

IV. Issues

[38] This appeal raises the following two issues:

- Firstly, in the pre-detention phase of the criminal investigation, how did the absence of a caution during police questioning affect the voluntariness of Mr. Tessier's statements under the confessions rule? Was he unfairly denied a meaningful choice to speak to police such that his statements must be considered as involuntary and thus inadmissible?

- Secondly, was Mr. Tessier psychologically detained in breach of his *Charter* rights and, if so, what impact did that have on the admissibility of his statements? In particular, should attendance at a police station for an officer-requested meeting be treated as a detention, absent steps taken by the police to communicate the contrary?

[39] There is overlap between these matters but it is useful to address the voluntariness question first. The confessions rule protects the right to silence at all times during an investigation whether or not the interviewee is in detention, whereas the residual *Charter* protections of the s. 7 right to silence arise only on detention (*Singh*, at para. 32; see also G. T. Trotter, “The Limits of Police Interrogation: The Limits of the Charter” (2008), 40 *S.C.L.R.* (2d) 293, at p. 302). I will address Mr. Tessier’s psychological detention argument and whether he met the burden that falls to him to show a breach of the *Charter*. However, in light of the Crown’s burden to show voluntariness under the confessions rule at common law, I find it convenient first to address his voluntariness claim which arises in the context of pre-detention investigative questioning by the police, including his argument that he was a suspect at the time. The burden rests with the Crown to prove beyond a reasonable doubt that the pre-detention statements were voluntary. If it succeeds, there will be no breach of his s. 7 right to silence protected by the *Charter* because Mr. Tessier will have exercised a free choice to speak (*Singh*, at para. 25; *R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 184; *R. v. Timm* (1998), 131 C.C.C. (3d) 306 (Que. C.A.)). The issue as to whether Mr. Tessier

was psychologically detained and, if so, whether a breach of his s. 10(b) *Charter* right to counsel warrants the exclusion of the statements from evidence at trial will be examined thereafter.

V. Analysis

[40] As a preliminary matter, I propose to address the Court of Appeal's conclusion that the trial judge committed reviewable errors of law. I am of the respectful view that the Court of Appeal was mistaken to order a new trial on this basis. Clarifying this at the start helps bring into focus the key issues in the case: the impact of the lack of caution on the choice to speak to police in the pre-detention phase of the criminal investigation and the question of Mr. Tessier's psychological detention at the police station.

A. *Correctness of the Trial Judge's Reasons*

(1) Submissions of the Parties and Standard of Review

[41] The Crown defends the trial judge's reasons and says he made no reviewable errors in law. In its submission, the Court of Appeal itself erred in law in its discussion of the concept of meaningful choice and, in particular, of the operating mind doctrine. The court introduced a higher standard by which the Crown must effectively provide proof of actual, subjective knowledge — proof beyond a reasonable doubt that the accused knew they did not have to say anything to police and that

anything said could be taken down and used in evidence. By misidentifying the operating mind test set by this Court in *Whittle* and confirmed in *Oickle*, the Court of Appeal wrongly applied what amounts to a waiver standard to proof of voluntariness: it inadvertently created a requirement by which police must caution individuals even when they are not detained or even suspected of committing an offence. A waiver standard, under which an absolute right to silence is assumed and all statements are excluded unless the right has been waived by the accused, was explicitly rejected by McLachlin J. in *Hebert*, who said “[t]here is nothing in the rules underpinning the s. 7 right to silence or other provisions of the *Charter* that suggests that the scope of the right to silence should be extended this far” (p. 183). It risks stifling basic and uncontroversial police practices and upsets the balance between the social interest in investigating crime and the legitimate aspects of the confessions rule that serve to protect the accused. The trial judge, it says, applied the correct legal principles and deference should be shown to his findings of fact, absent proof of a palpable and overriding error.

[42] Mr. Tessier defends the Court of Appeal’s identification of legal errors that, he says, undermined the trial judge’s conclusion on voluntariness. The trial judge took a restrictive view of the confessions rule linked exclusively to the reliability of the statement made. He neglected fairness considerations that require the Crown to show that persons interviewed by police should be informed of their right to silence and provided with a free and meaningful choice to speak to police as a measure of voluntariness. The trial judge erred in respect of the operating mind doctrine by tying

it to the requirement of limited cognitive ability. As the Court of Appeal observed, a meaningful choice to speak to the authorities commands not just limited cognitive ability, but also an awareness of what is at stake when making a statement to a person in authority. This includes an assessment of an interviewee's actual knowledge of their right to silence. When an interviewee's liberty is potentially in jeopardy, the police should provide a caution prior to questioning. In these circumstances, a person must have a meaningful choice to speak based on information about their corresponding legal rights. Admissibility should turn on the exercise of this meaningful choice irrespective of whether a person is a suspect, person of interest, or witness.

[43] It is noteworthy that before the Court of Appeal, Mr. Tessier argued that the trial judge erred in finding that Sgt. White did not suspect that he was involved in the homicide and that the trial judge gave "insufficient weight" to the fact that police did not caution him (para. 22). Even as he defends the judgment of the Court of Appeal, Mr. Tessier renews those arguments before this Court. These arguments allege essentially errors of fact and errors of mixed law and fact in the measure of voluntariness. A finding of voluntariness calls for deference unless it can be shown that it represents a palpable and overriding error (*Oickle*, at paras. 22 and 71; see also *Singh*, at para. 51; *R. v. Ewert*, [1992] 3 S.C.R. 161, at p. 162; *Ward v. The Queen*, [1979] 2 S.C.R. 30, at pp. 41-42; *Mom v. R.*, 2018 QCCA 1381, at para. 23 (CanLII); *Legault v. R.*, 2017 QCCA 1769, at para. 3 (CanLII); *R. v. D.N.*, 2018 BCCA 18, 358 C.C.C. (3d) 471, at para. 62; *R. v. Cunningham*, 2017 ABCA 169, 349 C.C.C. (3d) 82, at para. 4). An appellate court may only intervene where the error is "overriding and determinative

in the assessment of the balance of probabilities with respect to that factual issue” (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 35). The standard of review associated with the finding of voluntariness is tied to the idea that the analysis under the confessions rule must be a contextual one in which bright-line rules are few. Where the law is properly understood and the relevant circumstances considered, the trial judge is best placed to measure that context and make the relevant findings.

(2) The Trial Judge Did Not Err in Law

[44] The Court of Appeal identified three errors of law committed by the trial judge. First, it said he overlooked the fairness rationale for the confessions rule (see paras. 6 and 47). Second, he adopted a flawed understanding of the operating mind doctrine which he confined to whether the individual had basic cognitive capacity. The trial judge is said to have ignored whether Mr. Tessier made a meaningful choice to speak based on an awareness of what was at stake (see paras. 50-52). And third, he erred in law when he decided that because Sgt. White did not subjectively perceive Mr. Tessier as a suspect, he was not required to give him a caution and that, as a result, the absence of a caution did not impact on voluntariness (see para. 55).

[45] While the criticism of some of the trial judge’s imprecise statements of the law relating to confessions is not unfounded, I respectfully disagree with the Court of Appeal that these reflected “legal errors” that warranted appellate intervention. Appellate courts charged with reviewing the work of trial judges should not read single sentences in isolation, however incongruous they might seem standing alone as

statements of the law. A court of appeal must consider the law as it is presented in the whole of the judgment under review (see, e.g., *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 16). In light of the presumption that a judge knows the law, including the settled principles of law with which they are regularly confronted, this is the right course for appellate review for weighing supposed errors of law as well as those of fact (see *R.E.M.*, at para. 45; *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 54).

[46] Read as a whole, the trial judgment here indicates plainly that the judge identified the correct legal principles and did not commit reviewable errors of law in the manner identified in *Oickle*, at para. 22. I propose to turn briefly to each of the supposed legal errors to explain why there were none. In my respectful view, the complaints that he was insufficiently attentive to fairness considerations, or erred in weighing whether Mr. Tessier had an operating mind, are determinations bearing on whether the statements given were voluntary, which are questions of fact.

(a) *The Fairness Error*

[47] While it is true that the trial judge did not mention the fairness rationale for the confessions rule at para. 16, his incomplete statement is not a reviewable error of law when read in light of the balance of his reasons. The trial judge cited and applied fairness principles throughout his judgment.

[48] The trial judge considered *Whittle* at length, a case, as Sopinka J. emphasized at p. 932, that recognized the strong undercurrent of fairness to the accused in the criminal process as part of the confessions rule. The trial judge quoted extensively from *Morrison*, a case principally about fairness, including excerpts where the judge in that decision recognized that suspects have a right to choose freely whether to speak to the authorities or remain silent (para. 43, citing *Morrison*, at para. 57). Most importantly, the trial judge drew from the holding in *Morrison* that the failure to caution must “effectively and unfairly deny the suspect the choice” to speak and concluded that Mr. Tessier had not been treated unfairly in all of the circumstances (paras. 45-46, citing *Morrison*, at para. 57). Moreover, the trial judge asked the ultimate question posed by Charron J. at para. 53 in *Singh*, namely whether the accused exercised free will by choosing to make a statement (para. 53). He also considered police trickery at para. 21, the branch of the confessions rule generally associated with fairness (*Oickle*, at para. 69; see also L. Dufraimont, “The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions” (2008), 40 *S.C.L.R.* (2d) 249, at pp. 253-54).

[49] Despite an incomplete statement of the confessions rule at para. 16, these aspects of the trial judge’s analysis show an adequate engagement with the legal principles that include fairness as a rationale for the confessions rule. Whether fairness was given sufficient weight is a distinct matter — a question of fact, reviewable on a different standard — from the identification of fairness as a rationale of the legal test. No reviewable error was made on this point.

(b) *The Operating Mind Error*

[50] The Court of Appeal says at para. 50 of its reasons that the trial judge failed to apply the operating mind test set forth in *Whittle*. It is true that, at one point in his judgment, the trial judge appears to embrace a narrow understanding of the test, pared down to the question of whether an interviewee has a “limited degree of cognitive ability to understand what he is saying” (para. 41). But as the Court of Appeal itself recognized, the trial judge quoted more liberally from *Whittle* at para. 38, including the relevant dicta that an accused not only have the ability to understand what they are saying, but also the ability to comprehend that the statement may be used as evidence in criminal proceedings.

[51] It appears to me that the Court of Appeal’s objection to the trial judge’s reasons in this regard is its sense that *Whittle*, contrary to the trial judge’s understanding of this point of law, “does not address what factors to consider in deciding whether someone made a meaningful choice” (para. 51). Yet as *Whittle* suggests at p. 932 of Sopinka J.’s reasons, the confessions rule, the right to silence and the right to counsel are together concerned with “preserving for the suspect the right to choose” and whether “the action of police authorities deprive[d] the suspect of making an effective choice by reason of coercion, trickery or misinformation or the lack of information”. In *Whittle*, it was determined that the operating mind consideration of the voluntariness test requires proof that the accused was capable of making a meaningful choice to speak to the police and that the choice was not improperly influenced by state action. The

trial judge's determination of the law relating to the operating mind was, when the judgment is read as a whole, not mistaken in a material way.

[52] Respectfully, the cases do not support the Court of Appeal's wider interpretation of the operating mind doctrine. In the context of a detained or arrested suspect, the cases that employ the language of "choice" use it as a shorthand for voluntariness, to speak to the idea that a voluntary statement reflects an exercise of free choice which choice may be frustrated by the conduct of police (*Boudreau*, at pp. 269-71; *Whittle*, at pp. 932 and 939; *Hebert*, at p. 181; see also *Oickle*, at paras. 24-26; *Singh*, at paras. 35 and 53). The terms variously used in these cases, including "free", "active" and "meaningful" choice, are not predicated on any normative difference existing between them. All have been invoked in the jurisprudence to convey that the choice is voluntarily exercised when it is the product of an operating mind, as well as the absence of other factors as the context indicates, including police tricks, that would otherwise impugn voluntariness. As to the operating mind cases, they merely refer to the limited cognitive ability of a person to comprehend, in the case of *Horvath v. The Queen*, [1979] 2 S.C.R. 376, the police caution or, in the case of *Whittle*, what is being said and that it may be used as evidence in criminal proceedings (*Horvath*, at p. 425; *Whittle*, at p. 939; see also *Ward; R. v. Love*, 2020 ABQB 689, 21 Alta. L.R. (7th) 248, at para. 53). The default assumption in the cases is that, absent a cognitive impairment, an operating mind exists. But the burden always rests with the Crown to show, beyond a reasonable doubt, that the statement was

voluntary in light of the broader contextual analysis proposed in *Oickle*. An operating mind is of course a necessary but not sufficient condition.

[53] The statements concerning a free choice in the decided cases have been carefully tempered. Sopinka J. in *Whittle* explained that an accused is not entitled to a good or wise choice (p. 939). In doing so, he “implicitly rejected” the suggestion, as authors S. Penney, V. Rondinelli and J. Stribopoulos note, “that voluntariness might require a more thorough understanding of the consequence of speech” (*Criminal Procedure in Canada* (3rd ed. 2022), at ¶4.20, citing *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at pp. 393-95; *R. v. MacDonald-Pelrine*, 2014 NSCA 6, 339 N.S.R. (2d) 277, at para. 38; see also H. Parent, *Traité de droit criminel*, t. IV, *Les garanties juridiques* (2nd ed. 2021), at pp. 61-62). Previously, McLachlin J. in *Hebert* — who, parenthetically, subscribed to the opinion of Sopinka J. in *Whittle* — was quick to note that proof of subjective knowledge could prove to be an “impossible task”, and therefore should not form a part of what constitutes a choice to speak or remain silent (p. 177). In the particular context of a detainee tricked into confessing to an undercover police officer, she observed that a suspect’s choice is informed by the right to counsel, a *Charter* right which only arises upon detention. In other words, it is the exercise of the right to counsel upon detention which informs the right to choose, rather than any state of legal or other knowledge held by a person the moment they interact with police. The cases seek to preserve the balance between the right to silence and the legitimate law enforcement objectives of the state, which is why the language of meaningful, free or active choice has emphasized the overall voluntariness of the statement, rather than

a minimum level of subjective knowledge. Indeed, the Court of Appeal rightly recognized that the latter approach would be “unworkable” as a general requirement for all interviews with the police (para. 39).

[54] On my reading, however, the Court of Appeal introduced a level of subjective knowledge beyond what the cases require when it held that “an operating mind is not the only mental element required for a statement to be voluntary” and that a meaningful choice requires “knowing that [one is] not required to answer police questions, or that anything [said] would be taken down and could be used in evidence” (paras. 29 and 54). I agree with the Crown that the standard as described by the court would effectively require proof of actual knowledge that the accused did not have to say anything to the police and that anything said could be taken down in evidence, which, as a practical matter, would oblige the Crown to prove that a police caution was given and properly understood.

[55] As the foregoing cases show, it is the *Charter* that introduces the necessity of a police caution at the moment of detention. There is good reason why the suspects in *Hebert*, *Whittle*, *Oickle*, and *Singh* were cautioned: they all were detained or arrested, such that the *Charter* mandated that certain information about the right to counsel, and by implication the right to silence, be communicated to them by the police. I would not expand the confessions rule where a person is not arrested or detained by adding an informational component to it that is absent from the settled jurisprudence.

[56] In my respectful view, proof of actual knowledge is not consonant with the law as it stands and would amount to an overextension of the operating mind doctrine that risks upsetting the balance between the individual and societal interests upon which the confessions rule is predicated. As the Court of Appeal itself noted (at para. 35), para. 36 of *Singh* stated that the question of voluntariness is an objective one, though the individual characteristics of the accused are relevant in applying the objective test. In essence, although the court acknowledged it would be unworkable for police to caution everyone at the outset of all interactions, it effectively introduced that standard by hinging the outcome of the voluntariness analysis on actual knowledge akin to the information contained in the police caution (*Love*, at paras. 38-53). This error is most plain in its conclusion that the trial judge had to assess whether Mr. Tessier *knew* that he was not required to answer police questions (C.A. reasons, at para. 54).

[57] The Court of Appeal's reading of *Worrall* led it to embrace a standard that appears to me to be more demanding than what *Horvath* and *Whittle* describe. The court stated that the operating mind doctrine involves an understanding that one is not obliged to answer police questions (para. 54). In *Worrall*, Watt J. wrote that the accused "was never told that he was not required to answer police questions", which was a problem because "[v]oluntariness implies an awareness about what is at stake in speaking to persons in authority, or declining to assist them" (paras. 105-6 (emphasis deleted)). However, I observe that the Court of Appeal for Ontario has not followed *Worrall* to the letter, and neither have other courts of appeal across the country; *Whittle* has been accepted as the proper statement of the law (see, e.g., *Yergeau v. R.*, 2021 QCCA 1827,

at para. 11 (CanLII); *R. v. Baylis*, 2015 ONCA 477, 326 C.C.C. (3d) 18, at para. 50; *R. v. Ponace*, 2019 MBCA 99, [2020] 3 W.W.R. 657, at para. 94; *R. v. Lambert*, 2018 NLCA 39, 363 C.C.C. (3d) 397, at paras. 8-11; *R. v. Bottineau*, 2011 ONCA 194, 269 C.C.C. (3d) 227, at para. 94; see also Penney, Rondinelli and Stribopoulos, at ¶4.20). Instead, the Court of Appeal for Ontario has on occasion *assumed*, without deciding, that the suspect’s “awareness of consequences”, where established on the facts, could dispose of the issue of voluntariness (see *R. v. M. (D.)*, 2012 ONCA 894, 295 C.C.C. (3d) 159, at paras. 44-45; *R. v. Pepping*, 2016 ONCA 809, at para. 6 (CanLII)). The distinction between *requiring* awareness of what is at stake and *considering* such an awareness where established is an important one. Where established, positive knowledge can weigh in favour of voluntariness without making it a requirement. In any event, I read Watt J.’s statement as consonant with that of Beetz J. in *Horvath*, who said that “voluntariness implies an awareness of what is at stake” to refer to the importance of context to determine whether the absence of a caution impugns voluntariness in connection with a person who was hypnotized (p. 425).

[58] To conclude on this point, I see no reviewable error in the trial judge’s determination of the operating mind test. Instead, the view expressed by the Court of Appeal is that an operating mind is “not the only mental element required for a statement to be voluntary” (para. 29), which is out of step with the law in *Whittle*.

(c) *The Suspect Error*

[59] I respectfully disagree with the Court of Appeal that the trial judge erred by “elevating the ‘suspect’ rule of thumb to a legal test” (para. 56). Trial judges throughout the country consistently apply the suspect test as a useful tool to assist them in assessing the impact of the failure to caution on the voluntariness of a statement (see *Morrison*, at paras. 50 and 54; *R. v. Oland*, 2018 NBQB 255, at paras. 43-46 (CanLII); *R. v. Smyth*, 2006 CanLII 52358 (Ont. S.C.J.), at pp. 34-36; *R. v. Wong*, 2017 ONSC 1501, at para. 64 (CanLII); *R. v. Merritt*, 2016 ONSC 7009, at para. 39 (CanLII); *R. v. Higham*, 2007 CanLII 20104 (Ont. S.C.J.), at paras. 5-7). It was therefore appropriate for the trial judge to ask whether Mr. Tessier was a suspect. I further disagree that the trial judge was only guided by Sgt. White’s subjective perception of whether Mr. Tessier was a suspect (C.A. reasons, at para. 55). While he might well have been plainer in his reasons, the trial judge stated the essence of the test correctly, at para. 43, when he wrote that a suspect “is a person who, through information that the police collect during an investigation, viewed objectively, tends to implicate that person in a crime” (citing *Morrison*, at para. 50). It is true that Mr. Tessier, both before the Court of Appeal and this Court, argued that the trial judge failed to consider certain facts in coming to his conclusion that Mr. Tessier was not a suspect here. But that is a claim that the judge, through an omission, committed an error of fact rather than a reviewable error of law.

[60] With this clarification in mind, did the trial judge commit a reviewable error of fact in finding that Mr. Tessier was not a suspect?

[61] I accept the argument that the trial judge committed palpable errors in concluding that Mr. Tessier was not a suspect. There are two critical facts that, respectfully, the trial judge neglected to consider in his review of the circumstances and a third fact that, given these omissions, was misunderstood. First, at the start of the interview, when the police observed that Mr. Tessier did not arrive at the station in his own vehicle, another officer, Cst. Heidi Van Steelandt, was tasked with going to the place where he was staying in Didsbury to examine Mr. Tessier's Ford pickup. It was confirmed that the tires of that vehicle could match the traces observed at the scene of the homicide. This information was relayed to the detachment while Mr. Tessier was still at the station. The trial judge noted that the police knew there were tire tracks at the scene and what kind of truck Mr. Tessier drove (para. 50). But as Mr. Tessier argued before us, the trial judge made no mention that the police learned that the tire tracks matched the make of Mr. Tessier's truck. Second, following the interview, a surveillance team was put in place to observe Mr. Tessier. Despite Cst. Van Steelandt's testimony on this, the trial judge accepted Sgt. White's statement that Mr. Tessier was not a suspect without addressing these points. The trial judge's omission to consider the fact that the surveillance team had been put in place was also a palpable error in that it was a plain sign that suggests Mr. Tessier was suspected by police. In light of these two omissions, I am of the respectful view that the judge further underestimated the significance of the pointed questions posed by Sgt. White, including the direct suggestion that Mr. Tessier was culpably involved in the homicide, as a sign, viewed objectively, that Mr. Tessier was a suspect. These factual errors suggest strongly that

the trial judge misapplied the objective test for determining whether Mr. Tessier was a suspect, or at least became a suspect, at the time of the interviews.

[62] These were palpable errors indicating that, as a matter of fact, Mr. Tessier was a suspect for the purposes of the confessions rule. But in my view, they did not prove to be overriding mistakes which would warrant appellate intervention (see *Oickle*, at para. 71). The trial judge continued, as an alternative and in the event that he was mistaken, to assess the circumstances as though Mr. Tessier were a suspect, and concluded that the absence of the caution would not have been fatal in this context. Even where a person is a suspect, the cases are clear that there is no bright-line rule that a caution is required and that its absence renders a statement involuntary (*Prosko v. The King* (1922), 63 S.C.R. 226; *Boudreau*, at p. 267; *Oickle*, at paras. 47 and 71; *Singh*, at paras. 31-33; see also *R. v. Perry* (1993), 140 N.B.R. (2d) 133 (C.A.), at para. 13; *R. v. Peterson*, 2013 MBCA 104, 299 Man. R. (2d) 236, at para. 52; *Bottineau*, at para. 88; *R. v. Pearson*, 2017 ONCA 389, 348 C.C.C. (3d) 277, at para. 31; *R. v. Joseph*, 2020 ONCA 73, 385 C.C.C. (3d) 514, at paras. 51-56; *Bernard v. R.*, 2019 QCCA 1227, at para. 29 (CanLII)). The trial judge noted that the failure to caution a suspect may, in the particular circumstances of a case, “effectively and unfairly deny the suspect the choice to speak” (para. 45, citing *Morrison*, at para. 57). He then turned his mind to the relevant *Oickle* factors and concluded that Mr. Tessier had not been treated oppressively, was allowed to leave unaccompanied, and voluntarily cooperated throughout, disclosing information selectively (paras. 45 and 51-54). The Court of Appeal acknowledged that the trial judge did correctly point to evidence in support of

his conclusion on voluntariness (para. 57). In other words, he asked whether Mr. Tessier had been unfairly denied his choice to speak in the event that he was a suspect, and concluded that, in the circumstances, he had not.

(d) *Conclusion*

[63] In summary, while the trial judge was imprecise in some of his exposition of the law relating to the confessions rule, I am of the view that the Court of Appeal wrongly characterized these as errors of law and that, in themselves, these imprecisions had no material impact on the trial judge's analysis. When his reasons are read as a whole, it is plain that the trial judge's understanding of the law was not erroneous, even acknowledging that Mr. Tessier was likely a suspect. Given the trial judge's palpable errors of fact, however, and the relevance to the analysis of the caution, it is necessary to apply the law afresh to explain why the judge's errors are not overriding. I will return to that question after discussing the impact of the absence of a caution on voluntariness in the pre-detention phase.

B. *In the Pre-detention Phase of the Criminal Investigation, How Does the Absence of a Caution During Police Questioning of Mr. Tessier Affect the Voluntariness of His Statements?*

[64] The cases draw together three threads fundamental to this issue. First, Charron J. advised that police should caution suspects during investigative questioning, but she stopped short of imposing a bright-line rule. Second, the cases have long held that the absence of a caution is not determinative of voluntariness. Third, since

Boudreau, it has nevertheless been acknowledged that the caution is an “important” factor (see, e.g., *Bernard*, at para. 29; see also Penney, Rondinelli and Stribopoulos, at ¶4.48). Tying these threads together calls for a consideration of how courts should treat the absence of a caution when measuring the voluntariness of statements made to the police.

[65] On this point, Mr. Tessier and one of the interveners assert that the police caution should be provided irrespective of whether a person is a witness or a suspect. As I have already explained, the law as it currently stands does not support this proposition. But Mr. Tessier also contends that the police caution is a necessary mechanism through which the informational deficit between police and citizen can be attenuated. This allows proper effect to be given to the fairness concerns that animate the confessions rule. The Crown accepts the important place of the caution, but emphasizes that only suspects and detainees are subject to the coercive power of the state in a manner that could prompt involuntary statements. Requiring a caution for all those subject to police questioning is unnecessary to protect the individuals concerned and would inhibit legitimate police investigation of crime. The voluntariness analysis should remain contextual and bright-line rules imposing a caution to all individuals, at the expense of judicial discretion in the measure of voluntariness, should be avoided.

[66] The intervening attorneys general complement the Crown’s submissions. In a carefully written factum, the Attorney General of New Brunswick intervenes to urge this Court to reaffirm that the absence of a caution is but a single factor in the

voluntariness analysis. It acknowledges that the absence of a caution raises fairness concerns but, it says, the weight given to its absence should operate on a spectrum. Greater weight should attach to that factor where a person is a suspect, but the absence of a caution should remain non-determinative. The caution should be given to suspects only because their liberty is at greater risk than mere witnesses as persons who have been targeted in this way by the state. The Attorney General of New Brunswick proposes a suspect test which, it argues, provides a workable framework that will assist courts in applying the proper weight to the absence of a caution.

[67] To respond to these submissions, it is helpful to canvass why the case law has evolved in the manner it has. I will then endeavour to clarify how trial judges should consider the absence of a police caution as part of the contextual analysis for voluntariness set out in *Oickle*.

(1) The Confessions Rule and Fairness

[68] The law relating to the modern confessions rule in Canada is settled. A confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness (*Oickle*, at para. 68). The Crown bears the persuasive or legal burden of proving voluntariness beyond a reasonable doubt. The inquiry is to be contextual and fact-specific, requiring a trial judge to weigh the relevant factors of the particular case (*Singh*, at para. 35; *R. v. Kelly*, 2019 NLCA 23, 374 C.C.C. (3d) 360, at para. 40). It involves consideration of “the making of threats or promises, oppression, the operating mind doctrine and police trickery” (*R. v. Spencer*, 2007 SCC

11, [2007] 1 S.C.R. 500, at para. 12). These factors are not a checklist: ultimately, a trial judge must determine, based on the whole context of the case, whether the statements made by an accused were reliable and whether the conduct of the state served in any way to unfairly deprive the accused of their free choice to speak to a person in authority (Parent, at pp. 26-27; Vauclair and Desjardins, at No. 38.28).

[69] This Court has repeatedly emphasized that the confessions rule, properly understood, strives for a balance between, on the one hand, the rights of the accused to remain silent and against self-incrimination and, on the other, the legitimate law enforcement objectives of the state relating to the investigation of crime (*Hebert*, at pp. 176-77 and 180; *Oickle*, at para. 33; *Singh*, at paras. 43 and 45). I would add that these interests, while they often appear in competition, share a common preoccupation in the repute of the administration of criminal justice which helps direct trial judges in finding the right point of equilibrium. Justice mandates a recognition that the rights of the accused are important but not without limit; it also insists that the police be given leeway in order to solve crimes but that their conduct not be unchecked. Indeed, achieving the right balance between these objectives involves seeking out this common ground and, in this sense, it has been usefully described as the “mission” of the confessions rule (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 425; see also Vauclair and Desjardins, at No. 38.23). In seeking this balance, the law imposes the heavy burden on the Crown to prove voluntariness beyond a reasonable doubt, which serves as substantial protection for the accused at all stages of a criminal investigation. Unlike the burden under the *Charter*, where the

accused must establish a breach on a balance of probabilities, the confessions rule begins from a place of heightened protection for the accused because the rigorous task of showing voluntariness lies with the Crown.

[70] The rule is animated by both reliability and fairness concerns, and it operates differently depending on context. As Iacobucci J. explained in *Oickle*, while the doctrines of oppression and inducement are primarily concerned with reliability, other aspects of the confessions rule, such as the presence of threats or promises, the operating mind requirement, or police trickery, may all unfairly deny the accused's right to silence (paras. 69-71; *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at pp. 682-83 and 688, per Lamer J.; *Hebert*, at pp. 171-73; *Whittle*, at p. 932; *R. v. Hodgson*, [1998] 2 S.C.R. 449, at paras. 21-22; *Singh*, at para. 34). A statement may be excluded as involuntary because it is unreliable and raises the possibility of a false confession, or because it was unfairly obtained and ran afoul of the principle against self-incrimination and the right to silence, whatever the context indicates. It may be excluded if it was extracted by police conduct [TRANSLATION] “[that] is not in keeping with the socio-moral values at the very foundation of the criminal justice system” (J. Fortin, *Preuve pénale* (1984), at No. 900).

[71] Even if reliability and fairness concerns are often tightly intertwined, the police caution is typically understood as speaking to fairness, as the case of *Morrison*, cited here by the trial judge, has emphasized. I agree with the Attorney General of New Brunswick that the lack of a police caution generally does very little to undermine the

reliability of a statement. The mere fact that an individual was not cautioned does not in itself raise concerns that an unreliable confession or statement was provided. That said, in some situations a lack of a caution may exacerbate the pernicious influence of threats, inducements or oppression, which could contribute to undermining the reliability of a statement. In most cases, however, it speaks to fairness, in the sense that the absence of a caution may unfairly deprive someone of being able to make a free and meaningful choice to speak to police when, as a suspect, they are at a risk of legal jeopardy.

[72] But the caution does not resolve all of the concerns addressed by the confessions rule. The reason the absence of a caution is not determinative of voluntariness is because a caution is designed to rectify an informational imbalance when a detained or arrested individual is in a state of heightened vulnerability — which speaks to fairness — whereas voluntariness extends to a broader “complex of values” animated by both reliability and fairness (*Oickle*, at para. 70, citing J. H. Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev. 1970), vol. 3, § 826, at p. 351). While there is no doubt that fairness, driven by the common law right to silence and privilege against self-incrimination, plays an important role in the modern rule, the cases and the literature suggest it would be a mistake to allow it to dominate the analysis to the exclusion of other values (*Boudreau*, at pp. 269-70; *Oickle*, at para. 47; *Singh*, at para. 35; S. Penney, “Theories of Confession Admissibility: A Historical View” (1998), 25 *Am. J. Crim. L.* 309, at pp. 373-79; J. D. Grano, “Voluntariness, Free Will, and the Law of Confessions” (1979), 65 *Va. L. Rev.* 859, at p. 914). The confessions

rule is also about protecting innocent defendants from false confessions and protecting suspects from abusive police tactics, which are distinct purposes reflected in their own ways in the threats or inducements, oppression and trickery factors. These concerns persist even where a caution has been properly delivered and understood. Contextual analysis is required to extend adequate protections to suspects beyond what the caution provides on its own, a point recognized in *Boudreau*.

[73] The rule in *Boudreau* has stood the test of time. In deciding that the absence of a caution is an important but not a decisive factor in the voluntariness inquiry, the Court confirmed that the confessions rule should remain flexible to account for the complex realities of police investigations. Rand J. appropriately observed that it would be a “serious error to place the ordinary modes of investigation of crime in a strait jacket of artificial rules” (p. 270). This approach has successfully allowed for a continued balance between societal interests in the investigation of crime and individual rights for many years, even as the Court’s understanding of the confessions rule has expanded to accommodate broader notions of fairness. *Boudreau* held that in *Gach v. The King*, [1943] S.C.R. 250, Taschereau J. was speaking in *obiter* when he stated that all confessions are inadmissible absent a proper caution. *Gach* was later criticized by Justice F. Kaufman of the Court of Appeal of Quebec, writing extrajudicially, who perceived it to misconstrue the law and “swe[ep] aside forty years of Canadian jurisprudence and establis[h] a rigidity hitherto unknown” (*The Admissibility of Confessions* (3rd ed. 1979), at p. 144).

[74] To make the absence of a police caution determinative of voluntariness would risk inhibiting legitimate investigative techniques while ignoring the other protections provided by the rule. As one author put it, “[t]o strive for equality of knowledge . . . is to strive to eliminate confessions” (Grano, at p. 914). The confessions rule accepts in its design that statements resulting from police questioning are valuable, provided they are reliable and fairly obtained (*Hodgson*, at para. 21; *Singh*, at para. 29; see also Penney (1998), at p. 378; Trotter, at p. 293). Even where a caution is not given, the circumstances may nevertheless indicate that a person has freely chosen to speak and no fairness concerns arise. Requiring a police caution as a condition of voluntariness would defeat the purposes of the rule and the balance it strives to achieve by imposing an inflexible standard of subjectively held knowledge for all individuals, whatever their status or role in an investigation. While the cases rightly speak of a balance, it bears recalling that the scales already tip in favour of protecting the rights of the accused by the broad scope of the rule and the heavy burden resting with the Crown. Moreover, the common law has hesitated to substitute a caution or waiver requirement of the right to silence for suspects who are questioned for the fact-sensitive, contextual analysis in which the absence of a caution is an important, yet non-determinative, factor. If such a requirement was thought to be necessary, Parliament could introduce legislation to that effect (see S. Penney, “Police Questioning in the Charter Era: Adjudicative versus Regulatory Rule-making and the Problem of False Confessions” (2012), 57 *S.C.L.R.* (2d) 263, at pp. 263-64). In other contexts, for example the questioning of young persons, Parliament has done exactly

that in recognition of their heightened vulnerability (see *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 146(2)).

[75] That said, there is no doubt that a caution can contribute to ensuring that an investigation is conducted fairly, especially where a suspect is detained and in a state more prone to making involuntary statements. In providing her guidance that a suspect should receive a caution, Charron J. in *Singh* was careful to note that a person's situation changes after the moment of detention, which is why the caution is seen as necessary in those circumstances. As Charron J. explained, state authorities control the detainee who is in a more vulnerable position and cannot walk away. The fact of detention alone may cause a person to feel compelled to make a statement (para. 32; see *Grant*, at paras. 22 and 39; *Hebert*, at pp. 179-80). The caution is required to attenuate the informational deficit in the face of heightened risk and vulnerability. Even if one acknowledges that many encounters with the police can be daunting, fairness considerations are unlikely to arise in the same way where the person is not suspected of being involved in the crime under investigation. Fairness concerns are manifest once an individual is targeted by the state. There is nothing inherently unfair, for instance, about police questioning a person standing on the street corner without providing a caution while gathering information regarding the potential witnessing of a crime.

[76] Yet in the specific context where a mere witness or an uninvolved individual is questioned, introducing a caution requirement as a condition of voluntariness could exact a cost on the administration of justice, notwithstanding the

fact that no unfairness has arisen in obtaining the statement. Questioning at a police station is, to be sure, qualitatively different if the circumstances suggest that the interviewee brought or summoned for questioning is, on an objective basis, a suspect deserving of a caution. But to call for cautions in all circumstances would unnecessarily inhibit police work. Where a person faces no apparent legal jeopardy and the intentions of police are merely to gather information, an imposed caution could even chill investigations. Effective law enforcement is also highly dependent on the cooperation of members of the public (*Grant*, at para. 39). Where a contextual analysis reveals that no unfairness has arisen and no *Charter* protections were engaged, a bright-line rule to caution everyone could disturb the balance struck by the confessions rule by excluding reliable and fairly-obtained statements. It is preferable to allow courts to take measure of the true circumstances of the police encounter flexibly. In the spirit of Charron J.'s suggestion in *Singh*, courts should pay particular attention to whether the absence of a caution has had a material impact on voluntariness in a manner which would warrant exclusion of the statement.

[77] As a suspect who was not detained, Mr. Tessier's circumstances lie between these extremes. Contrary to the Crown's suggestion, there are fairness reasons why the caution may take on greater importance once a person becomes a suspect. A person in Mr. Tessier's situation may also experience heightened vulnerability, but to a lesser degree than someone who, arrested and detained, is more fully under the control of the state. Speaking generally, a suspect who is not detained is free to leave. In some circumstances, notwithstanding the absence of a caution, a suspect may clearly know

they do not have to answer questions or may be subject to no influences that would impugn voluntariness by way of threats or inducements, oppression, or police trickery. A suspect is not unfairly denied a free choice to speak in these circumstances. Conversely, even with an operating mind, conduct of the police may unfairly deny them that choice. All of this to say that the totality of the circumstances will be important in determining whether a statement made by a suspect who is not detained has been unfairly obtained.

(2) Consequences of the Absence of a Caution

[78] I agree with the Attorney General of New Brunswick that the weight to be given to the absence of a caution will fall on a spectrum. At one end, the significance attached to the failure to caution an uninvolved individual — such as the person on the street corner — will typically be negligible. The relative lack of vulnerability of an uninvolved individual or witness who is questioned by police means that a caution will typically be unnecessary to show that the statements were voluntary. To require that police caution every person to whom they address questions in a criminal investigation, even where those questions are asked at a police station, would be — as the Court of Appeal rightly noted here — an unworkable standard. It would unduly limit the broader societal interest in investigating crime by excluding reliable and fairly obtained statements in circumstances that do not warrant it.

[79] At the other end of the spectrum, the vulnerability and legal jeopardy faced by detainees cement the need for a police caution. Fairness commands that they know

of their right to counsel and, by extension, of their right to remain silent so that they can make an “informed choice” whether or not to participate in the investigation (I borrow the expression “informed choice” from *Singh*, at para. 33). The balance courts seek to achieve in applying the confessions rule in this context tilts in favour of protecting the rights of the detained person and of limiting society’s interest in the investigation of crime. The weight attached to the absence of a caution in these circumstances, while not determinative of the question of voluntariness owing to the contextual analysis required, will be at the highest end (see *Singh*, at para. 33).

[80] In circumstances in between, where police interview a suspect who is not detained and do not provide a caution, I agree with the longstanding view that the lack of caution is not fatal, but that it is an important factor in determining voluntariness (see generally Kaufman, at pp. 142-46). The importance attached to the absence of a caution will also be significant in recognition of the potential for vulnerability and exploitation of an informational deficit, unless it can be demonstrated in the circumstances, as I will explain in more detail below, that there is no doubt as to its voluntariness. This builds incrementally on Charron J.’s helpful reasons on this point in *Singh*. The heightened jeopardy and consequential vulnerability faced by a suspect, as opposed to an uninvolved individual, warrants special consideration in the final analysis to ensure adequate and principled protections under the confessions rule. Although encounters between police and citizens sometimes mean the status of a person may change over the course of an interview, investigators are well accustomed

to signs that raise their suspicions. This would be the proper moment to caution the interviewee to prevent the potential exclusion of the statement at trial.

[81] The first step in assessing the importance of the absence of a police caution is therefore to identify whether or not the person was a suspect. I would endorse the suggestion of the Attorney General of New Brunswick that fairness considerations may arise where a person is a suspect, and that a suspect test is a useful way of determining whether an accused person may have been unfairly denied their right to silence (see *Oland*, at para. 42; *Smyth*, at p. 34, citing *Boudreau*). This is also consistent with statements from this Court that “the confessions rule applies whenever a person in authority questions a suspect” (*Oickle*, at para. 30). The test is as proposed by the Attorney General of New Brunswick: whether there were objectively discernable facts known to the interviewing officer at the time of the interview which would lead a reasonably competent investigator to conclude that the interviewee is implicated in the criminal offence being investigated (see *Morrison*, at para. 50; *Oland*, at paras. 43-46; *Smyth*, at pp. 34-36; *Wong*, at para. 64; *Merritt*, at para. 39; *Higham*, at paras. 5-7).

[82] The test is objective, and includes both an assessment of the objectively discernable facts known at the time and the interaction between police and the interviewee. Pointed questions, particularly where they suggest the culpable involvement of the individual being questioned, may indicate that the person is a suspect, but pointed questions may have other legitimate ends, depending on the circumstances. A trial judge is best positioned to determine whether the police were

simply seeking to gauge a person's reaction to certain lines of questioning, or whether the questioning is more consistent with the interrogation of a true suspect. While the fact that the police initiated the interview does not, on its own, indicate that a person is a suspect, it may serve as a sign that a person was a suspect where combined with other indications. That said, questions that provoke anxiety or discomfort or even imply guilt do not necessarily mean a person is a suspect. The nature of the interaction between police and the individual and its connection to the objectively verifiable facts is therefore relevant to the suspect test.

[83] Once a court reaches the conclusion that a person was a suspect, the absence of a police caution is not merely one factor among others to be considered. Rather, it is *prima facie* evidence of an unfair denial of the choice to speak to police, and courts must explicitly address whether the failure created an unfairness in the circumstances (see *Oland*, at para. 42). It cannot be washed aside in the sea of other considerations. Instead, it serves to impugn the fairness of the statement and must be addressed, by the Crown, in the constellation of circumstances relevant to whether the accused made a free choice to speak. In discharging its burden to prove beyond a reasonable doubt that a statement was voluntary, the Crown will need to overcome this *prima facie* evidence of unfairness.

[84] This adjustment should be understood in light of the allocation of the evidential and persuasive burdens of proof which, for the operating mind test, is explained as follows by authors Lederman, Fuerst and Stewart, at ¶8.119, citing *Ward*,

at p. 41, and *R. v. Lapointe and Sicotte* (1983), 9 C.C.C. (3d) 366 (Ont. C.A.), at p. 383, aff'd [1987] 1 S.C.R. 1253:

A final consideration under the operating mind test is the allocation of the evidential burden and [the] persuasive (legal) burdens of proof. Inasmuch as the accused may be the only person who has knowledge of these subjective matters, the evidentiary burden to adduce sufficient evidence to raise the issue should be allocated to the accused. . . . Once the accused has adduced sufficient evidence to make it a live issue, the Crown must then satisfy the trial judge beyond a reasonable doubt that the statement was voluntary.

[85] Extrapolating from this useful insight and broadening its application to beyond the operating mind context, and in keeping with Charron J.'s advice on cautions in *Singh*, I propose to recognize that the absence of a caution to a suspect constitutes *prima facie* evidence that an accused was unfairly denied their choice to speak to the police. This is sufficient to render the absence of a caution a live issue that the Crown must dispel in order to establish the voluntary character of the statement beyond reasonable doubt.

(3) Legal Framework

[86] In the course of cross-examination of police witnesses or upon hearing the accused's own testimony, it may come to light that the accused was in a situation of heightened vulnerability and risk, either because they were detained or a suspect, and were not given a caution despite being suspected of a crime. That is sufficient to cast doubt on whether the interviewee spoke voluntarily as understood in *Whittle* and

Oickle; that is, that the accused had the ability to understand what was being said and that it may be used in evidence, and that there was no other recognized consideration impugning voluntariness. The accused thus has met their evidentiary burden to make the absence of a caution a “live issue”; in keeping with its persuasive burden, the Crown must then satisfy the trial judge beyond a reasonable doubt that the statement was nevertheless voluntary.

[87] In these circumstances, it is appropriate for the trier of fact to undertake a contextual inquiry to determine whether an unfairness arose that vitiates voluntariness by denying the right to silence. This might arise where there is evidence of police trickery, for example circumstances in which the absence of a caution is the result of a willful failure to give a caution or a deliberate tactic to manipulate the suspect into thinking they have nothing at stake (see, e.g., *R. v. Crawford*, [1995] 1 S.C.R. 858, at para. 25; *R. v. Auclair* (2004), 183 C.C.C. (3d) 273 (Que. C.A.), at para. 41; *M. (D.)*, at para. 45; *Higham*, at para. 22). Impropriety on the part of the police, usually in the form of obscuring the jeopardy faced by the suspect to encourage cooperation, may unfairly deny a suspect their right to silence. Plainly, the statement should be excluded if the police deception shocks the community. But even if it does not rise to that level, deceiving the interviewee into thinking that, as a mere witness, they are in no jeopardy and that their statements will not be used in evidence against them could preclude admissibility at the end of the day. “[T]he ability to make a meaningful choice remains pertinent where trickery is involved”, write Lederman, Fuerst and Stewart, “and exclusion is mandated where there is a reasonable doubt as to the confession’s

voluntariness in this regard” (¶8.126). I would note there is a distinction between misleading a person about the extent of their jeopardy and declining to inform a person that they are a suspect. Police need not provide details about the status of their investigation provided the salient information is communicated and there are no strategies of deception (*R. v. Campbell*, 2018 ONCA 837, 366 C.C.C. (3d) 346, at paras. 8-9).

[88] While not necessary for the Crown to demonstrate, proof that the accused was in fact subjectively aware of their right to silence or aware of the consequences of speaking will be powerful evidence that the absence of a caution did not undermine voluntariness. In such an instance, doubts as to fairness that could result from the absence of a caution plainly do not arise because the suspect has the information necessary to choose whether to speak or remain silent. For example, in the cases of *Pepping*, *R. v. Boothe*, 2016 ONCA 987, and *R. v. Blackmore*, 2017 BCSC 2682, cited by the Court of Appeal, the statements were held to be voluntary despite the absence of a caution. In each of these cases, the court was satisfied that the suspect was aware of the consequences of speaking. Stated non-exhaustively, indications that a suspect may be aware of the right to silence or the consequences of speaking include awareness of being recorded (*R. v. Leblanc* (2001), 162 C.C.C. (3d) 74 (Que. C.A.), at para. 17), indications that the suspect is directing conversation (*Boothe*, at para. 20 (CanLII)), awareness of what the police are investigating and the suspect’s alleged role in the investigation (*M. (D.)*, at para. 45; *Leblanc*, at para. 26), and exercising the right to silence by declining to answer police questions (*M. (D.)*, at para. 46). I would

underscore that these cases do not stand for the proposition that the Crown must prove beyond a reasonable doubt subjective knowledge of the right to silence or that the proof of knowledge displaces the settled test for an operating mind. Rather, they indicate that where there is evidence that the accused was aware of their right to silence or of the consequences of speaking, the weight attached to the absence of a caution becomes less important because there are other strong indications of voluntariness. An eagerness to talk, as in the case of *Pepping* (at para. 6), may or may not serve as evidence of voluntariness, depending on the circumstances. A person may appear eager to talk as a result of either a genuine interest in doing so or through a feeling of fear and compulsion.

(4) Summary

[89] In summary, the confessions rule always places the ultimate burden on the Crown to prove beyond a reasonable doubt that a statement made by an accused to a person in authority was made voluntarily. When an accused brings a voluntariness claim with respect to police questioning that did not include a caution, the first step is to determine whether or not the accused was a suspect. If the accused was a suspect, the absence of a caution is *prima facie* evidence of an unfair denial of choice but not dispositive of the matter. It is credible evidence of a lack of voluntariness that must be addressed by the court directly. Depending on the circumstances, it is potentially relevant to different *Oickle* factors as well as any other considerations pertinent to voluntariness. However, the absence of a caution is not conclusive and the Crown may

still discharge its burden, if the totality of the circumstances allow. The Crown need not prove that the accused subjectively understood the right to silence and the consequences of speaking, but, where it can, this will generally prove to be persuasive evidence of voluntariness. If the circumstances indicate that there was an informational deficit exploited by police, this will weigh heavily towards a finding of involuntariness. But if the Crown can prove that the suspect maintained their ability to exercise a free choice because there were no signs of threats or inducements, oppression, lack of an operating mind or police trickery, that will be sufficient to discharge the Crown's burden that the statement was voluntary and remove the stain brought by the failure to give a caution.

(5) Application to the Facts

[90] In light of the foregoing, and given the absence of a caution, were Mr. Tessier's statements to the police voluntary under the confessions rule? I agree with the trial judge's conclusion that the statements are admissible: Mr. Tessier did exercise a free or meaningful choice to speak to Sgt. White and he was not unfairly denied his right to silence. This is so even taking Mr. Tessier's argument at its highest by accepting that he was a suspect. I shall assume that Charron J.'s recommendation applies here: Sgt. White should have cautioned Mr. Tessier at the outset of the interview. Given that there was a reasonable basis to consider Mr. Tessier a suspect and in light of the pointed questioning he faced, which was adversarial in nature, the absence of the caution raises *prima facie* proof that, on its own, satisfies the evidentiary

burden that the Crown must address in its legal burden of proving voluntariness. But I am satisfied that the record substantiates the Crown's argument, accepted by the trial judge, that Mr. Tessier had an operating mind and was not otherwise tricked in the circumstances. There are more decisive indications of voluntariness here, including circumstances that go above and beyond the basic requirements of an operating mind. The record contains strong signs, each of which points to the fact that Mr. Tessier was well aware of the consequences of speaking to Sgt. White. He knew that anything he said could be used as evidence, and knew that he had a choice between alternatives as to whether or not to cooperate with police. Additionally, while undoubtedly pointed at times, Sgt. White was forthright in the manner in which he confronted Mr. Tessier. The accused exercised a free choice to speak in the circumstances.

[91] Informed that he was being recorded, Mr. Tessier began the interview anxious to convey information that would lead Sgt. White's suspicions elsewhere. In particular, he noted at the outset that Mr. Berdahl's ex-girlfriend "hate[d]" him, that Mr. Berdahl owes a lot of people money, and that when he heard Mr. Berdahl had been involved in a homicide, he thought Mr. Berdahl had been culpably involved. Referring to when police first contacted him about their investigation, Mr. Tessier said the following to Sgt. White:

And at first I thought he did something. Um, you know, it was like uh what did he do now? kind of thing, like uh cause he does work as a bouncer for some of the strippers and that. And he – he's – he's done that kind of stuff before. Bodyguard whatever. Like he does all the side jobs, you know. . . . [S]o I thought maybe he's you know stabbed somebody or whatever else, you know, cause he's always got his knives on him, he's always got, you

know well he's got – he usually has a lot of weapons and stuff on him so uh I'm wondering if he did something that way.

(A.R., vol. IV, at p. 109)

[92] Mr. Tessier clearly knew that anything he said could be used as evidence. Not only was he advised at the start of the interview that it was being recorded, he made inquiries to ensure the recording was still live. He was told at times to speak up for the purposes of the recording. The obvious inference is that Mr. Tessier was aware that police were recording his statement for investigatory purposes related to the homicide of Mr. Berdahl. The trial judge took note of this (at para. 10); the Court of Appeal made no mention of Mr. Tessier's awareness that the interview was being recorded and his expression of interest that his narrative was being caught on tape — an indication that he knew what police were investigating and what was at stake. To revert to the operating mind test in *Whittle*, Mr. Tessier not only had the ability to understand what he was saying but also to comprehend that the evidence may be used as evidence in criminal proceedings. Importantly, as was the case for the interviewee in *Pepping*, Mr. Tessier understood that the police officer was recording his statement and he sought to ensure that his own version of events would be part of that record.

[93] Mr. Tessier even made positive assertions that he would not cooperate, an indication that he knew his cooperation was voluntary and that when he spoke it reflected a choice between alternatives. After returning from his cigarette break outside the detachment where he freely conversed with his friend, and after Sgt. White

confirmed the time for the purpose of the recording, Mr. Tessier then declined to provide his DNA sample, stating the following:

No, I'll state right now. Um, I – I don't know what's going on. I don't want to be painted into a corner. . . . I – I don't want to be put in a position where I – I'm like the – the one guy that you guys have or something like that . . . Like uh if my hair is on him or something like that, I don't want to be [the] murder[er]. I don't want to be charged with anything like that.

(A.R., vol. IV, at p. 130)

[94] At other moments, there are indications that Mr. Tessier was attempting to craft an image of concern and selective cooperation, while attempting to find out what police knew. Early on in the exchange, he invited Sgt. White to ask questions about Mr. Berdahl, seemingly confident in the information he could provide. On several occasions Mr. Tessier inquired into what happened to Mr. Berdahl. He invited police to his home to sort through Mr. Berdahl's possessions. These interactions suggest that Mr. Tessier was well aware that police were investigating the homicide of Mr. Berdahl and that anything he said could be used as evidence, an awareness that he unambiguously displayed when he said to Sgt. White, "I'm the only person that you guys got and that's not good" (A.R., vol. IV, at p. 130). The exchanges also show an eagerness to talk and a perceived confidence in his ability to control the information provided to Sgt. White, further indications, when the whole of the context is considered, of the voluntariness of his statements.

[95] While he was not told that he was a suspect, Mr. Tessier was not misled about his jeopardy. It was clear from the beginning that he had not been eliminated

from the investigation, a point made directly by Sgt. White when he explained the purpose for requesting the DNA sample. If there was any doubt that Mr. Tessier was facing the potential jeopardy of a murder charge, this was dispelled when Sgt. White asked directly if he had killed Mr. Berdahl. It was also known to Mr. Tessier:

Q: What do you think should happen to the person that uh caused his – his death?

A: He should be charged.

Q: For?

A: Murder, apparently.

(A.R., vol. IV, at p. 125)

[96] In other words, Mr. Tessier was aware that the police might pursue him in a criminal investigation, and he sought to avoid that outcome by managing the information he conveyed to Sgt. White. Again, the facts are comparable with those in *Pepping*. In that case, police did not caution the accused before interviewing him. The trial judge had found that that the accused was not a suspect and that his statements were voluntary. The Court of Appeal reviewed the record and found reasonable support for voluntariness, even if the accused was a suspect. On the application of *Singh*, the question was whether the absence of a caution rendered the statement involuntary. The Court of Appeal held that the record supported the findings that the accused was eager to talk and aware of the legal consequences of giving a statement, and accordingly the court deferred to the trial judge. As in that case, Mr. Tessier was eager to speak with Sgt. White, sought to ensure that his statement was being recorded, and took proactive steps to decline to cooperate when it suited him.

[97] The record makes plain that the trial judge's conclusion that Mr. Tessier had an operating mind should not be disturbed on appeal. He knew that his statements to police could be used as evidence in criminal proceedings, and the absence of a caution did not give rise to an informational deficit that was unfairly exploited by Sgt. White. His choice to speak to the police was a free or meaningful choice.

[98] As the voluntariness inquiry is broader than just the operating mind doctrine, it is appropriate to consider whether there were any threats or inducements, oppressive tactics, or police trickery that would cast doubt on the voluntariness of Mr. Tessier's statements. I note that Mr. Tessier does not argue that he was in some way threatened, tricked, or treated oppressively. At its highest, Mr. Tessier's claim is that Sgt. White unfairly exploited an informational deficit, in particular through his pointed questions, and should have cautioned him. I have already described why that does not describe the circumstances of this case or decide the question. Nevertheless, other indications that Mr. Tessier's statements were voluntary suggest that there was nothing unfair about the methods Sgt. White used to interview him.

[99] Mr. Tessier was indeed nervous when confronted with Sgt. White's pointed questions. Sgt. White testified that he was attempting to get a "read" on Mr. Tessier to see if he would say anything inculpatory (A.R., vol. II, at p. 35). Generally, questioning contributes to an atmosphere of oppression where it is excessively aggressive and intimidating over a prolonged period (*Oickle*, at para. 60). While the trial judge did not take adequate account of the adversarial nature of the

questioning in his evaluation of the status of Mr. Tessier as a suspect, the questioning did not contribute to an atmosphere of oppression in the manner contemplated in *Oickle*. Nor did the fact that the interview occurred at the station create an atmosphere of oppression. To be perfectly plain: the facts here are very different from other interrogation cases where a person was subjected to a lengthy and vigorous interrogation and was unable to leave the interview room, or was deprived of sleep or nourishment over the course of the interview. None of that occurred here.

[100] The trial judge was not mistaken in concluding that Sgt. White did not engage in police trickery that was “so appalling as to shock the community” (*Oickle*, at para. 67). There is no suggestion here that Sgt. White engaged in even a lesser form of trickery by misleading Mr. Tessier about his jeopardy to encourage cooperation. Sgt. White confronted Mr. Tessier in a forthright manner. It was clear he was investigating the death of Mr. Berdahl. He presented Mr. Tessier with real information, noting, for example, that it was suspicious that Mr. Tessier was the last person in the company of Mr. Berdahl before he was found dead. His queries about whether Mr. Tessier was driving and flicking cigarettes near Carstairs was motivated by the genuine discovery of cigarettes within the vicinity of the body. It was no secret that Mr. Berdahl owed Mr. Tessier money — Mr. Tessier said so himself at the beginning of the interview. It is true that he did not share all the information he had about the tire tracks and the footprints at the scene of the crime with Mr. Tessier, but he did not hide his interest in either the kind of vehicle Mr. Tessier drove or the kind of shoes he wore.

[101] It is best to acknowledge that Mr. Tessier's jeopardy was at its highest at the end of the first interview, at which point the RCMP put together a surveillance team to observe Mr. Tessier, and that the trial judge did not record this fact in his reasons. And yet it bears recalling that it was during this period of increased jeopardy that Mr. Tessier conclusively showed his statements after the first interview to be voluntary: he repeatedly called Sgt. White and re-attended the detachment in person to look for him. That Mr. Tessier actively sought out Sgt. White to bring him to his home to check if his gun was in its case is an overriding indicator of voluntariness with respect to his statements after the first interview. It also provides general context consistent with his other efforts to cooperate and disclose information selectively.

[102] The voluntariness issue in this case is about fairness. Mr. Tessier did not argue that any of the statements made to Sgt. White were inaccurate. No reliability concerns arise. Rather, the case is about whether Mr. Tessier was treated unfairly by police such that he was denied a meaningful choice to speak to them. Nothing about the circumstances of his statements suggests this. Mr. Tessier was well aware of the nature of the investigation and sought to manage the information conveyed to Sgt. White in a manner that suited him. There were no threats or police tricks, nor was there an atmosphere of oppression. Accepting that he erred in deciding that Mr. Tessier was not a suspect during the interviews of March 17, 2007, the trial judge's conclusions that Mr. Tessier's statements were voluntary and that he exercised a free choice to speak should not be disturbed.

C. *Was Mr. Tessier Psychologically Detained, and, if so, What Impact Did That Have on the Admissibility of His Statements?*

[103] Mr. Tessier recalls that, in the circumstances of this case, he was questioned at a police station following a request by a person in authority that he present himself there. He says that he was more than a suspect; he was psychologically detained by Sgt. White such that the failure to inform him of the right to obtain and instruct counsel without delay constituted a breach under s. 10(b) of the *Charter*. Further, he argues that the statements gathered during the first and second interviews should have been excluded from the evidence under s. 24(2) of the *Charter*.

[104] Mr. Tessier submits that the trial judge distilled the wrong factors to guide his detention analysis, relying improperly on considerations identified in *R. v. Moran* (1987), 36 C.C.C. (3d) 225 (Ont. C.A.), and restated in *R. v. Seagull*, 2015 BCCA 164, 323 C.C.C. (3d) 361. Mr. Tessier argues that on a proper application of *Grant* and *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, he was psychologically detained. The Court of Appeal noted it was not necessarily an error to rely on the factors in *Moran* and *Seagull*, so long as full consideration was given to the *Grant* factors to answer the ultimate question of detention.

[105] The psychological detention question in this case is governed by the three factors discussed in *Grant* and affirmed in *Le*. Psychological detention exists where an individual is legally required to comply with a direction or demand by the police, or where “a reasonable person in [that individual’s] position would feel so obligated” and

would “conclude that he or she was not free to go” (*Grant*, at paras. 30-31; *Le*, at para. 25; *Parent*, at pp. 460-61). Three factors are to be considered and balanced in determining whether a person has been psychologically detained: first, the circumstances giving rise to the encounter as they would reasonably be perceived by the individual; second, the nature of the police conduct; and third, the particular characteristics or circumstances of the individual where relevant (*Grant*, at para. 44; *Le*, at para. 31).

[106] Applying these factors, I would reject Mr. Tessier’s claim that he was psychologically detained and confirm the trial judge’s conclusion on this point.

[107] All three *Grant* factors weigh against finding that Mr. Tessier was detained. The initial contact was in the form of a general inquiry, and Mr. Tessier would not have felt singled out for a focussed investigation given that he knew others were being interviewed as well. Mr. Tessier attended the detachment through his own means. Although the situation changed when Sgt. White asked a series of pointed questions that suggested police thought Mr. Tessier was culpably involved, a reasonable person in his shoes would not have felt obliged to comply in the circumstances. Mr. Tessier was aware that police were investigating the homicide of his friend and, when challenged, he provided an exculpatory narrative and sought to direct suspicions elsewhere. At no point did Sgt. White state or imply that Mr. Tessier would not be free to go. Instead, after denying his involvement, Mr. Tessier used that moment to relieve the increased pressure on him by going outside for a smoke. Mr. Tessier clearly

possessed the agency to leave the interview room and, crucially, he declined to cooperate with the DNA sample upon his return after consulting with his friend.

[108] The fact that the interview took place at the police station does not on its own give rise to a detention (Parent, at pp. 476-77; see also *R. v. Pomeroy*, 2008 ONCA 521, 91 O.R. (3d) 261; *R. v. Hawkins*, [1993] 2 S.C.R. 157, rev'g (1992), 102 Nfld. & P.E.I.R. 91 (N.L.C.A.)). The contextual inquiry mandated by *Grant* and *Le* requires the totality of the circumstances to be examined. Mr. Tessier's attendance at the detachment was requested, not demanded. Sgt. White's relaxed manner of dress and permissive attitude to Mr. Tessier's movements would have lessened a sense that compliance was mandatory. The interview ended in a cordial manner, with Mr. Tessier inviting officers to his home and choosing to hitch a ride back to his vehicle with Sgt. White.

[109] Even if he was observed, Mr. Tessier was permitted to leave the detachment unattended. Mr. Tessier exhibited no particular vulnerabilities that would suggest that the reasonable person would have felt compelled to comply with demands or directions from the police. At the time of the questioning, he was a mature adult who demonstrated keen awareness of his position in relation to police.

[110] With respect to his interactions with police after the first interview, it is significant that Mr. Tessier repeatedly called Sgt. White and attended the RCMP detachment of his own volition and on his own terms. Mr. Tessier was initiating contact

and could not plausibly claim to feel detained when he returned to the RCMP detachment and accompanied officers to his house.

[111] Given that Mr. Tessier was not psychologically detained, his *Charter* rights were not triggered. There was no breach of his right to counsel. I would confirm the trial judge's conclusion on this issue.

VI. Conclusion

[112] For the foregoing reasons, I would allow the appeal, set aside the judgment of the Court of Appeal and restore the conviction ordered at trial.

The following are the reasons delivered by

BROWN AND MARTIN JJ. —

I. Overview

[113] In the early stages of a murder investigation, the RCMP discovered that Mr. Tessier was a close friend of the deceased. They asked him to come to the police station for an interview. He did so, and his statements during that interview were audio and video recorded. During what can only be described as a focused, targeted interrogation, the investigating officer:

- asked Mr. Tessier *if he killed the victim*,
- asked Mr. Tessier *how he could disprove having killed the victim*,
- asked Mr. Tessier *why his DNA* would be near the crime scene,
- suggested to Mr. Tessier that *he was lying*, and
- invited him *to incriminate himself by providing physical evidence*.

At no point did police warn Mr. Tessier that he was not obliged to speak with them or that anything he said could be used in evidence.

[114] Although Mr. Tessier said that his statements to the police were made involuntarily, the trial judge admitted them and convicted Mr. Tessier of first degree murder. He erroneously found that, because the officer did not perceive Mr. Tessier as a suspect, his failure to warn Mr. Tessier about his right to remain silent and the consequences of speaking to police did not impact the voluntariness of his statements. The Court of Appeal of Alberta set aside Mr. Tessier's conviction and ordered a new trial. Specifically, it held that the trial judge erred in ruling the statements voluntary since, where no such warning had been given, he must have first considered whether the accused understood he did not have to say anything and that anything he said could be used against him (2020 ABCA 289, 12 Alta. L.R. (7th) 55, at paras. 37 and 56).

[115] Mr. Tessier says he was detained. We agree entirely with the majority's account of the law governing that issue, including the substance of Mr. Tessier's burden. While it is unnecessary for us to decide whether Mr. Tessier has met that

burden, it is not obvious to us that he has. In any event, we are content to decide this case on the trial judge's erroneous treatment of the confessions rule. Specifically, we agree with the Court of Appeal that the trial judge's reasons reflect "an impoverished understanding of the modern confessions rule" (para. 46). In the trial judge's view, it was sufficient that Mr. Tessier had basic cognitive capacity and the police did not threaten, trick, or induce him into making a statement. His reasoning follows a troubling trend since this Court's decision in *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, whereby the four common factors identified in *Oickle* as vitiating voluntariness are misused as a checklist to satisfy the Crown's burden.

[116] The majority rightly affirms that the *Oickle* factors are not a checklist (para. 68). Kasirer J. further recognizes that voluntariness protects the right of suspects to freely and effectively choose to speak to police (paras. 4, 9 and 71). As a result, the majority introduces a salutary change to the law: the absence of a warning in this circumstance is "*prima facie* evidence that [suspects] were unfairly denied their choice to speak to the police" (para. 9; see also paras. 83 and 89). We therefore understand the majority to adopt a presumption of inadmissibility when statements are elicited from suspects without a warning. The rationale underlying the majority's presumption is that the absence of a caution may unfairly deprive individuals of making a "free and meaningful choice to speak to police" when they are at "risk of legal jeopardy" (para. 71).

[117] While we agree with these statements, in our view, the majority falls short by failing to carry this same rationale to its logical conclusion: that is, in order to ensure that individuals are making a “free and meaningful choice to speak to police”, police should provide a warning at the outset of *all* interviews — and not just interviews of *suspects*. In our view, any interview conducted without a warning is presumptively involuntary, *and* the presumption should be more difficult to rebut where the interviewee’s risk of self-incrimination was objectively heightened.

[118] In our view, such a rule follows from our jurisprudence, which has progressed beyond a negative inquiry into police inducements, trickery, and oppression. Since at least this Court’s decision in *R. v. Hebert*, [1990] 2 S.C.R. 151, confirmed more recently in *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, it has been clear that voluntariness exists *only* where the accused made *a meaningful choice* to speak with police. An individual’s statement to police must therefore reflect a “genuine desire to confess” (H. Stewart, “The Confessions Rule and the *Charter*” (2009), 54 *McGill L.J.* 517, at p. 522). A meaningful choice is *an informed choice*. Interviewees cannot make a meaningful choice without knowing that the choice is between speaking and not speaking with police, and of the consequences of choosing to speak. Voluntariness is premised on the assumption that the interviewee should have actual knowledge of the legally available options. So understood, that meaningful choice arises at the moment police begin to question an individual; its protection is not confined to detainees or suspects.

[119] We stress that it cannot merely be *assumed* that people interacting with the police know that they may remain silent and that whatever they say can be used in evidence. Indeed, the police officer in this case got the rule wrong himself when he (much later) told Mr. Tessier that only statements made after he was formally read his rights and *Charter* cautioned could be used against him.

[120] In sum, and unlike our colleagues, we would not limit the importance of a warning to circumstances where an accused is a suspect or detainee. A warning should be given at the outset of *all* interviews, and its importance increases with the objective risk of self-incrimination. Specifically, when the police initiate contact with a person to secure information about a crime they are investigating, a rebuttable presumption arises whereby any statement given in the absence of a warning is involuntary. The Crown may rebut the presumption by establishing, based on some other objective source of information, that interviewees otherwise knew they had a right to remain silent and that anything they said could be used in evidence. The presumption will be more difficult to rebut where the risk of self-incrimination is objectively heightened, for instance, when a person is invited to conduct a recorded interview at the police station, when the police take an adversarial approach during an interview, or when there is information that, *objectively* viewed, would raise a reasonable suspicion that the individual was involved in the crime. That is true whether or not the investigating officer *subjectively* views the individual being questioned as a witness, suspect, or detainee.

[121] A warning — one simple sentence — by the authorities at the outset of an interview — that the person is not obliged to say anything, but that anything said can be used in evidence, sets the necessary foundation for voluntariness and enhances the fairness of the process. Replacing the dubious assumption of universal knowledge with a simple and direct communication corrects any informational asymmetry to the benefit of all concerned.

[122] First, interviewees, having been informed of their choice, understand that they may lawfully remain silent.

[123] Secondly, police are given a clear, bright-line rule which does not rely on a cumbersome framework directing them to consider the perceived status of the interviewee at any particular point in time. Interviews are so dynamic and fluid that it has proven exceedingly difficult to pinpoint with any confidence when an interviewee becomes a potential suspect, a person of interest, a real suspect, or a detainee. Providing basic and necessary information from the outset, which is when the voluntariness requirement arises, allows authorities to proceed without fear that an interviewee's misunderstanding about whether to speak or not will result in their carefully conducted interviews yielding involuntary (and therefore inadmissible) statements.

[124] Finally, it follows that the Crown will benefit from such information having been given to the accused at the outset, since it can therefore more easily establish the meaningful choice at the heart of the voluntariness inquiry.

[125] Our approach promotes the confessions rule's animating concern with fairness and the administration of justice. It provides a strong incentive for police to warn individuals before questioning them, and helps alleviate the informational deficit and coercive element inherent in police interrogations. Contrary to the Crown's submissions and the majority's reasons, it will not unduly interfere with police investigations. Nor can we endorse an approach that effectively invites police to exploit the murky lines around psychological detention and rely on individuals' ignorance of their rights to extract statements where they are at risk of incriminating themselves.

[126] Applying our restated test, the question in this case becomes whether Mr. Tessier spoke to police voluntarily with awareness about what was at stake. In our view, he did not. When the police contacted him to secure information in relation to their homicide investigation, he was not initially informed that he was not required to speak to police and that what he said could be used as evidence. Further, both the officer's adversarial questioning and the information pointing to Mr. Tessier as a suspect increased his objective risk of self-incrimination. As the majority acknowledges (at para. 61), the trial judge committed palpable errors by ignoring key information that would have raised a reasonable suspicion that Mr. Tessier committed the crime. The Crown failed to rebut the presumption of involuntariness, and the statements should not have been admitted. We would therefore dismiss the appeal and confirm the judgment of the Court of Appeal setting aside the conviction and ordering a new trial.

II. Background

[127] On March 16, 2007, Allan Berdahl's body was found in a ditch alongside a remote road near Carstairs, Alberta. He had died from gunshot wounds to the head. Officers observed one set of tire tracks, two sets of footprints, and blood spatter in undisturbed snow around the body. Two cigarette butts and a single .22 calibre bullet were later located near the scene.

[128] The police quickly learned that Mr. Tessier was a friend and business associate of Mr. Berdahl. They asked Mr. Tessier for an interview, and he attended the RCMP detachment in Didsbury to be interviewed by Sgt. White, a veteran investigator. The interview was audio and video recorded. The door of the interview room was closed but not locked.

[129] When the interview began, Mr. Tessier told the officer he was "nervous as hell" (A.R., vol. IV, at p. 98). Sgt. White noticed that Mr. Tessier appeared nervous and his hands were shaking. Sgt. White explained that police were investigating a homicide and began with background questions. Mr. Tessier described an afternoon and evening with the deceased the day before his body was discovered, and said that he last saw Mr. Berdahl around 8 p.m.

[130] At that point, Sgt. White suggested that Mr. Tessier was "[p]retty mixed up" or "bothered", and there was "only one reason for that", so he should "[t]ell the truth" (p. 117). He remarked that Mr. Tessier's presence in Didsbury, near the location

of the body, was “[p]retty coincidental” and “if you cross[ed] all the little lines, what does [that] look like?” (pp. 109-10). Telling Mr. Tessier: “. . . you hold the truth as far as I’m concerned . . .”, he explained that the police typically look to people that know the victim and Mr. Tessier was “one of his best friends” and “the last person with him” (pp. 120-21 and 127).

[131] Sgt. White went on to ask several pointed questions: Was there any reason his DNA might be near the crime scene?; what should happen to the person who caused the death?; “[d]id you think it was planned?”; “[d]id you kill Allan Berdahl?”; and “how can you prove to me that you didn’t do it”? (pp. 126-27). Mr. Tessier said he was “scared to answer questions” and he did not know what to do (p. 126).

[132] Next, Sgt. White began collecting physical evidence from Mr. Tessier. First, he asked Mr. Tessier to provide a DNA sample so the police could use it to “eliminate” his DNA being at the crime scene. Mr. Tessier replied, “Why wouldn’t I?” (p. 129). Sgt. White explained that it must be voluntary and he should consult counsel. The interview stopped so Sgt. White could obtain a DNA kit and Mr. Tessier could go for a smoke. When they returned to the interview room, Mr. Tessier declined to provide a DNA sample. He said that he had spoken to a friend who told him that he did not know what was going on and the police could be “painting [him] into a corner” (p. 130). Sgt. White suggested that Mr. Tessier had a “great deal of emotion” and was “on the edge” (p. 131).

[133] Secondly, Sgt. White asked to look at Mr. Tessier's shoes to "eliminate" him (p. 130). Mr. Tessier complied and Sgt. White took a photocopy of the bottom of the shoe. While the interview was ongoing, other officers travelled to Mr. Tessier's truck and concluded that the tire tread was a possible match to the impressions on scene. Thirdly, Sgt. White went with Mr. Tessier to his truck and collected a bottle of Tylenol and a cheque that belonged to the victim.

[134] The interview lasted approximately 105 minutes. When the discussion came to an end, Mr. Tessier asked if he was free to leave and he was told that he was. After the first interview, the police held a briefing and set up a team to surveil Mr. Tessier.

[135] When Mr. Tessier and Sgt. White spoke again, Sgt. White made further statements indicating that he suspected Mr. Tessier, including: "I think there's something really bothering ya and that's why you're here again" and "[s]ometimes things happen and you wish you could turn the clock back" (pp. 155-56). Sgt. White told him: "You look tired. You look [like] you haven't sle[pt] for two days . . . you haven't shaved in a couple of days . . . you look worn" (p. 158). He also asked whether money was "a major stress factor" for Mr. Tessier, how much Mr. Berdahl owed him and if there was any reason Mr. Berdahl would "all of [a] sudden be not your friend" or "make you upset" (pp. 157 and 159).

[136] During the first and second interviews, Mr. Tessier was not warned about his right to counsel, his right to silence, or that anything he said could be used in

evidence. Sgt. White did not tell Mr. Tessier that his participation in the interview was optional, that the closed door was unlocked, or that he was free to go at any time. Mr. Tessier was advised of his right to counsel and received a warning that his statements may be used against him only when the police went to his home and discovered his gun was missing. At that time, Sgt. White incorrectly advised that only statements he made *after* the warning could be used against him. When Mr. Tessier asked for clarification, Sgt. White said that only what he said going forward could be used in court against him.

[137] Sgt. White testified that Mr. Tessier was not a suspect during those interviews because they did not have any evidence implicating him, although police wanted to “confirm his alibi” and “eliminate him” (A.R., vol. II, at pp. 39-40). Mr. Tessier became a “person of interest” during the second interview when he disclosed that he had recently picked up a firearm from the shooting range (p. 63). Sgt. White defined a person of interest as someone “worthy of further scrutiny into his actions and movements to verify or eliminate” as the person responsible for the death (p. 63).

[138] Sgt. White also testified that the purpose of interviewing a suspect is “to get an admission of guilt” (p. 86). He agreed that reading interviewees their *Charter* rights “makes them less comfortable” and can “sto[p] them from talking further” (p. 86). On cross-examination, Sgt. White admitted: “I was hoping that [Mr. Tessier] would confess” and “if he wanted to confess, I was there” (pp. 117, 125 and 128).

[139] In both interviews, Mr. Tessier denied involvement in or knowledge of the circumstances of Mr. Berdahl's death, but made a number of admissions and statements that were later proven false. The Crown sought to rely on his statements at trial. The trial judge admitted both statements as voluntary. The Court of Appeal found legal errors in the trial judge's analysis, allowed the appeal, set aside Mr. Tessier's conviction and ordered a new trial to consider whether Mr. Tessier had made a meaningful choice to speak to police.

III. Analysis

A. *Voluntariness Requires the Court to Scrutinize Whether the Accused Made a Meaningful Choice to Speak With Authorities*

(1) Overview

[140] As we will explain, voluntariness exists only where an accused makes a *meaningful* choice to speak with police. This reflects the confessions rule's concern for a person's right to choose whether to speak with police, a concern that underlies the privilege from self-incrimination and the right to silence. A *meaningful* choice is an *informed* choice. Interviewees must be *informed* of their right to silence and of the consequences of speaking to police. This is the information traditionally contained in a standard police caution, which appears in the English *Judges Rules* of 1912.

[141] In what follows, we refer to the standard police caution as a warning to differentiate it from the *Charter* cautions that police provide to fulfill their informational duties under ss. 10(a) and 10(b) of the *Charter*. While this Court referred to “warning[s]” and “caution[s]” interchangeably in *Boudreau v. The King*, [1949] S.C.R. 262 (at p. 267, citing *Gach v. The King*, [1943] S.C.R. 250, at p. 254), the meaning of a caution has taken on a different connotation in the *Charter* era. Police administer a variety of cautions upon arrest or detention to meet their *Charter* obligations, and a complex jurisprudence governs their content. Our approach, however, does not impose upon the warning necessary to show an informed choice the same requirements that govern cautions under the *Charter*. We therefore use the term “warning” to avoid confusion over its meaning and scope.

[142] This Court’s approach to a warning, stated in *Boudreau*, has not been reviewed to account for *Hebert*’s recognition of the need for an informed choice. To give effect to this requirement, we propose that the Crown must show that police warned an interviewee of the right to silence and the consequences of speaking where the police initiated contact with an individual to secure information about a crime they were investigating. Absent that warning, a presumption of involuntariness arises which, if not rebutted, renders any statement inadmissible, since police cannot assume interviewees understand their rights or their risks. The presumption can be rebutted by showing that the interviewee was nonetheless aware of the right to remain silent and that anything said could be used in evidence. As a practical matter, the Crown’s burden in rebutting the presumption will increase when the objective risk of self-incrimination

at the time of making the statement is heightened. Where, for example, the interview is conducted in a police station, the concomitant adversarial nature and the likelihood a witness becomes a suspect or detainee as a result will call for clear and compelling evidence that, notwithstanding the absence of a warning, the interviewee made an informed choice to speak, in the sense of understanding the right to remain silent and that anything said could be used in evidence.

[143] As we will explain below, it is our respectful view that, for several reasons, our proposed approach is to be preferred over *Boudreau*. We begin, however, with an overview of voluntariness and the need for an informed choice.

(2) Nature and Scope of the Confessions Rule

[144] The common law confessions rule requires the Crown to prove beyond a reasonable doubt that an accused's statement was voluntarily made. It applies to all oral and written statements made to a person in authority and tendered by the Crown in criminal or quasi-criminal proceedings, whether the accused was detained or not (S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶8.13). The remedy is automatic exclusion.

[145] Importantly, the confessions rule captures not only inculpatory statements (such as where the accused confesses to committing the crime) but also exculpatory statements (S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in*

Canada (3rd ed. 2022), at ¶4.4; *Piché v. The Queen*, [1971] S.C.R. 23, at p. 36, per Hall J.). Statements may contain both admissions and denials, and even statements that are exculpatory on their face may be used against the accused (F. Kaufman, *The Admissibility of Confessions* (3rd ed. 1979), at p. 6). In this case, for instance, Mr. Tessier did not confess to the murder but provided information that the Crown relied on at trial as circumstantial evidence of his guilt.

[146] The confessions rule is closely related to, and indeed derives from, two longstanding common law principles: the right to silence and the privilege against self-incrimination (*Singh*, at paras. 21 and 24). All three are concerned for the right of the individual to choose whether to make a statement to the authorities, and for the repute and integrity of the judicial process (*Hebert*, at pp. 164 and 173). The common law right to silence “reflects the general principle that, absent statutory or other legal compulsion, no one is obligated to provide information to the police or respond to questioning” (*Singh*, at para. 27). Similarly, the privilege against self-incrimination is rooted in the idea that a citizen involved in the criminal process must be accorded protections against the overwhelming power of the state, and in the related idea that accused persons have no obligation to give evidence against themselves (*Hebert*, at p. 174).

[147] The confessions rule is a common law rule that exists independently of the *Charter*. Certain *Charter* protections arise only at a particular point in the criminal process, based on the legal jeopardy faced by an individual. Only people who are detained or arrested must be told of their *Charter* right to retain and instruct counsel

under s. 10(b), which is also called being *Chartered*. Those who are detained and arrested must also be told that they have the right to remain silent and to not incriminate themselves, although the Court in *Singh* held the significance of this warning diminishes if detainees exercised their s. 10 right to counsel (para. 33). This “caution” conveys that the detainees or arrestees need not say anything to the police and that what they say can be used in evidence. Under the confessions rule, even before there is a detention or arrest, if an interviewee is suspected of committing an offence, the police are also advised to warn that person (*Singh*, at paras. 32-33).

[148] The most important difference for our purposes is that the confessions rule applies from the outset of the interaction between the individual and the police, whether or not the individual is detained or arrested. In assessing whether a person made a meaningful choice to speak with authorities and understood the implications of doing so, the *entire interaction*, from beginning to end, must be reviewed; to be admissible, the accused’s statements must *always* be voluntary. Further, the rule is not triggered by the *status* of the individual (a potential suspect, a person of interest, a real suspect, or a detainee) at any discernible point in time. It operates *anytime* that *anyone* speaks to an agent of the state and applies throughout the entire dealings between them.

[149] The parties agree that the confessions rule aims to balance an individual’s right to choose whether to speak to the authorities and society’s interest in the investigation of crime. But this is not a simple tug-of-war between the police and accused persons. Society’s interest encompasses more than investigating crime; the

public also has an interest in protecting individual rights and ensuring fairness in the administration of justice (*Hebert*, at p. 182). As this Court has recognized, therefore, the modern confessions rule has two objectives: “. . . to ensure trial fairness and to preclude conviction of an accused based upon compelled and as such inherently unreliable evidence” (*R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 16).

[150] This is confirmed by a brief review of the common law confessions rule over the years, which illustrates that voluntariness has moved beyond a negative inquiry concerned with police inducements, trickery, and oppression. While historically concerned with statements obtained by “fear of prejudice or hope of advantage”, the rule’s purpose now embraces fairness concerns and the accused’s “meaningful choice” to speak with police (*Ibrahim v. The King*, [1914] A.C. 599 (P.C.), at p. 609).

(3) Expansion of the Confessions Rule

[151] The confessions rule traces back to the 18th century, when courts recognized that “a confession forced from the mind by the flattery of hope, or by the torture of fear” was inadmissible at trial (*R. v. Warickshall* (1783), 1 Leach 263, 168 E.R. 234, at p. 235). The formal police caution (or warning, as we call it) appeared in the English *Judges Rules* of 1912, which guided police officers to warn, before charging any person with a crime or conducting a custodial interview, of the right to silence and that any statement may “be given in evidence” (*R. v. K.P.L.F.*, 2010 NSCA 45, 290 N.S.R. (2d) 387, at paras. 21-24, citing *R. v. Voisin*, [1918] 1 K.B. 531 (C.C.A.), at p. 539; Kaufman, at pp. 149-52). In 1964, the *Rules* were amended to

require the warning be given “[a]s soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence” (*Practice Note (Judges’ Rules)*, [1964] 1 W.L.R. 152, at p. 153).

[152] By the mid-20th century, the confessions rule and the warning were well established in Canadian criminal law. In *Prosko v. The King* (1922), 63 S.C.R. 226, this Court adopted a test articulated by the Privy Council in the 1914 decision of *Ibrahim*:

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. [p. 609]

[153] For a brief period in the 1940s, the absence of a warning was an absolute bar to the admissibility of a statement made as a result of police questioning (*Gach*). Then, in the 1949 decision of *Boudreau*, this Court backtracked, holding that the presence or absence of a warning is an important but not determinative factor in determining voluntariness:

The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one. [Emphasis added; p. 267.]

[154] This is the nearly 75-year old rule, stated over 30 years before the *Charter*, and coupled with concerns only for police coercion and inducements, which informs the majority's analysis (see paras. 5, 52, 62, 64 and 72). But since the *Charter*, broader fairness concerns have come to characterize our understanding of the terms of interaction between the individual and the state — concerns which have moved our jurisprudence.

[155] And so, in *Hebert*, the Court held that voluntariness connotes a “broader” conception that protects a choice between alternatives (at p. 166), which is reflected in the operating mind doctrine. One of the themes underlying the confessions rule is the idea that “a person in the power of the state's criminal process has the right to freely choose whether or not to make a statement to the police”, coupled with a “correlative concern with the repute and integrity of the judicial process” (p. 173). Those same concerns underlay the privilege against self-incrimination and supported recognition of a detainee's right to silence as a principle of fundamental justice under s. 7 of the *Charter* (p. 175). The scope of the common law right to silence must, the Court continued, recognize a detainee's right to make a meaningful choice whether to speak to authorities or to remain silent. Rejecting the *Ibrahim* rule as too narrow, the majority formulated a confessions rule which “permits consideration of the accused's informed choice, as well as fairness to the accused and the repute of the administration of justice” (p. 182 (emphasis added)).

[156] In *R. v. Whittle*, [1994] 2 S.C.R. 914, this Court held that the right to counsel, the right to silence, and the common law confessions rule operate together to provide a standard of reliability with respect to evidence obtained from detained persons and to ensure fairness in the investigatory process (p. 939). A shared element of all three rules is the *right to make a choice* in relation to action by the state and whether the action by the authorities deprived the suspect of making an effective choice by reason of coercion, trickery or misinformation or the lack of information (pp. 931-32). *Whittle* also developed an analytical framework for the operating mind requirement, confirming that it only “requires that the accused possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused” (p. 939 (emphasis added)). The Court declined to set a higher standard that would include an understanding of the consequences of confessing or the ability to make a wise choice (p. 936).

[157] In *Oickle*, the Court affirmed *Hebert*’s choice “between alternatives” as an aspect of voluntariness, which is “most evident” in the operating mind doctrine (paras. 25-26, citing *Hebert*, at p. 166). The common law confessions rule encompasses broader fairness concerns, the Court observed, and a confession may be involuntary even where reliability is not at issue (para. 27). Four circumstances that commonly vitiate voluntariness were then outlined: (a) threats or promises; (b) oppression; (c) lack of an operating mind; and (d) police trickery that “shocks the community” (paras. 47-67, citing *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 697). The Court cautioned, however, that “[h]ard and fast rules simply cannot account for the variety of

circumstances that vitiate the voluntariness of a confession”, that voluntariness is “shorthand for a complex of values”, and that the analysis “must be a contextual one” (paras. 47 and 70-71, citing J. H. Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev. 1970), vol. 3, § 826, at p. 351). Despite that accompanying caution, lower courts — like the trial judge in this case — have treated these four factors as an exhaustive and determinative checklist for satisfying the Crown’s burden.

[158] And yet, in *Singh*, this Court affirmed that the common law confessions rule, like the right to silence, is a manifestation of a *broader* principle against self-incrimination (para. 21). Voluntariness, the Court explained, is a broader concept grounded in a “complex of values”, including “respect for the *individual’s freedom of will*, the need for law enforcement officers themselves to obey the law, and the overall fairness of the criminal justice system” (para. 30 (emphasis in original)). Thus it has long embraced the principle that a person is not obliged to give information to the police or to answer questions (para. 31). This component of the voluntariness rule is reflected in the usual warning given to a suspect and in the significance attached to its presence as a factor in determining the voluntariness of a statement (para. 31, citing *Boudreau; R. v. Fitton*, [1956] S.C.R. 958; *R. v. Esposito* (1985), 24 C.C.C. (3d) 88 (Ont. C.A.)).

[159] Importantly, the Court in both *Oickle* and *Singh* emphasized that the modern confessions rule “clearly includes the right of the detained person to make a meaningful choice whether or not to speak to state authorities” (*Singh*, at para. 35 (emphasis added); *Oickle*, at paras. 24-27). Voluntariness requires the court to consider

whether the accused was denied the right to silence (*Singh*, at para. 37). In assessing voluntariness, the focus is on the conduct of the police and its effect on the suspect's ability to exercise free will. The test is objective but the individual characteristics of the accused are relevant considerations (para. 36).

(4) The Modern Conception of Meaningful Choice Goes Beyond an Operating Mind

[160] The Court of Appeal's decision is entirely consistent with this Court's statements in *Hebert*, *Whittle*, *Oickle* and *Singh*. While the majority confines the Court's statements in *Hebert* and *Singh* to detainees (see paras. 52, 55, 75 and 79), we would give them full force. Voluntariness requires the court to scrutinize whether the accused was denied the right to silence under the *Charter* or the common law. The inquiry focuses predominantly on the accused's ability to *make a meaningful choice* whether to speak to police (*Singh*, at para. 35; Lederman, Fuerst and Stewart, at ¶8.71, citing *Hebert*, at p. 182). Since voluntariness requires a meaningful choice, it must also require access to information guiding that choice. It follows that a meaningful choice to speak cannot be made without knowing whether one is required to speak and whether there are consequences to doing so. As the respondent says, “[f]or a person's will to be *overborn[e]* they must have a will to refuse to begin with. Knowledge of the information contained within a police caution is what creates such a will” (R.F., at para. 41 (emphasis in original)). It follows, then, as a matter of simple logic that the state may need to correct an information asymmetry before a statement will be found voluntary.

[161] The majority relies on the operating mind principle as stated in *Whittle* and *Oickle*, which is admittedly a low threshold. The majority says the “default assumption” is that an operating mind exists absent a cognitive impairment (para. 52). In our view, the operating mind doctrine always *presumes* an accused *already had* some information about the right to silence. Hence the issue in *Whittle*, which was, specifically, whether an accused person had the cognitive capacity to *understand* what they were told and what they said to police. The reason for this is apparent in *Oickle*, where the Court affirmed the operating mind doctrine follows from the conception of voluntariness as a choice between alternatives. True, it inquires into an accused’s cognitive capacity; but an accused’s cognitive capacity to choose between alternatives is meaningless without information about those alternatives. The doctrine therefore *presumes* accused persons are informed of their rights, and the inquiry is into whether they understood them. Indeed, *Oickle* affirmed the doctrine involves no “higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment” (*Whittle*, at p. 936 (emphasis added); *Oickle*, at para. 63).

[162] Further, in *Hebert*, *Whittle*, *Oickle* and *Singh*, the accused persons were all *actually warned or Charter cautioned*.

[163] The accused in *Oickle* was given warnings or *Charter* cautions on three occasions. First, before asking him to take a polygraph test, the officer told Mr. Oickle that he was not under arrest or detention, the door was not locked, he was free to leave

at any time, he was not required to “sit here and talk to [him]” but anything he said could be admissible in court, and that he had the option to contact a lawyer or legal aid (*R. v. Oickle* (1998), 164 N.S.R. (2d) 342 (C.A.), at para. 80). Secondly, during Mr. Oickle’s interrogation, the officer reiterated that he had the right to a lawyer and could “walk out at any time” (*Oickle* (SCC), at para. 7). Finally, after confessing to setting a fire, Mr. Oickle was arrested, warned of his right to counsel, and given a secondary police caution. The Court concluded he was “fully apprised of his rights at all times”, including his rights to silence, to a lawyer, and to leave at any time (*Oickle*, at paras. 6-7 and 72). The inquiry therefore focused on whether the police inducements were sufficient to raise a reasonable doubt as to voluntariness. *Oickle* demonstrates that an operating mind and the absence of inducements, oppressive circumstances, and police trickery are always *necessary* but not *sufficient* conditions.

[164] Likewise, the Crown argued before us that *Whittle* did not require the Court to consider whether the accused could make a meaningful choice. Importantly, however, and as ignored by the Crown and the majority, *Whittle* was a case about cognitive capacity. The basic informational component of a caution was *presumed* in the Court’s analysis (*Whittle*, at p. 941). Mr. Whittle suffered from schizophrenia. He was arrested on outstanding warrants and informed of his right to counsel, which he did not exercise. While in his cell, he told the officers that he committed a murder and three robberies. After verifying the incidents, the police warned Mr. Whittle and informed him of his right to counsel, which he again declined to exercise. He provided more details on the murder. He was informed once again of his right to counsel, which

he then opted to exercise. After speaking with his lawyer, who informed him of his right to silence, Mr. Whittle agreed to speak with police. He was warned again and informed of his right to counsel. He continued to provide details on the incidents (*R. v. Whittle* (1992), 78 C.C.C. (3d) 49 (Ont. C.A.), at pp. 54-60). Thus, the Court in *Whittle* was concerned not with whether the accused was *informed* of the contents of a warning, which he clearly was, but whether he could *understand* it (p. 941).

[165] Similarly, in both *Hebert* and *Singh*, the accuseds had been *Charter* cautioned. Mr. Hebert was arrested on a robbery charge and informed of his right to counsel. After arriving at the RCMP detachment, he contacted counsel and obtained advice on his right to refuse to give a statement. After exercising his right to counsel, the police took Mr. Hebert to an interview room, gave him “the usual police caution”, and asked him what he had done (p. 159). He said he did not wish to make a statement. He was then placed in a cell with an undercover police officer, who engaged Mr. Hebert in a conversation during which he made various incriminating statements (pp. 158-59). Mr. Singh was arrested for second degree murder. He was advised of his right to counsel under s. 10(b) and privately consulted with counsel. During two subsequent interviews, he stated on numerous occasions that he did not want to talk about the incident, he did not know anything about it, or he wanted to return to his cell. The officer told Mr. Singh: “You don’t have to talk to me if you don’t want to talk to me” (*R. v. Singh*, 2003 BCSC 2013, at para. 7 (CanLII)). Nonetheless, the officer continued to deflect Mr. Singh’s assertions and engage him in conversation. Mr. Singh did not confess to the crime but made incriminating statements (*Singh* (SCC), at para. 2).

[166] The majority writes that the accused persons in *Hebert, Whittle, Oickle* and *Singh* were each warned because they were detained, since “the *Charter* mandated that certain information . . . be communicated to them by the police” (para. 55). To be clear, we do not dispute that *the Charter* required the police to give cautions in the foregoing cases inasmuch as the accused persons were detained and their *Charter* right to counsel was engaged. We say, however, that *the confessions rule* also mandates a warning in order to give effect to an accused’s right to make a meaningful choice between alternatives. Again, *Whittle* recognized that the right to counsel and the confessions rule protect a “right to choose . . . in relation to state action” and ask whether the accused has been deprived of that choice by reason of, among other things, a lack of information (pp. 931-32). Our point is that this informational aspect to the confessions rule was not contested in the foregoing cases since, unlike here, it was satisfied by providing a *Charter* warning.

[167] It follows that the majority’s reliance on *Hebert, Whittle, Oickle* and *Singh* for the notion that the need for a warning is limited to circumstances where the interviewee is a suspect or detainee (at para. 55) is simply not well-founded.

B. *The Significance of a Warning Under the Modern Conception of Voluntariness*

[168] This brings us to the significance of a warning in the modern conception of voluntariness. The Crown conceded, and the majority agrees, that it would be prudent for police to warn a witness before conducting a police station interview. We further agree with the majority that the presence or absence of a warning will not always be

determinative of the voluntariness inquiry (though it has been a relevant factor in the voluntariness analysis since *Ibrahim* “and, in many cases, an important one” (*Boudreau*, at p. 267)). What divides us is how the absence of a warning should be treated in the voluntariness analysis, particularly in circumstances where the interviewee was neither a suspect nor detainee. Before outlining our approach, we review the current status of a warning in such circumstances.

[169] This Court has not directly addressed the impact of the absence of a warning since the *Charter* was enacted. In *Singh*, it adopted a “useful yardstick” for when to warn an interviewee, explaining that the warning should be given “when there are reasonable grounds to suspect that the person being interviewed has committed an offence” (para. 32, citing R. Marin, *Admissibility of Statements* (9th ed. (loose-leaf)), at pp. 2-24.2 and 2-24.3). Police may consider what they would do if the person attempted to leave the questioning room or officer’s presence — if the answer is arrest or detain the person, the warning should be given. The Court held that even where the suspect has not been formally arrested or obviously detained, police officers are “well advised” to give a warning in those circumstances (para. 33).

[170] Despite *Boudreau*’s long history and this Court’s recent guidance in *Singh*, a consistent response in the lower courts to the failure to warn an interviewee has yet to emerge. The failure to warn a suspect was a significant factor for ruling a statement involuntary in *R. v. Worrall*, [2002] O.J. No. 2711 (QL), 2002 CarswellOnt 5171 (WL) (S.C.J.); *R. v. Higham*, 2007 CanLII 20104 (Ont. S.C.J.); *R. v. Garnier*, 2017 NSSC

338; *R. v. Morrison*, [2000] O.J. No. 5733 (QL), 2000 CarswellOnt 5811 (WL) (S.C.J.); and *R. v. Randall*, 2003 CanLII 2205 (Ont. S.C.J.). Those cases turned on whether the person being interviewed was a suspect at the time, and applied different standards to answer that question.

[171] A distinct approach to warnings has emerged in Ontario. The Court of Appeal for Ontario has rejected the suggestion that involuntariness follows directly from the absence of a warning, even where the interviewee was a suspect at the time (see, e.g., *R. v. Joseph*, 2020 ONCA 73, 385 C.C.C. (3d) 514, at para. 53; *R. v. Pearson*, 2017 ONCA 389, 348 C.C.C. (3d) 277, at para. 19; *R. v. Bottineau*, 2011 ONCA 194, 269 C.C.C. (3d) 227, at para. 88; *R. v. Al-Enzi*, 2021 ONCA 81, 401 C.C.C. (3d) 277, at para. 86). The Crown relies on those cases, but neglects to mention that they all involved some form of modified warning or a *Charter* caution. The accused in *Bottineau* was provided a *K.G.B.* warning and told that he did not have to make a statement (paras. 89-92). In *Joseph*, the accused was told he did not need to answer the police's questions and he could speak with a lawyer (para. 58). In *Pearson*, the accused was not warned in his first interview, but during the second interview, he was told that he was free to leave, he did not have to speak, and anything he said was admissible in court (paras. 20-22).

[172] These inconsistent approaches to warnings illustrate the bases for some of the common criticisms of the modern confessions rule. The confessions rule offers “protections beyond those guaranteed by the *Charter*”: the accused benefits from its

application outside arrest and detention, the Crown bears a weighty burden of proof, and the remedy is automatic exclusion (*Oickle*, at para. 31; L. Dufraimont, “The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions” (2008), 40 *S.C.L.R.* (2d) 249, at p. 265). Yet commentators have criticized the modern contextual approach to the confessions rule for failing to provide “clear and useful guidance” to police and courts on permissible police interrogation tactics (Dufraimont, at pp. 258-59; see also S. Penney, “What’s Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era — Part II: Self-Incrimination in Police Investigations” (2004), 48 *Crim. L.Q.* 280, at p. 285). It has been further criticized for inviting dubious police conduct (see, for instance, D. Stuart, “*Oickle*: The Supreme Court’s Recipe for Coercive Interrogation” (2001), 36 *C.R.* (5th) 188; E. Thomas, “Lowering the Standard: *R. v. Oickle* and the Confessions Rule in Canada” (2006), 10 *Can. Crim. L.R.* 69; see also *R. v. Sinclair*, 2010 SCC 35, [2010] 2 *S.C.R.* 310, at paras. 77 and 89-99, per Binnie J., dissenting). Professor Penney has proposed brighter lines on the types of conduct that compromise the voluntariness of an accused’s statement under the confessions rule (“Police Questioning in the Charter Era: Adjudicative versus Regulatory Rule-making and the Problem of False Confessions” (2012), 57 *S.C.L.R.* (2d) 263, at pp. 274-84).

[173] In our view, these criticisms of the confessions rule are all applicable to this Court’s approach to warnings in the voluntariness analysis. The role of a warning in the voluntariness analysis requires greater clarity, brighter lines and increased protections for individuals.

[174] Since *Boudreau*, courts have been instructed that a failure to warn a suspect is “a factor and, in many cases, an important one” in assessing the voluntariness of the suspect’s statement. But *Boudreau* has led to little consistency in how courts approach the failure to warn a suspect. It has sometimes been afforded decisive weight in the analysis, as in *Worrall*, despite the absence of the traditional factors that undermine voluntariness (see, for instance, *R. v. Lourenco*, 2011 ONCA 782, 286 O.A.C. 187, at para. 7; *Garnier*, at paras. 71, 73, 76-77, 81 and 83 (CanLII)). Elsewhere, a failure to warn a suspect is dismissed as merely one factor to weigh among many (see, for instance, *Pearson*, at para. 19). Moreover, as this case illustrates, *Boudreau* does not assist witnesses who were aggressively questioned as though they were suspects. As well, if the timing of a warning relies *only* on the suspect rule, police may abuse the rule to avoid a warning by downplaying the importance of evidence or withholding key evidence from the interviewing officer to avoid triggering the need for a warning (*R. v. Dunstan*, 2017 ONCA 432, 348 C.C.C. (3d) 436, at para. 86).

[175] In our view, all this should lead the Court to adopt a new approach to warnings. To say that the “complex of values” guiding our notions of fairness and the administration of justice has evolved since *Boudreau* in 1949 is an understatement. (After all, Mr. Boudreau was hanged.) A more stringent approach to a warning is needed in the voluntariness analysis, one that better upholds the confessions rule’s modern protections for the common law right to silence and the principle against self-incrimination.

[176] While our colleagues take a half-step by recognizing a presumption of inadmissibility when statements are elicited from *suspects* without a warning, in our view the rule and its rationale require more. As explained below, we endorse a presumption of inadmissibility whenever police are investigating a crime and elicit a statement from a person about the crime without providing a warning. The importance of a warning increases with the objective risk of self-incrimination. Of course, one instance where the risk of self-incrimination is objectively heightened will continue to be where an interviewee is a suspect. But this will not be the *only* scenario where warnings are necessary. On our approach, then, *Boudreau* no longer has the last word on the weight of a warning in the voluntariness analysis.

C. *Where the Police Contact a Person to Secure Information During an Investigation, the Absence of a Warning Should Be Presumptively Determinative of Voluntariness*

[177] Since the voluntariness inquiry focuses on whether the accused made a meaningful (and therefore informed) choice to speak to police, it follows that the Crown carries a burden to prove an informed choice. If the police provided a warning before obtaining a statement, this burden will be more easily discharged. But where no warning was given during a police interrogation, there is a rebuttable presumption that any statement was involuntary, and therefore, inadmissible.

[178] The presumption will not arise whenever an accused makes a statement to a person in authority, or to *every* interaction that an individual has with police. The presumption arises only where police investigate a crime and initiate contact with a

person to secure information about the crime. As the confessions rule operates primarily to set common law limits on the coercive pressures of a police interrogation (Dufraimont, at p. 250, citing *Oickle*, at para. 1), the failure to provide a warning in those circumstances must render the statement presumptively involuntary. It cannot be assumed that an accused knew of the right to silence when questioned by police. As this Court's jurisprudence on s. 9 of the *Charter* recognizes, most citizens are unaware of the precise limits of police powers and may believe they have an obligation to cooperate with police even during routine interactions (*R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 26, citing S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (2nd ed. 2018), at p. 83). Similarly, s. 10(b) jurisprudence, which is also rooted in the principle against self-incrimination, embraces the idea that detained persons must be immediately *told* of their rights, not that those rights are known to them already (*R. v. Bartle*, [1994] 3 S.C.R. 173, at pp. 190-91). If our *Charter* jurisprudence does not assume citizens are aware of their rights when detained, we see no reason to make this assumption where individuals are subject to police interrogation that may fall short of formal detention but which nonetheless creates opportunities for pressure and coercion. Absent a warning, the statement is presumptively involuntary.

[179] To avoid triggering the presumption, police *must* do what our colleagues say they *should* do: give a warning. Interviewees must be informed that: (1) they do not need to speak to police; and (2) if they decide to speak, their statements may be used in evidence but their silence cannot. Simply informing interviewees of the right to silence is not enough. The consequences of speaking and of silence must be

disclosed, since it is the consequences that allow witnesses to understand their options and what is at stake — that is, to make a meaningful choice. In evaluating whether the presumption is triggered, courts should focus on the substance of the warning, not its form, keeping in mind there is no uniform warning in Canada (*K.P.L.F.*, at para. 28; L. Stuesser, “The Accused’s Right to Silence: No Doesn’t Mean No” (2002), 29 *Man. L.J.* 149). Police do not need to tell interviewees that they have a legal *right* to silence, but their options, like the consequences, should be made clear.

[180] The greater the objective risk of self-incrimination at the time the statement is made, the heavier the Crown’s burden to rebut the presumption by adducing clear and compelling evidence showing the interviewee made a meaningful choice, having been informed of the right to remain silent and the consequences of speaking. Jurisprudence on the confessions rule provides guidance on when the risk of self-incrimination is objectively heightened. The risk is objectively raised when an interviewee becomes a detainee or a suspect. Indeed, the majority acknowledges that “[f]airness concerns are manifest once an individual is targeted by the state” (para. 75). As recognized in *Singh*, it is important to affirm individuals’ right to silence after they are detained (para. 32). Detention accentuates imbalances of power between police and detainees, increasing their vulnerability to interrogation tactics, and it exerts a coercive pressure that, on its own, can prompt a detainee to confess (*Singh*, at para. 32; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 22, citing *Hebert*, at pp. 179-80). Police suspects, too, are at a heightened risk of self-incrimination. Aside from being a likely target for increased coercive pressure, suspects face the greater likelihood that

their statements will be used against them in court proceedings (*Worrall*, at para. 106; *Lourenco*, at paras. 6-7).

[181] Our approach accounts for how police station interviews represent another circumstance where the risk of self-incrimination is objectively heightened. A psychological detention is more likely to arise during such an interview. Interrogation rooms amplify the imbalances of physical and psychological power between police and an interviewee. As this Court has already recognized, interviewees may find the experience overwhelming (*R. v. Crawford*, [1995] 1 S.C.R. 858, at para. 25). Interrogations at a police station frequently begin with general, background questions before turning adversarial. Often police alternate between general and focused questioning. The precise point at which the interview turns adversarial, while difficult to pinpoint, is completely within the officer's control. Just as officers may downplay whether they considered a person a suspect (as they did here), they may also downplay the adversarial nature of their questioning. Moreover, adversarial questioning can result in a witness becoming a suspect midway through an interview.

[182] The risk of self-incrimination is also objectively heightened when police engage in adversarial or aggressive questioning. The effect of police questioning on the accused is a longstanding consideration in assessing voluntariness under the confessions rule (see, for instance, *Fitton*, at p. 962, per Rand J.). To objectively raise the risk of self-incrimination, however, the questioning need not be so aggressive that interviewees could be led to falsely confess. A false confession in most cases “takes

strong incentives, intense pressure and prolonged questioning” (*Oickle*, at para. 45, citing R. J. Ofshe and R. A. Leo, “The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions” (1997), 16 *Stud. L. Pol. & Soc.* 189, at pp. 193-96). To objectively heighten the risk of self-incrimination, it will suffice if the questions are adversarial and police are investigating a crime. In this context, interviewees’ liberty is placed at risk when they are asked questions designed to elicit incriminating evidence, including confessions. That is true regardless of whether the police also considered the person a suspect.

[183] We agree with the majority that the evidence is to be assessed from the perspective of a reasonably competent investigator and that the test is objective (paras. 81-82). As the facts of this case demonstrate, fixing the point at which a police officer can credibly claim to subjectively view an interviewee as a suspect is often slippery and elusive. The focus, then, is properly on the nature of the questions, objectively viewed. Adversarial or aggressive questions that heighten the risk of self-incrimination include those that insinuate witnesses are lying, accuse witnesses of committing the crime under investigation, ask witnesses to disprove their guilt, or otherwise invite witnesses to incriminate themselves. Similarly, in determining whether police were investigating a crime, a court should take an objective view, focusing on whether the officer’s questions indicated they were investigating a crime.

[184] As we have observed, the Crown concedes, as does the majority, that it is prudent for police to warn witnesses before an interview at a police station. This is

because it will be easier to show the statement was voluntary where police do so (majority's reasons, at para. 5). But the majority does not appear to appreciate that the converse must also be true: where police do not do so, the statement cannot be accepted as voluntary without some other basis for so deciding. And yet, each proposition follows from the concession that a warning is prudent practice. In other words, the same reason that giving a warning is *prudent* (to show voluntariness) also explains the problem in not giving a warning (without more, the statement is involuntary). In agreeing, therefore, that giving a warning is *prudent*, we would take that necessary next step: for the very reason that giving a warning *is* prudent, police *must* do so *before* conducting an interview in pursuit of a criminal investigation.

[185] The Crown argues that recognizing that voluntariness requires proof of an informed choice will require police to warn everyone with whom they interact. But that is an overstatement. On our approach, warnings are not required for statements made on 911 calls, complainant-initiated statements, spontaneous utterances, or unsolicited statements (as in *R. v. Turcotte*, 2005 SCC 50, [2005] 2 S.C.R. 519). Police are passive receivers of preliminary information in these circumstances. Nor are police required to warn an interviewee while actively responding to emergencies. Public safety may be jeopardized if police officers are required to ascertain voluntariness in respect of every person they speak to while responding to an emergency (*Paterson*, at para. 24). Finally, warnings are not appropriate in situations where people are obliged to speak with the police.

[186] The Crown's burden to rebut the presumption of involuntariness is strict, but not insurmountable. Absent a warning, we agree with the Court of Appeal that a court must consider whether "the person making the statement understood they did not have to say anything, and understood that if they responded to questions, their answers could be used against them" (para. 37). Unlike the Court of Appeal, however, we conclude the accused's behaviour and personal characteristics will rarely be probative of this question (para. 36). A focus on the interviewee's willingness to talk, age or lack of vulnerability would mean that no warning is needed for most citizens. Yet this result runs against the very reason a warning is required: Canadians are largely unaware of their rights when interacting with police.

[187] Instead, the presumption may be rebutted in certain circumstances. First, it may be rebutted where accused persons received partial warnings, such as where they were informed they did not need to speak but were not told their statements could be used against them (as in *R. v. M. (D.)*, 2012 ONCA 894, 295 C.C.C. (3d) 159, at paras. 44-45; *Pearson*, at paras. 20-22; *Joseph*, at para. 58; *Bottineau*, at para. 91). Similarly, where an accused received a warning during a recent interaction on the same matter, it may demonstrate that the accused made an informed choice in a subsequent interaction, notwithstanding the failure to warn the accused on that later occasion. Accused persons may also expressly state and acknowledge their legal rights, indicating they were able to make a meaningful choice (*R. v. Engel*, 2016 ABCA 48, 616 A.R. 181, at para. 18). While the circumstances in which the presumption may be

rebutted are narrow, police can easily avoid this step by doing what the Crown and the majority already acknowledge as prudent: providing a warning.

[188] Lastly, and contrary to the majority's assertions (at paras. 12, 41 and 74), discharging its burden does not require the Crown to show the accused waived the right to silence. Making an informed choice does not require "a particular state of knowledge" on the interviewee's part (*Hebert*, at p. 177). Rather, the question is whether accused persons were *provided information* sufficient to know their rights (p. 177). Thus, even though a warning has a significant role in the voluntariness analysis under our approach, the inquiry into whether a warning was administered is an objective one. Where no warning was provided, it is open to the Crown to point to another objective source of the requisite information. As noted, in some cases, the source will be accused persons themselves if they express or reveal awareness of their right to silence or knowledge about the adverse consequences of speaking to police. As stated in *Hebert*, proof of an informed choice does not "place on the authorities and the courts the impossible task of subjectively gauging whether the suspect appreciates the situation and the alternatives" (p. 177). The Crown need only demonstrate that the police warned the accused or that *another source of information* substituted for the usual warning.

[189] For this reason, contrary to the majority's suggestion (at para. 41), our proposal does not resurrect a waiver standard that was expressly rejected by McLachlin J. in *Hebert* (p. 183). Indeed, it is *our* approach which shows fidelity to

Hebert's guidance that the test for whether an accused's right to choose was violated must be "essentially objective" (p. 177). Like *Hebert*, the focus is on whether a warning was provided (at p. 177), not on any subjective state of knowledge of the accused nor on whether the accused waived the right to choose to speak to police.

[190] To summarize, our revised approach takes seriously this Court's injunction that voluntariness exists *only* where the accused made *a meaningful* — that is, *informed* — choice to speak with police. Where, therefore, police initiate contact with an individual to secure information about a crime they are investigating, there is a rebuttable presumption that any statement given without a warning was involuntary. Further, in circumstances where the risk of self-incrimination is objectively heightened — such as where the police take an adversarial approach or where there is information that, objectively viewed, would raise a reasonable suspicion that the individual was involved in the crime — clear and compelling evidence will be required showing the individual knew of the right to silence and that anything said could be used in evidence.

D. *Benefits of This Revised Approach*

[191] We agree with the majority that the common law confessions rule has always sought to balance society's interest in the investigation of crimes and an individual's right to choose not to speak with police (paras. 4, 12, 41, 53, 56, 69, 73-74 and 79). That said, its application has favoured the former over the latter. Uncertainty in the meaningful choice analysis and the significance of a warning inevitably favours the police, who can exploit ignorance of *Charter* rights to extract statements. Our

proposed approach rights the balance by providing greater clarity on the timing of a warning and its role in the voluntariness analysis, while protecting the right to silence and those most vulnerable to coercive police pressure.

[192] Ensuring greater protections for vulnerable witnesses is one of the most compelling reasons to make a warning central to the voluntariness analysis. As this case illustrates, when questioning witnesses, police may use aggressive interrogation tactics to lead witnesses to believe they have been caught out and that they should “come clean” and “tell the truth”. To amplify the potency of these techniques, police may be tempted to keep witnesses in the dark about their right to silence.

[193] In our view, police should not be permitted to leverage ignorance of the right to silence to increase the coercive pressure of an interrogation. Such a tactic is corrosive of legality and individual liberty, and will inevitably disadvantage vulnerable persons, including those who may feel less capable of resisting police pressure, such as persons from communities subject to over-policing. Our approach provides greater protection for those witnesses least able to resist police interrogation tactics. In *Oickle*, this Court cautioned judges to be mindful of the danger of false confessions that arise in police interrogations of witnesses that are vulnerable due to “their background, special characteristics, or situation”, including those with “compliant personalities” and those “prone to accept and believe police suggestions” (para. 42, citing W. S. White, “False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions” (1997), 32 *Harv. C.R.-C.L. L. Rev.* 105, at p. 120). Commentators have

identified a range of characteristics that may make a person more likely to falsely confess (D. E. Ives, “Preventing False Confessions: Is *Oickle* Up to the Task?” (2007), 44 *San Diego L. Rev.* 477, at pp. 480-84). Interviewees may have difficulty appreciating the consequences of speaking with police or coping with the unusual stress of a police interview, as in the case of a person who has an intellectual disability (pp. 480-81). They may be conflict-averse and eager to please authorities (p. 482). Persons susceptible to police suggestion may demonstrate a lack of assertiveness, high anxiety, and low intelligence (p. 482). While not a complete solution, a warning can mitigate some of the risks associated with vulnerable witnesses that lead to false confessions. In the result, fairness is not the only justification for a warning: the reliability of confessions is also enhanced by our approach.

[194] Indeed, we foresee greater protection for all witnesses, not just vulnerable witnesses. As noted, the confessions rule is one manifestation of the principle against self-incrimination and it protects the right to silence. It is “intended to ensure that the content of a suspect’s statement to a person in authority reflects his or her own reasons for speaking, such as a genuine desire to confess” and not “extraneous reasons”, like “improper conduct by state agents” (Stewart, at p. 522). Informing all witnesses of their options provides greater assurance that decisions to speak to police are freely made. In turn, this ensures the admission of a confession is less likely to bring the administration of justice into disrepute. This consideration aligns with the “broader notion of voluntariness”, which “prevail[s]” in the *Charter* era (*Singh*, at para. 34, citing *Hebert*, at pp. 166-67 and 173, per McLachlin J.).

[195] This broader notion of voluntariness also suggests a further reason for adopting our proposed approach. Witnesses who are ignorant of their choice about whether to speak to police may soon become witnesses who feel they have no choice *except* to speak to police, potentially leading to a breach of their rights under ss. 9 and 10(b) of the *Charter*. The lines around psychological detention are “murky” (*Le*, at para. 31). Police tactics that attempt to exploit these uncertain boundaries to obtain a confession, hoping that a court will not find the accused was arbitrarily detained or will nonetheless admit the evidence under s. 24(2), are incompatible with the confessions rule’s broader notion of voluntariness. For these reasons, we also disagree with the majority’s suggestion at para. 89 that a warning primarily acts as a sword for the Crown, or a tool that makes it easier to prove voluntariness, rather than a shield for the accused, which ensures the fairness and reliability of their statements to police.

[196] There are also practical benefits to our proposed approach. A wholly contextual inquiry into the weight of a warning does not offer clear guidance to police on when to warn. Unlike the majority’s approach, ours encourages police to avoid any uncertainty about the timing of a warning entirely. Our strong presumption of involuntariness encourages police to warn whenever police are investigating a crime and initiate contact with a person to secure information about the crime. Attaching real consequences to a failure to warn makes it easier for police to know when to administer a warning and for courts to evaluate the consequences of failing to do so.

[197] To this, the Crown's response is at once unedifying and revealing. Asked at the hearing of this appeal to explain why it would be a problem for the police to inform people of their basic rights before questioning them, Crown counsel admitted: "... there is obviously no harm to doing it and there may in particular cases be significant benefit to doing it . . ." (transcript, at p. 14). Crown counsel later asserted that warning all interviewees could "needlessly alarm people", "there is little to be gained", and "it may in fact deter some number of people from speaking with the police" (pp. 16-17). However, the Crown ultimately conceded that "it may be a good idea for police in many cases to explain that information in an informal or nonthreatening way" (p. 18). The majority agrees. They write that there is "no doubt" that a warning can ensure an investigation is conducted fairly and they encourage police to warn interviewees, since it can make it easier to prove a statement is voluntary (para. 75). Despite this, the majority follows the Crown's lead and concludes that a brighter-line rule that requires warnings for all interviewees, even when they are not suspects or detainees, is somehow unworkable.

[198] Yet neither the Crown nor the majority point to *any* specific harms that will flow from informing interviewees of their basic rights. The majority merely asserts that a brighter-line rule would "upset the balance" struck by the confessions rule and says it "could exact a cost on the administration of justice" (see paras. 7, 12, 55, 72 and 76). Our approach does not attach disproportionate consequences to a failure to warn, nor create a blanket rule that necessarily excludes statements obtained without a warning. It gives police a certainty they do not otherwise possess and, more importantly, it

establishes a consistent protection for interviewees, the rights-bearers for whom we must have primary regard. The only possible harm is that the police lose the advantage of psychological leverage when they level the informational playing field.

[199] In short, the Crown invites us to elevate ignorance of the right to silence into an essential tool for the investigation of crime. We would not do so. The right to silence is not a secret to be kept locked away in the pages of this Court's decisions or left to the judgment calls of police officers who might be concerned that citizens will not be "comfortable" or that they might decide to exercise their right not to talk to police during criminal investigations. The purpose of the right to silence is, after all, to protect the ability of a citizen *not* to speak to police. We are not remotely persuaded by the Crown's criticism, which really reduces to this: if people are actually informed of their rights, *they may in fact exercise them*; and that the power imbalance and informational asymmetry of which we speak is structurally necessary for police to do their job. That is the "cost" to the administration of justice to which the majority alludes without explicitly acknowledging at para. 76 of its reasons. We take a very different view of what fairness and the administration of justice requires. More particularly, we reject utterly that the capacity of police to do their job is so fragile that it depends, in any measure, on people remaining in the dark about their rights when asked to speak with police.

[200] This normative objection is entirely aside from the speculative quality of the Crown's argument that our approach would unduly impede police investigations

and have a chilling effect on people's willingness to speak with police. There is no empirical or even anecdotal evidence before us about the effect this requirement would have on police investigations. What is *indisputable*, however, is that the right to silence will be chilled under the majority's approach.

[201] To all this, the majority says that *Boudreau* "has stood the test of time" (para. 73). Indeed, it has — a very *long* time, during which much water has flowed under the jurisprudential bridge. To be faithful to our jurisprudence's developments since *Boudreau*, we would consign it to the dustbin of history. *Boudreau* implicitly accepted that successful policing hinges, in part, on interviewees' ignorance of their rights. We see this as incompatible with the "broader notion of voluntariness" that has prevailed in the *Charter* era, and that is concerned with according fairness to the accused and preserving respect for the administration of justice (*Singh*, at para. 34, citing *Hebert*, at pp. 166-67 and 173). The degree to which we extend the confessions rule should not be overstated. It must be remembered that *Boudreau* was *itself* a departure — indeed, a retrenchment — from the Court's earlier statement in *Gach*, that "all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence, unless proper caution has been given" (p. 254). Our approach does not go that far, but merely accords the warning its proper significance.

[202] Finally, an informed choice requirement leaves intact the doctrine of operating mind as set out in *Whittle* and *Oickle*. As discussed, the doctrine presumes the accused has been informed of the right to silence. This aspect of the doctrine was not at

issue in *Whittle*, since the accused was repeatedly warned or *Charter* cautioned. Our reasons do not lower the high threshold for the types of mental states that impair an accused's ability to understand what is said. Rather, they merely express the doctrine's *informational* component.

[203] Therefore, the benefits to our revised approach are several: it protects individuals from police coercion, promotes the right to silence and the privilege against self-incrimination that animate the confessions rule, and benefits police and judges by clarifying the importance of a warning and its role in the voluntariness inquiry.

IV. Application

[204] We agree with the Court of Appeal that the trial judge made legal errors in assessing the voluntariness of Mr. Tessier's statements. The police initiated contact with Mr. Tessier to secure information about a homicide investigation. This alone triggered the need for a warning. The Crown therefore had to demonstrate that Mr. Tessier made an informed choice to speak to Sgt. White. Since Sgt. White warned Mr. Tessier only upon seeing that his firearm was missing, Mr. Tessier's prior statements were presumptively inadmissible.

[205] Further, the risk of Mr. Tessier incriminating himself was objectively heightened in these circumstances, making the presumption of inadmissibility more difficult to rebut. Mr. Tessier was interviewed at a police station, Sgt. White's questioning turned adversarial and Mr. Tessier became a suspect partway through the

first interview. That interview was comprehensive, lasting nearly two hours, and punctuated by evidentiary searches. Sgt. White was investigating a homicide and, as he acknowledged, hoping to get a confession from Mr. Tessier. Once his questioning took an adversarial turn in the first interview, the risk of self-incrimination was objectively heightened.

[206] The adversarial posture emerged early on, when Sgt. White insinuated that Mr. Tessier had killed the deceased. Remarking on Mr. Tessier's presence in Didsbury, near where Mr. Berdahl's body was found, Sgt. White observed it was "[p]retty coincidental". Sgt. White returned to the point a few questions later, again insinuating Mr. Tessier's answers implicated him in Mr. Berdahl's homicide. The adversarial questioning escalated, with Sgt. White cross-examining Mr. Tessier on his whereabouts and activities leading up to the day of Mr. Berdahl's death. When Mr. Tessier expressed uncertainty on certain points, Sgt. White remarked he was "[p]retty mixed up" and there was "only one reason for that", again insinuating his guilt. Sgt. White then made two direct attempts to elicit a confession, asking Mr. Tessier to "[t]ell the truth" and later, asking Mr. Tessier directly whether he killed Mr. Berdahl. In response to Mr. Tessier's denials, Sgt. White expressed disbelief and asked Mr. Tessier for proof that he did not kill Mr. Berdahl. Sgt. White followed up these questions with a request for Mr. Tessier's DNA sample, so he could "eliminate" his DNA at the crime scene.

[207] After Mr. Tessier's cigarette break during the first interview, Sgt. White continued to cross-examine Mr. Tessier on his whereabouts and on his activities in the days leading up to Mr. Berdahl's death, as well as his relationship with Mr. Berdahl. Thus, the adversarial nature of the first interview remained unchanged after the cigarette break. We conclude that Mr. Tessier's risk of self-incrimination was objectively heightened shortly after the first interview began and until Mr. Tessier left the interrogation room. Sgt. White's testimony at trial supports this conclusion. He confirmed he hoped Mr. Tessier would confess.

[208] We would also conclude the risk of self-incrimination was objectively heightened when Mr. Tessier became a suspect. Considering Sgt. White's questions and the totality of evidence before him, Sgt. White ought to have reasonably suspected early on in the first interview that Mr. Tessier was involved in Mr. Berdahl's death. Before the first interview, it was known to police that: Mr. Tessier was the last person to see Mr. Berdahl alive; Mr. Berdahl's death was deemed a homicide; and Mr. Tessier was Mr. Berdahl's best friend but they had a conflict over a car and the deceased was planning to leave to Winnipeg. Early on during the first interview, Mr. Tessier confirmed that: he had owned the car at issue in the dispute; he had last seen Mr. Berdahl two days earlier; Mr. Berdahl planned to leave for Winnipeg; and he was in Didsbury, near Mr. Berdahl's body, on the morning he learned of Mr. Berdahl's death. This evidence ought to have generated a reasonable suspicion that Mr. Tessier could be culpable in Mr. Berdahl's homicide. This conclusion is reinforced by

Sgt. White's questions. Shortly after Mr. Tessier provided this information, Sgt. White asked that "if you cross all the little lines, what does [that] look like?"

[209] The remainder of the first interview only confirms this conclusion, since Sgt. White escalated his adversarial questioning. Mr. Tessier admitted that they had a conflict over money that Mr. Berdahl owed and Sgt. White observed Mr. Tessier was agitated and something was bothering him. Further, when Sgt. White ended the first interview, the police held a meeting and set up an RCMP team to conduct surveillance on Mr. Tessier. This was an obvious sign that Sgt. White gathered enough information to consider Mr. Tessier a suspect during the first interview.

[210] For these reasons, we agree with the majority that Mr. Tessier was a suspect after the first interview, which further increases the difficulty of rebutting the presumption of inadmissibility. Since Sgt. White also did not warn Mr. Tessier before the second interview, Mr. Tessier's statements from both interviews were presumptively inadmissible as a result. In our view, the trial judge erred in law by overlooking the overwhelming objective evidence that Mr. Tessier was a suspect in favour of Sgt. White's stated subjective belief. In his testimony, Sgt. White conceded Mr. Tessier became a "person of interest" when Mr. Tessier disclosed that he recently picked up a firearm from the shooting range. The trial judge placed undue weight on Sgt. White's subjective classification of Mr. Tessier. Respectfully, given Sgt. White's questions and the evidence before him, Sgt. White's belief was unreasonable.

[211] In light of these factors, Mr. Tessier's risk of self-incrimination was considerably heightened. While this adds to the Crown's burden to rebut the presumption of involuntariness, it changes nothing here. The Crown has failed to adduce clear and compelling, or even any, evidence demonstrating that Mr. Tessier's statements were voluntary. Mr. Tessier did not receive a warning during a prior interaction with Sgt. White on this matter. While Sgt. White informed Mr. Tessier he did not need to provide a DNA sample, he did not give a partial warning on his right to silence. Mr. Tessier expressed a concern about being "paint[ed] into a corner" but he did not expressly acknowledge his right to silence of which he was never informed.

[212] The Crown has failed to demonstrate beyond a reasonable doubt that Mr. Tessier's statements were voluntary. Mr. Tessier's statements during the first and second interview should have been excluded at trial.

V. Conclusion

[213] The majority's presumption of inadmissibility for statements elicited from suspects without a warning marks an improvement over *Boudreau*. Regrettably, however, the majority fails to take the logical next step that flows from its recognition that voluntariness protects a right to meaningfully choose to speak to police. We would take that step and recognize that police must warn interviewees, regardless of whether they are suspects or detainees. A presumption of inadmissibility with a broader application than the majority's approach is consistent with the concept of meaningful choice in confessions law jurisprudence. And, it strives to see that interactions between

the individual and the state are always characterized by “respect for the individual’s freedom of will, the need for law enforcement officers themselves to obey the law, and the overall fairness of the criminal justice system” (*Singh*, at para. 30 (emphasis deleted)). Achieving this here requires of this Court merely to enforce that which the majority acknowledges as prudent: that *both* parties know their rights.

[214] We therefore respectfully dissent. The appeal should be dismissed, and the order of the Court of Appeal setting aside Mr. Tessier’s conviction and ordering a new trial should be confirmed. Since we would dismiss the appeal on the basis that Mr. Tessier’s statements were involuntary, we need not address the issue of whether he was psychologically detained.

Appeal allowed, BROWN and MARTIN JJ. dissenting.

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