COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Ordonio, 2025 ONCA 135
DATE: 20250225
DOCKET: C67246

Simmons, Brown and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Justine Ordonio

Appellant

James Lockyer and Jeffery Couse, for the appellant

Katie Doherty and Katherine Beaudoin, for the respondent

Frank Addario and Jocelyn Rempel, for the intervener Criminal Lawyers Association

Heard: September 19-20, 2024, with supplementary written submissions dated February 7 and 14, 2025.

On appeal from the conviction entered by Justice Deena F. Baltman of the Superior Court of Justice, sitting with a jury, on May 14, 2019.

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Brown J.A.:

I. OVERVIEW

[1] In early 2019, the appellant, Justine Ordonio, was tried before a judge and jury and convicted on one count of first degree murder for his involvement in the April 2015 stabbing death of Teresa Hsin.

[2] Ms. Hsin had been found on April 10, 2015, slumped over in the driver's seat of her BMW, which was parked in a handicapped space at a branch of Scotiabank in Mississauga, Ontario. She had been stabbed to death. The Crown's theory was that the stabbing had taken place two days before, on April 8, 2015. Three persons were charged in connection with Ms. Hsin's death: the appellant; Ms. Hsin's son, Eric Lu; and Mark Dookhram.

[3] Central to the Crown's case was a statement given by the appellant to the police during a 13-hour interview on November 10 and 11, 2015 (the "Statement"). On the *voir dire* regarding the admissibility of the Statement, the Crown conceded that absent the Statement there was insufficient remaining evidence to proceed against the appellant: 2019 ONSC 1804, at para. 6.

[4] The jury convicted the appellant of first degree murder. The appellant appeals, advancing several grounds of appeal. He submits the trial judge erred:

(i) By admitting the Statement;

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(ii) In her instructions to the jury about how to assess the reliability of the Statement;

(iii) In instructing the jury that it was open to them to determine whether the appellant could be identified from certain video footage or eyewitness descriptions given by witnesses; and

(iv) In failing to admit certain *ante mortem* statements made by Ms. Hsin.

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[5] I conclude that the trial judge erred in her analysis that resulted in the admission of the appellant's Statement. I would allow the appeal, set aside the conviction, direct a new trial, and remit the issue of the Statement's admissibility to the judge who presides at a new trial. Given that disposition, it is not necessary to address the other grounds of appeal.

II. THE CIRCUMSTANCES SURROUNDING THE APPELLANT'S STATEMENT TO THE POLICE AND ITS ADMISSION AT TRIAL

[6] The circumstances leading up to the appellant's arrest and interview were described by the trial judge in her ruling on the *voir dire* regarding the admissibility of the appellant's Statement. She wrote, at paras. 1-3:

> On April 8, 2015, Teresa Hsin went missing after she attended her nearby Scotiabank branch in Mississauga. Two days later, she was found dead in her car in the parking lot adjacent to the bank. She had been stabbed multiple times and died from wounds in the head, arm, shoulder and upper body. The evidence suggests the assailant was hidden in the back seat of her car, a four-door BMW.

> Three men have since been charged with first degree murder. Police allege that the murder was planned and orchestrated by Ms. Hsin's son, Eric Lu. Hsin owned a number of spas, all named "Relaxology", and Lu worked with her in running the spas. Police maintain that Lu employed the accused, Justine Ordonio, to carry out a previous almost fatal assault on Hsin in mid-November 2014, and when that failed, arranged for him to be concealed in the back seat of her car on this occasion. They further allege that Ordonio, in turn, contracted Mark Dookhram to drive the getaway car on April 8, 2015.
>
> Lu has consistently denied any involvement in his mother's murder. Police linked Ordonio to the crime through a combination of photographic and video evidence, cellphone records, and a lengthy statement from Dookhram. In this statement, Dookhram revealed that he was recruited as the getaway driver, used an Audi vehicle, and that Ordonio entered the Audi in bloody clothing, carrying a knife.

[7] As part of their investigation of the killing of Ms. Hsin, the police conducted an interview of the appellant at 14 Division in Toronto on July 10, 2015. During that interview, the appellant denied any knowledge of or involvement in Ms. Hsin's killing.

[8] On November 10, 2015, at 12:30 p.m., the appellant was arrested for first degree murder at his Toronto home. During the drive to a Peel Regional Police station, the appellant was cautioned and advised of his right to counsel. He was then asked whether the police had made "a mistake" by arresting him. The appellant denied any responsibility for the crime and responded to some other questions posed by the arresting officers during the drive. The Crown conceded that by failing to hold off questioning until the appellant had spoken to counsel, the

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police had breached the appellant's rights under s. 10(b) of the *Canadian Charter of Rights and Freedoms*.

[9] When the appellant arrived at the police station at 1:17 p.m., he was taken directly into an interview room. At 1:35 p.m., Detective Mark Heyes entered the interview room and began to talk with the appellant. Det. Heyes made a telephone available to the appellant, who spoke with a lawyer for just under 10 minutes. That conversation ended at 2:13 p.m. Det. Heyes re-entered the room and began to question the appellant. The interview continued until approximately 2:00 a.m. the following morning, November 11, 2015.

[10] During that time there were some breaks in the interview: to obtain water and cigarettes for the appellant; to enable bathroom breaks; to bring in a Swiss Chalet dinner; and some periods when Det. Heyes simply left the room.

[11] Towards the end of the interview, the appellant wrote and signed the Statement regarding his involvement in the death of Ms. Hsin. Parts of the Statement were inculpatory, though they did not exactly correspond to the Crown theory of the case.

[12] Later in November 2015, the appellant, Eric Lu, and Mark Dookhram were charged with the first degree murder of Ms. Hsin.

[13] At the preliminary hearing of the three accused, the appellant contended that his Statement was the product of Det. Heyes's use of an interrogation method

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known as the Reid Technique. He argued that the use of such a technique of interrogation should act as a material reason to find that the Statement was not voluntary. At the conclusion of the preliminary hearing in July 2017, Hawke J. committed Lu to stand trial and discharged the appellant and Dookhram, having found that the statements they made to police were involuntary. Hawke J. gave extensive reasons dated July 6, 2018, explaining why the appellant's Statement was not admissible on his preliminary hearing.[1] In the course of those reasons, Hawke J. considered the defence's submissions about the use and effect of the Reid Technique of interrogation.

[14] The Crown thereupon preferred indictments against the appellant and Dookhram.

[15] In November and December 2018, Baltman J. conducted a blended *voir dire* regarding alleged s. 7 and 10(b) *Charter* breaches and the voluntariness of the appellant's statements to the police. The appellant did not testify on the *voir dire* nor did the defence call any other evidence: 2019 ONSC 1804, at para. 6. On January 7, 2019, Baltman J. ruled the Statement voluntary and admissible. Reasons for her ruling were released on March 21, 2019, and included a consideration of the use and effect of the Reid Technique of interrogation. She

[1] *Her Majesty the Queen v. Mark Dookhram, Justine Ordonio, and Eric Lu*, Court File No.: Brampton 15-004357, reasons dated July 6, 2018, unreported.

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also found that there were no *Charter* breaches beyond the conceded s. 10(b) *Charter* breach, that there was a subsequent "fresh start", and even if there was not, the Statement was admissible on a s. 24(2) *Charter* analysis.

[16] A trial of the three accused started in early 2019 before Coroza J. and a jury. Coroza J. declared a mistrial.

[17] The appellant was then tried without his co-accused before Baltman J. and a jury. The trial commenced in March 2019 and on May 14, 2019, the jury brought in a verdict convicting the appellant of first degree murder.

III. THE ISSUES ON APPEAL REGARDING THE APPELLANT'S STATEMENT AND THE STRUCTURE OF THESE REASONS

A. The Issues

[18] The appellant raised two main issues with the trial judge's decision to admit the Statement as voluntary:

(i) First, the appellant adopts the position of the Intervener, the Criminal Lawyers Association (the "CLA"), that the common law of confessions should be expanded by adopting the principle that where the police employ the Reid Technique to interview an accused and a statement results, a rebuttable presumption arises that the statement was made involuntarily. According to the appellant, if that amended principle was applied to the Statement he made, the Crown would be unable to rebut the presumption of involuntariness;

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(ii) Second, the appellant contends that the trial judge committed two errors in applying the confessions rule:

(a) The trial judge failed to assess the cumulative effect of all the circumstances surrounding the 13-hour interrogation and the making of the Statement and, instead, erroneously adopted a “siloed” or piecemeal approach in her analysis; and

(b) The trial judge erred in her assessment of the effect of the conditions of the interview on the appellant, including his tiredness and physical discomfort, and ought to have found the interview to be oppressive.

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B. The Structure of these Reasons

[19] Although central to the appellant’s submissions is a critique of the police use of the Reid Technique to interview or interrogate an accused, I propose to start my analysis of the issues not by describing the Reid Technique but by outlining the current legal framework within which a trial judge must determine the admissibility of a statement made by an accused to a person in authority. Since the appellant puts into issue the adequacy of that framework, I think its description is the appropriate starting point for the analysis of the voluntariness issue.

[20] I shall then describe the Reid Technique, followed by a survey of the main criticisms made of the technique in some of the criminology literature, together with a review of how some Canadian courts have viewed the technique.[2]

[21] The standard of review applicable to the issues raised by the appellant will then be discussed.

[22] That done, I will examine the first issue: the adequacy of the current common law principles concerning confessions when the police use the Reid Technique to interview an accused. I will explain why I do not accept the appellant's submission that this court should amend the common law confessions rule by adopting a principle that where the police employ the Reid Technique in interviewing an accused, such use gives rise to a rebuttable presumption that the statement was made involuntarily.

[23] Next, I will turn to consider the appellant's second submission that the trial judge erred in admitting his Statement. I will explain why I conclude that the trial judge (i) erred in the manner in which she applied the *Oickle*[3] principles to the facts of the 13-hour interrogation of the appellant and (ii) made a palpable and overriding error of fact in concluding that the appellant did not fall asleep during the interrogation.

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[2] The reviews of the criminology literature and Canadian jurisprudence do not purport to be exhaustive. They are based on the materials placed before the court on this appeal.
[3] 2000 SCC 38, [2000] 2 S.C.R. 3.

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[24] Finally, I shall set out the disposition I propose for the appeal.

IV. THE PRINCIPLES GOVERNING THE ADMISSION OF A CONFESSION

[25] The common law confessions rule provides that any statement of the accused to a person in authority, which affords relevant and material evidence in respect of its maker, the accused, is inadmissible at the instance of the Crown unless the Crown proves on a *voir dire*, beyond a reasonable doubt, that the statement was voluntary: Matthew Gourlay et al., *Modern Criminal Evidence* (Toronto: Emond, 2022), at p. 419; David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Thomson Reuters, 2023), at §37.04. As put by the authors of *Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 6th Ed.*,[4] at §8.71: "Reduced to its essentials, the voluntariness inquiry focuses predominantly, though not exclusively, on the ability of the accused to make a *meaningful choice* whether or not to confess" (footnotes omitted).

[26] The common law rule historically contained several threads, each based on different policy considerations. Over the past 30 years several decisions of the Supreme Court of Canada have organized those threads into a settled rule, starting with *R. v. Hebert*, [1990] 2 S.C.R. 151; then developing through *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3; *R. v. Spencer*, 2007 SCC 11, [2007] 1

[4] Sidney N. Lederman, Michelle K. Fuerst and Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 6th Ed.*, (Toronto: LexisNexis, 2022).

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S.C.R. 500; *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405; *R. v. Tessier*, 2022 SCC 35, 473 D.L.R. (4th) 317; and *R. v. Beaver*, 2022 SCC 54, 475 D.L.R. (4th) 575.

[27] The common law rule seeks to protect against false confessions: voluntariness is the touchstone of the rule but this concept overlaps with, yet is not necessarily co-extensive with, reliability: *Oickle*, at paras. 47 and 69. “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”: *Singh*, at para. 36. The confessions rule also seeks to protect the rights of the person charged without unduly limiting society’s need to investigate and solve crime: Watt, §37.04. In sum, the rule 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: *Tessier*, at para. 69.

[28] The jurisprudence teaches that the rule should not be applied mechanically to the facts of a particular case. Instead, a judge must examine and evaluate all the circumstances surrounding the making of the statement. The approach is contextual. The evidence must satisfy the judge beyond a reasonable doubt of the voluntariness of the confession in order for it to be admissible: *Sopinka*, at §8.72; Watt, at §37.04; *Singh*, at para. 53.

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[29] *Tessier*, at para. 68, contains a succinct summary of the factors usually considered in a voluntariness inquiry:

> 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. 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". <u>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</u>. [Citations omitted; emphasis added.]

[30] Even though some circumstances may be conveniently collected under the four categories of inducements, oppression, operating mind, and police trickery, the existence of a particular circumstance in a case may not automatically render a statement admissible or inadmissible: *Sopinka*, at §§8.72-8.73. As put by Watt at §37.04: "Context controls".

[31] Regarding the factor of oppression, Watt notes that there is no exhaustive list of what acts or omissions of a police interviewer might create an oppressive atmosphere, but he writes that there can be no doubt that "[a]mongst the many factors that can create an atmosphere of oppression are (i) depriving D [the defendant] of food, clothing, water, sleep or medical attention; (ii) denying D

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access to counsel; (iii) excessively aggressive, intimidating questioning over a long time; and (iv) the use of nonexistent evidence": Watt, at §34.07; see also *Tessier*, at para. 99.

[32] That the trial judge must take into account all the circumstances that surrounded the making of the statement was emphasized in *Oickle*, at para. 47:

> The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession. [Emphasis added.]

[33] And again, at para. 68, the court in *Oickle* stated:

> If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision. [Emphasis added.]

[34] To summarize, the confessions rule jurisprudence makes two key points. First, the rule seeks to protect against false confessions. Second, the rule directs courts to inquire into all the circumstances surrounding the making of a confession and red-flags, for a court's consideration, a wide variety of circumstances traditionally grouped under the categories of inducements, oppression, operating mind, and police trickery.

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V. THE REID TECHNIQUE OF QUESTIONING

A. The criminology literature

[35] The Reid Technique of questioning forms one part of what the criminology literature describes as the broader Reid Method. The method was developed by John Reid and others in the 1940s as an interview and interrogation technique designed to evaluate the veracity of a suspect without the use of mechanical aids, such as the polygraph. The Reid Method has three stages: (i) the pre-interview factual analysis of a case; (ii) a behavioural analysis interview of a suspect; and (iii) the interrogation of the suspect, which the literature calls the Reid Technique.

[36] The first two stages of the Reid Method are described by Nadia Klein in *"*Forensic Psychology and the Reid Technique of Interrogation: How an Innocent Can Be Psychologically Coerced into Confession*"* (2016) 63:4 Crim LQ 504, as follows at pp. 506-508:

> The first stage of the Reid technique is a factual analysis of the particular case. Before any interviews or interrogations take place, an investigator should become thoroughly familiar with the known facts and circumstances of the case, as it would not be possible to conduct an effective interview or interrogation without this knowledge.
>
> …
>
> The second stage is the Behavioural Analysis Interview (BAI), and is the result of Reid and [Frank] Inbau's considerable work on conducting polygraph interviews. In his work, Reid observed "that truthful suspects appeared to display different attitudes and behaviours

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> during their polygraph examinations than deceptive suspects." Reid meticulously documented these behaviours over several years and developed categories of 'behaviour symptoms' that seemed to be a reliable indicator of truth or deception. This led to the creation of 'behaviour provoking questions,' questions that an innocent suspect tended to answer differently from a guilty suspect. These questions became the foundation of the BAI.
>
> …
>
> Using the guidelines outlined by Reid, by the end of the BAI the investigator should be "definitely or reasonably certain" as to the guilt of the suspect. For those suspects that are deemed truthful this is where the process ends. For those found to be deceptive, the investigator moves into the final stage, the interrogation. [Footnotes omitted.]

[37] The method's second stage – the behavioural analysis interview – has attracted much critical comment in the literature, which calls into question the assertion that interrogators can accurately identify those who are lying during the BAI phase of the interview: Wyatt Kozinski, "The Reid Interrogation Technique and False Confessions: A Time for Change" (2017) 16:2 Seattle J Soc Justice 301, at p. 317; Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, "Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt" (2003) 27:2 L & Human Behaviour 187, at p. 188.

[38] The third and final stage of the Reid Method involves the interrogation technique that the jurisprudence calls the "Reid Technique". A conceptual summary of the Reid Technique was provided by Kozinski at pp. 311-312:

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> According to the authors of the Reid Manual, “only people who are believed to be guilty are ... interrogated.” This means that, by the time police get to this stage in the process, they are no longer engaged in the objective collection of information. Instead, their single-minded objective is to get the suspect to admit his guilt and sign a confession that is rich in detail and other indicia of voluntariness and genuineness. While the Reid Manual describes this part of the Technique as a nine-step process, it actually resolves itself into three major components: (1) tell the suspect you already know for sure he committed the crime, and cut off any attempts on his part to deny it; (2) offer the suspect more than one scenario for how he committed the crime, and suggest that his conduct was likely the least culpable, perhaps even morally justifiable (minimization); (3) overstate the strength of the evidence the police have inculpating the suspect – by inventing non-existent physical evidence or witness statements, for example – and assuring him he'll get convicted regardless of whether he talks. The driving idea is to persuade the suspect that it's in his best interest to give a confession that paints him in a positive light.

[39] As Kozinski mentions, the literature usually breaks the Reid Technique down into nine steps. An exhibit marked in the proceedings below set out the nine steps of a Reid Technique interrogation:

> The Reid technique's nine steps of interrogation are:
>
> 1. Direct confrontation. Advise the suspect that the evidence has led the police to the individual as a suspect. Offer the person an early opportunity to explain why the offense took place.
>
> 2. Try to shift the blame away from the suspect to some other person or set of circumstances that prompted the suspect to commit the crime. That is, develop themes containing reasons that will psychologically justify or excuse the crime. Themes may be developed or changed to find one to which the accused is most responsive.

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3. Try to minimize the frequency of suspect denials.

4. At this point, the accused will often give a reason why he or she did not or could not commit the crime. Try to use this to move towards the acknowledgement of what they did.

5. Reinforce sincerity to ensure that the suspect is receptive.

6. The suspect will become quieter and listen. Move the theme of the discussion towards offering alternatives. If the suspect cries at this point, infer guilt.

7. Pose the "alternative question", giving two choices for what happened; one more socially acceptable than the other. The suspect is expected to choose the easier option but whichever alternative the suspect chooses, guilt is admitted. As stated above, there is always a third option which is to maintain that they did not commit the crime.

8. Lead the suspect to repeat the admission of guilt in front of witnesses and develop corroborating information to establish the validity of the confession.

9. Document the suspect's admission or confession and have him or her prepare a recorded statement (audio, video or written).

[40] Klein argues that before an interrogation using the Reid Technique starts, the investigator has decided the suspect is guilty and the purpose of the interrogation is to elicit a confession. However, she notes that the “curators of the Reid technique adamantly deny this fact and state that their interrogation method is designed to elicit the *truth* from a suspect, not a confession”: at p. 508.

[41] Several articles in the criminology literature offer descriptions of each of the nine steps in the Reid Technique: Klein, at pp. 508-512; Timothy E. Moore & C. Lindsay Fitzsimmons, “Justice Imperiled: False Confessions and the Reid

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Technique" (2011) 57:4 Crim LQ 509, at pp. 512-513; Frances E. Chapman, "A Recipe for Wrongful Confessions: A Case Study Examining the 'Reid Technique' and the Interrogation of Indigenous Suspects" (2020) 28:3 Michigan State Intl L Rev 369, at pp. 393-424. See also *R. v. Barges*, 2005 CanLII 47766 (ON SC), at paras. 53, 80. The trial judge in *R. v. L.F.*, [2006] O.J. No. 658 (Ont. S.C.), summarized how the nine steps often are applied, stating at para. 9:

> [The police officer] generally conducted the interview/interrogation using what is known as the Reid Technique of Interviewing and Interrogation, although he minimized its importance to his interview. This technique involves the interrogator developing themes during a tightly controlled questioning session. The themes include befriending the suspect, minimizing his involvement in the offence that the officer tells him he "knows absolutely" he committed and baiting the suspect by appealing to his sense of manhood, pride, or in this case, his love for his children. The questioner immediately cuts off any attempts by the suspect to deny involvement. He repeatedly asks for an explanation of why he committed the offence, rather than whether he did it.[5]

[42] Klein offers her assessment of the psychological goals the Reid interrogation process seeks to achieve, stating at p. 513:

> The Reid technique construes interrogation as the psychological undoing of deception. It is a two-stage process. The first stage, encompassing steps one through four of the nine-step interrogation, is designed to reduce the suspect's self-confidence in surviving the interrogation by convincing them that there exists

[5] In *L.F.*, the court ruled that the statements were made voluntarily.

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> incontrovertible evidence of their guilt, that no reasonable person could come to any other conclusion, and that there is no way out of their situation other than to confess. Once the suspect has accepted that they are powerless to change their situation, the investigator moves to the second stage, steps five through nine, wherein inducements are offered, by way of alternate reasons for the crime, that are designed to persuade the suspect that confessing is in their best interest psychologically, materially, and legally. [Footnotes omitted.]

[43] Klein continues, at p. 514:

> According to Reid, the suspect will confess when the perceived consequences of the confession are more desirable then [*sic*] the internal struggle of lying. Therefore, the goal of a Reid interrogation "is to decrease the suspect's perception of the consequences at confessing, while at the same time increasing the suspect's internal anxiety associated with [their] deception." [Footnotes omitted.]

[44] Gisli H. Gudjonsson, in *The Psychology of Interrogations and Confessions: A Handbook* (Chichester: Wiley, 2003), echoes Klein's characterization of the psychology underpinning the Reid Technique when she writes that the technique is broadly based on two processes: (i) breaking down denials and resistance; and (ii) increasing the suspect's desire to confess: at p. 11.

[45] The literature suggests that not all nine steps need be used during a particular Reid Technique interrogation: Chapman, at p. 386. However, the materials filed before us on this appeal do not disclose any consensus on which or how many of the nine steps must be used by a police questioner before the interrogation can be classified as one that uses the Reid Technique.

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[46] As well, the literature discloses that several of the “steps” used in the Reid Technique are techniques used by other forms of police questioning. For example, Gudjonsson summarizes 1994 and 1996 studies by Richard A. Leo[6] of police interrogation techniques (which were not limited to the Reid Technique) that identified 24 interrogation tactics used by the police. Leo found that the average number of discrete tactics used per interrogation was 5.6: Gudjonsson, at p. 32. Leo concluded that the four most successful interrogation tactics in terms of obtaining a confession were: (i) appeal to the suspect’s conscience; (ii) identify contradictions in the suspect’s story; (iii) use praise or flattery; and (iv) offer moral justifications and psychological excuses for the event.

[47] These two points – the lack of consensus on the elements necessary for an interview to qualify as a Reid Technique interrogation and the sharing of some tactics by both the Reid and non-Reid techniques of questioning – are important points to which I will return in my analysis in Part VII.B below.

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[6] *Police Interrogation in America: A Study of Violence, Civility, and Social Change* (1994) [unpublished, archived at University of California at Berkeley]; “Inside the Interrogation Room” (1996) 86 J Crim L & Criminology 266. These materials were not included in the appellant or intervener materials, and have not been consulted directly. They are referenced insofar as they appeared inside the portions of Gudjonsson which were put before this court.

B. Judicial consideration of the Reid Technique

[48] Elements of the Reid Method, including the third stage Reid Technique of questioning, have been the subject of comment by Canadian courts since at least 1992: *R. v. Grant*, [1992] M.J. No. 641 (P.C.).[7]

[49] Some judicial inquiries into the voluntariness of specific statements have noted how aspects of the questioning employed drew on tactics that form part of the Reid Technique, such as the use of themes, direct confrontation, minimization of responsibility, physical contact with the accused, and the development of a relationship between the interviewer and the accused: for example, *R. v. Minde*, 2003 ABQB 797, 343 A.R. 371, at paras. 32, 38, 41, 46, and 87;[8] *R. v. Barton*, [1993] O.J. No. 1231 (C.A.), at para. 6.

[50] Some cases observe that the way in which the technique was employed was "oppressive". For example, in *R. v. M.J.S.*, 2000 ABPC 44, 80 Alta. L.R. (3d) 159 the court commented, at para. 45:

> When stripped to its essentials the Reid Technique is solely designed to convince the suspect that he is caught, that the police have overwhelming evidence that he is the culprit, and that there is no way that the suspect will be able to convince the interrogator or anyone else involved in the Criminal Justice System that he didn't do the crime.

[7] Five decisions from the 1990s were referenced in *R. v. M.J.S.*, 2000 ABPC 44, 80 Alta. L.R. (3d) 159, at para. 48.
[8] *Minde*: The videotaped statement was ruled inadmissible.

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[51] In *Barges*, in ruling that the post-arrest interview was inadmissible, the court stated, at para. 96:

> The length of the interview, the sometimes aggressive stance used, the repeated assertions by the accused that he does not wish to answer or speak to the police, and the persistent reference to the themes that it is only fair to his family for him to advance his side of the story, and, more importantly, that failure on his part to do so will lead to the police putting forth a picture that he is a monster and a slaughterer, and the suggestions by the interviewers that if he wishes to give his explanation, now is the time and that he may not have any further opportunity to do so all leave me with a reasonable doubt as to whether this statement has been proven to be voluntary. A fair reading of the interview supports the inference that cooperation by Mr. Young may deflect what otherwise will be the painting of a planned and deliberate murder involving him. Although he does [not] succumb in the sense of any directly inculpatory admissions, those utterances he does make which the Crown views as useful flow from the atmosphere created within the interview. [Emphasis added.]

[52] In *R. v. Thaher*, 2016 ONCJ 113, the court, at para. 118, describes the Reid Technique as "inherently coercive". It ruled inadmissible the statements obtained by using the Reid Technique of questioning, concluding, at para. 119:

> For the potentially inculpatory portions of the second statement to be admitted, the Crown would have to prove beyond a reasonable doubt that Mr. Thaher's utterances, made after hours and hours of denials, were the product of a choice he made and not the combination of oppressive conditions and the presentation of false evidence leading him to doubt his own memory. I have a reasonable doubt on this issue. As result, the statements will not be admitted.

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[53] Ontario jurisprudence consistently has held that police use of the Reid Technique, or elements thereof, does not in itself render a statement inadmissible. However, the case law instructs that a court must look at all the circumstances of a Reid Technique interrogation, together with their cumulative effect, to determine whether the Crown had discharged its burden to establish voluntariness beyond a reasonable doubt.

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[54] That approach goes back as far as the 1993 decision of this court in *Barton*, in which a suspect was subjected to the three-stage Reid Method, with the second stage involving the administration of a polygraph test followed by a third-stage interview using the Reid Technique. Inculpatory statements made by the accused were admitted at trial and the accused was convicted. In dismissing the appeal from conviction, Carthy J.A. stated, at para. 7:

> I agree with counsel for the Crown that wherever such techniques, whether through polygraph or otherwise, are used, the court should give them the closest scrutiny to assure that statements are truly voluntary. But this is not to say that particular procedures should be prohibited as invariably leading to statements which are not voluntary. I see *Amyot*[9] as a finding that in that case the test created an atmosphere in which the individual's confession could not be considered voluntary. [Emphasis added.]

[55] In a concurrence in *R. v. Barrett* (1993), 64 O.A.C. 99 (C.A.), rev'd on other grounds, [1995] 1 S.C.R. 752, Carthy J.A. stated:

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[9] *R. v. Amyot* (1990), 58 C.C.C. (3d) 312 (Que. C.A.).

> Trained police investigators understand the psychology of criminal behaviour and recognize symptoms of guilt or innocence. They have methods of questioning to reveal one or the other, and to draw confessions from the guilty. These tactics and techniques are described in full in Criminal Interrogation and Confessions, 3rd ed., Ingrau, Reid and Buckley. So far as I can see there is nothing offensive in these techniques, but the fact that I have never seen them outlined in viva voce evidence on a voir dire suggests that the police may be reticent in publicizing their methods.

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[56] Subsequently in *R. v. Whalen*, [1999] O.J. No. 3488,[10] Fontana J. commented on *Barrett*, at para. 28:

> When, in *Regina v. Barrett*, Carthy, J.A., says that he can see nothing offensive in the Reid Technique, (which I say parenthetically) includes the polygraph induced statements, Carthy, J.A. is not in my view, pronouncing his blessing in absolute terms on the technique. He is speaking with regards to the voluntariness of statements generally. In other words, just because the Reid system was used, is not of itself sufficient reason to discredit voluntariness or to approve it. It is one more factor to be taken into consideration and it must be measured against all of the general principles which the cases set out.

[57] In *R. v. C.T.*, 2015 ONCJ 299,[11] the court, while noting the extensive academic criticism of the Reid Technique, stated, at para. 22:

> Despite the concerns respecting its use, it is clear that the use of the Reid technique will not by itself necessarily lead to the conclusion that a statement is not voluntary: *R. v. Visciosi*, [2006] O.J. No. 3251 (S.C.J.) at paras. 14-

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[10] *Whalen*: The responses of the accused, non-verbal or otherwise, were not admitted: at para. 54.

[11] *C.T.*: The court ruled that statements made by the accused up to a certain point in the questioning were voluntary, but an inculpatory statement made by the accused following a threat made by the interviewing police officer to expose the accused as a pedophile was not: at paras. 29-32.

> 15. As *Oickle* makes clear, the determination must be contextual and each case will turn on its own facts. However, given the inherently coercive nature of the technique and the concerns about its ability to create false confessions, in my view the use of the technique creates a need for extra caution in evaluating the voluntariness of a statement. [Emphasis added.]

[58] In *L.F.*, where the court held that the statements were given voluntarily by the accused, the court stated, at para. 10:

> The Reid Technique of questioning is not inherently objectionable. The police must be afforded the necessary latitude to perform their responsibilities to society. Inflexible rules must not be allowed to straitjacket their legitimate pursuits. Questioning suspects and witnesses to a crime is an essential and often the most effective investigative tool the police possess. However, the protection of the Charter rights of accused persons to fair treatment during investigations, including, for example, the right to be secure against unreasonable search and seizure or to have used against them only confessions that are voluntarily given to the police, and many others, must be assiduously protected. The court's function is to find the fair and appropriate balance between these competing interests. [Emphasis added.]

[59] Then, in *R. v. Morgan and Smith*, 2010 ONSC 3459, 221 C.R.R. (2d) 322,[12] Ricchetti J. stated, at para. 25:

> I agree with the statement of Justice Wein in *R. v. Vicisoso*, [2006] O.J. No. 3251(S.C.) at paras. 14-16 that the use of the Reid Technique is by itself not objectionable. See also *R. v. L.F.*, [2006] O.J. No. 658 (S.C.) at paras. 9-10.

[12] *Morgan and Smith*: The court was satisfied the statement was voluntarily given: at para. 107.

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[60] Subsequently, Forestell J. in *R. v. Jorgge*, 2014 ONSC 6022,[13] stated, at para. 32:

> The Reid technique was utilized in the interview in this case. The utilization of the 'Reid technique' does not in itself render a statement inadmissible. The issue is whether the use of the technique in the particular circumstances of the individual case will leave the trier with a reasonable doubt as to voluntariness. [Emphasis added.]

[61] To similar effect were the comments of Schreck J. in *Thaher*, where he stated, at para. 30:

> Of course, use of the Reid technique or something akin to it does not automatically render a statement inadmissible: *R. v. Visciosi*, [2006] O.J. No. 3251 (S.C.J.) at paras. 14-15. However, the technique is inherently coercive and for that reason has been the subject of considerable judicial and academic criticism. [Citations omitted.]

[62] To date, most Ontario cases have adopted the following approach to a voluntariness inquiry where it is alleged the Reid Technique of questioning has been used:

- In the words of *Morgan and Smith*, at para. 26, "[t]he fundamental question is not what technique the police officer used but rather, considering all the circumstances of the police questioning and statements given by the

[13] *Jorgge*: While the court found that statements made up to a certain point in the interview were voluntary, those made after a veiled threat were not admissible: at paras. 40-41.

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accused, whether the statement was voluntarily given.… [I]t is not the court's role to evaluate the utility of the Reid Technique but to adjudicate on the admissibility of the end product" (citations omitted);

- "The issue is whether the use of the [Reid] technique in the particular circumstances of the individual case will leave the trier with a reasonable doubt as to voluntariness": *Jorgge*, at para. 32;
- "[T]he onus is on the Crown to prove voluntariness beyond a reasonable doubt and that all of the circumstances are to be viewed cumulatively in deciding whether this onus has been met.… [The] main concern in the circumstances of this interview flows from a consideration of the end result of the interview seen as a whole": *Barges*, at paras. 82, 84 (emphasis added).

VI. THE STANDARD OF APPELLATE REVIEW

[63] Ascertaining the appropriate legal test to determine whether a confession is voluntary is a question of law; applying the appropriate test to determine whether a particular statement was or was not voluntary is a question of fact or of mixed law and fact. "If a trial court properly considers all the relevant circumstances, then a finding regarding voluntariness is essentially a factual one and should only be overturned for 'some palpable and overriding error which affected [the trial judge's] assessment of the facts'": *Oickle,* at para. 71, citing *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 33; *Beaver*, at para. 54.

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[64] This standard of review 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”: *Tessier*, at para. 43.

[65] Consequently, mere disagreement by the appellate court with the trial judge regarding the weight to be given to various pieces of evidence is not a ground to reverse a finding on voluntariness: *Oickle*, at para. 22; *Sopinka*, at §8.164.

[66] This standard of appellate review applies even in cases, such as the present one, where the taking of an accused’s statement was videotaped and the appeal court can watch the entire interrogation. As the Supreme Court noted in *Spencer*, at para. 17, even where the interrogation is videotaped, other evidence may be heard during the *voir dire* on admissibility. In those circumstances, the testimony and cross-examination of those involved in the taking of the statement usually are important factors the trial judge is required to weigh in the overall inquiry into voluntariness. In *Spencer* the court viewed trial judges as sitting in the best position to draw conclusions from such evidence given that they deal with making findings of fact on a daily basis, as well as their privileged position in assessing the evidence as a whole.

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[67] That said, the ability of an appeal court to watch the same recording of an interrogation as used by the trial judge enables it to gain a depth of understanding about the interrogation process otherwise not achievable from a mere transcript review. That, in turn, places the appeal court in an improved position to assess arguments that the trial judge made palpable and overriding errors, failed to consider the entirety of the evidence regarding the interrogation, or failed to assess the cumulative effect of the questioning.

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VII. FIRST ISSUE: SHOULD THE CONFESSIONS RULE BE AMENDED FOR CIRCUMSTANCES WHERE THE POLICE USE THE REID TECHINQUE TO INTERVIEW AN ACCUSED OR SUSPECT?

A. The positions of the parties

[68] In its factum, the intervener, the CLA, asks this court to discard the case-by-case examination of interrogations using the Reid Technique and substitute a legal presumption that a confession produced by the Reid Technique is “inevitably suspect”. Such a presumption would make evidence that the police used the Reid Technique, or substantial parts of the technique, in a police interview “credible evidence of involuntariness” for any resulting statement. In the face of such a presumption, the Crown would bear an evidentiary burden of overcoming the “inevitably suspect” nature of the confession by directly addressing the use of an interrogation method judicially noted to be unfair and to produce unreliable evidence. The Crown would have to demonstrate why the confession was

voluntary, given that it was elicited using tactics bearing the hallmarks of unreliability – improper inducements and oppression.[14]

[69] At the hearing of the appeal, the appellant joined with the CLA in asking the court to amend the common law confessions rule so that statements elicited by police use of the Reid Technique of questioning would be presumptively inadmissible. Appellant's counsel requested that this court adopt the following statement that would serve as guidance to trial judges:

> The voluntariness of the confession incorporates [an accused's] right to silence, his right to counsel, and the impact of the Reid process, a process designed to elicit confessions true or false. Its effects must be measured accordingly. Its use gives rise to a rebuttable presumption of involuntariness.

[70] The Crown submits this court should reject the call of the CLA and appellant to amend the modern confessions rule. The essence of the Crown's position is captured at para. 90 of its factum:

> This Court should not transform the voluntariness inquiry into a pigeonholing exercise that turns on naming the particular interrogation technique used in a given case. The *Oickle* test has stood the test of time - for good reason. The test focuses on the case specific impact of any potential issues that may arise with an accused's statement. The label of the technique is not the salient point but what, *if any*, particular impact whatever tactic(s) the police have employed had on a given accused. At the heart of the *Oickle* analysis is a rejection of the type of hard and fast rules that the intervenor suggests. The

[14] Factum of the CLA, at para. 3.

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> intervenor's approach would turn this emphasis on its head. It would move the focus away from whether a particular accused's statement was the product of his voluntary decision to speak.

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B. Analysis

[71] For several reasons, I am not persuaded that the common law confessions rule requires amendment in the way proposed by the appellant and CLA.

The comprehensiveness of the existing confessions rule

[72] First, as I understand their submissions, the main rationale advanced by the appellant and CLA for the creation of a presumption of inadmissibility is that the Reid Technique uses methods that risk eliciting a false confession from a suspect or accused. Their concern focuses on (but is not limited to) psychological elements of the Reid Technique that could constitute a form of improper inducement – the element of minimization – as well as the aggressive, confrontational nature of the mode of questioning that could be oppressive. Combined, these elements could result in a statement that is not the product of a voluntary decision by the accused or suspect to speak to the police.

[73] The current Canadian law of confessions that flows from *Oickle* and subsequent cases is fully alive to the risk of false confessions resulting from statements elicited by police questioning, whatever method may be used. The existing confessions rule establishes a framework designed to minimize the

possibility that false confessions find their way into the evidence that a trier of fact considers.

[74] That framework starts with the principle that a confession can only be admitted into evidence if the Crown demonstrates, beyond a reasonable doubt, that the statement was voluntary. As stated in *Beaver*, at para. 45: “The common law confessions rule provides that a confession to a person in authority is presumptively inadmissible, unless the Crown proves beyond a reasonable doubt that the confession was voluntary”. Given that starting point, I have some difficulty conceiving how, as a practical matter, the onus the Crown presently bears under the modern confessions rule would differ or be less strict than its onus under the amended rule the appellant and CLA propose. Under their amended common law rule, statements elicited by certain (but not all) interrogation techniques would be presumptively inadmissible unless the Crown demonstrated the statements were voluntary. Yet, under the current rule, all confessions are presumed inadmissible regardless of the mode of police questioning, and in all cases the Crown must demonstrate the voluntariness of the statement, otherwise it is not admitted into evidence. It strikes me that the gloss or amendment proposed by the appellant and CLA posits a distinction that does not amount to a real practical difference.

[75] Further, the existing confessions rule requires courts to consider all the circumstances surrounding the making of a statement. That would include considering the *Oickle* factors of any indications of inducements or oppressive

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circumstances, the two main dangers flagged by the appellant and CLA about statements elicited by use of the Reid Technique.

Is the current confessions rule not achieving its stated objective?

[76] Second, I am not persuaded that the record before us demonstrates that the existing confessions rule is failing to achieve its objective of preventing the admission of false confessions when the statements were elicited by police use of the Reid Technique, or any other technique for that matter.

[77] At trial, the appellant applied to adduce expert evidence from a psychologist on (i) the tendency of certain interview techniques to produce unreliable or false information, as well as (ii) the techniques used to interview the appellant and their implications for the reliability of the information obtained.[15] The trial judge dismissed the application. Although the notice of appeal listed the rejection of that application as a ground of appeal, the appellant has not pursued that ground. Consequently, the information placed before us on this issue consists only of case law and criminology literature, unsupported by any tested expert opinion evidence.

[78] The case law filed shows that Canadian courts have been aware of the risks posed by the use of the Reid Technique since the early 1990s, particularly the risks of psychological inducements and oppressive circumstances. As the review of the Canadian jurisprudence in Part V.B shows, a number of judges have used strong

[15] Ruling on application to adduce expert evidence, *R. v. Ordonio*, 2019 ONSC 3017, at para. 5.

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language to describe the oppressive nature of some interrogations that have used the Reid Technique. But no case has suggested that use of the Reid Technique, in and of itself, should render a statement *a priori* inadmissible on some basis other than that underpinning the current confessions rule.

[79] The only case pointed to by the appellant and CLA as one where a Reid Technique-elicited statement resulted in a wrongful conviction because the confession was false is the case of *R. v. Doyle*, 2023 ONCA 427, 89 C.R. (7th) 183 – an alleged "shaken baby syndrome" death case. The information about that case put before us is limited to this court's brief Reasons for Decision in *Doyle*. They indicate the panel allowed the appeal primarily on the basis that the conviction was the product of unreliable expert evidence given by a disgraced pathologist, Dr. Charles Smith. The reasons also dealt with the Crown's submission that differences in the appellant's explanation of the events leading to the victim child's death warranted a new trial, not an acquittal. In that context, the *Doyle* panel characterized the police interview as a "gruelling interrogation" that reflected several of the abusive techniques described in *Oickle*. But, beyond that description, the record before us is devoid of information that would enable us to understand the circumstances in which the accused, Doyle, made his statement to the police and the treatment of the statement at trial, including whatever instructions the trial judge gave about its use.

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[80] Moving beyond the case law, the only article from the criminology literature filed on this appeal that attempted to provide a broad, empirically grounded, picture of the effect or impact of different questioning techniques was that by Christian A. Meissner et al., “Accusatorial and information-gathering interrogation methods and their effects on true and false confessions: a meta-analytic review” (2014) 10:4 J of Experimental Criminology 459. This meta-review of the criminology literature from 1967 through 2013 classified police questioning techniques as either “information-gathering” (employing open-ended, exploratory approaches and direct, positive confrontation) or “accusatorial” (psychologically-based methods that use close-ended or confirmatory questions). The study sought to ascertain from the published literature whether information-gathering or accusatorial interrogation methods produced a higher ratio of true to false confessions. The study reviewed literature that reported on the results of both field studies – that is, actual interrogations of suspects – as well as controlled laboratory studies.

[81] The sample of field studies used by the authors was small: only five studies qualified for inclusion in the study, of which only one was conducted in Canada. The authors reported that the use of both accusatorial and information-gathering methods of interrogation was associated with the elicitation of confessions in a real-world context. However, they cautioned that the field studies could not distinguish between true and false confessions because “ground truth” in such a real-world context was nearly impossible to determine.

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[82] The authors relied on the literature reporting on controlled, laboratory studies to ascertain whether information-gathering or accusatorial interrogation methods resulted in greater likelihoods of false confessions. They reported that in laboratory studies accusatorial methods significantly increased the likelihood of obtaining a false confession whereas information-gathering approaches appeared to show a numerical decrease in the rate of false confessions obtained relative to accusatorial methods. The authors acknowledged that those findings were not particularly robust due to the small number of studies eligible for the meta-review.

[83] While this meta-review seems to confirm the common sense intuition that a period of accusatorial questioning by a person in authority may well increase the likelihood of a false statement as compared to questioning using more open-ended, information-gathering approaches, the study did not examine the effectiveness of evidentiary rules used by various jurisdictions to screen for that risk. Consequently, the study, while quite informative on certain points, does not provide empirical support for the argument that the existing Canadian confessions rule requires amendment because it is not achieving its stated objective.

The risk of shifting the focus of *voir dires*

[84] Third, amending the common law confessions rule in the manner suggested by the appellant and CLA inevitably would inject a new threshold issue into any *voir dire* on voluntariness, namely: did the police use the Reid Technique to elicit

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the statement the Crown seeks to admit into evidence, thereby triggering the proposed special presumption of inadmissibility?

[85] The appellant submits the Reid Technique is a "process that hovers around the edges of oppression and inducements". As such, it resembles the Mr. Big process that the Supreme Court considered in *R. v. Hart*, 2014 SCC 52, [2014] S.C.R. 544. Just as the Supreme Court in *Hart* adapted the common law to deal with a police investigative technique that caused some wrongful convictions, the appellant submits this court should amend the confessions rule so that the use of the Reid Technique to elicit a statement would give rise to a special rebuttable presumption of inadmissibility.

[86] Two significant differences exist between the use of a Mr. Big process by the police and the present case that deals with police questioning techniques.

[87] First, under the case law that existed before the *Hart* decision, statements made by an accused during a Mr. Big operation typically were received at trial under the party admissions exception to the hearsay rule: at para. 63. The confessions rule was inoperative because the accused did not know that "Mr. Big" was a police officer when the confession was made: at para. 64. By contrast, the Crown must demonstrate beyond a reasonable doubt that a statement made by an accused to a police officer during an interrogation that uses

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any technique, including the Reid Technique, was voluntary, a high threshold to meet.

[88] Second, Mr. Big operations are easy to identify: police officers play made-up roles in a tightly choreographed operation that uses a concocted story-line: *Hart*, at paras. 57-60. By contrast, whether a police interrogation has used the Reid Technique is not so susceptible to a clear answer. While the literature describes the Reid Technique of questioning as one that involves nine steps, the literature acknowledges that the moniker of Reid Technique has been applied to interrogations that do not use all nine steps. As well, the literature recognizes that both information-gathering and accusatorial questioning processes share certain direct questioning methods.[16]

[89] Given those features, injecting into a confession *voir dire* a threshold issue of whether the police used the Reid Technique, or a technique that substantially tracked the nine steps of the Reid Technique, or some hybrid of the Reid Technique and another technique, would create an issue that would consume more judicial resources without any apparent forensic benefit as compared to the application of the existing confessions rule. That is because at the end of the day, as stated in *Beaver*, the current confessions rule provides that any confession to

[16] Meissner et al., at p. 469.

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a person in authority is presumptively inadmissible unless the Crown proves the voluntariness of the statement beyond a reasonable doubt.

[90] It is worth noting that during the *voir dire* defence counsel recognized that the real issue was not how to label the questioning technique used but the effect of the questioning technique on the voluntariness of the statement elicited:

> [DEFENCE COUNSEL:] I do agree with [Crown counsel] that whether [the police officer] used the Reid technique or a semi Reid technique is not the issue the issue is whether you use coercive methods which are replete throughout the Reid technique and that's made plain in the case law.
>
> …
>
> So whatever label you put on it is, you know, potentially misleading. It's not whether you call it Reid or PEACE it's whether it's coercive and the, the cases have recognized that there are features of the Reid technique that are inherently coercive like the posing of alternatives one somewhat less morally reprehensible than the other, but both of them constituting...
>
> THE COURT: Incriminating.
>
> [DEFENCE COUNSEL]: ...guilt.[17]

C. Conclusion

[91] For these reasons, I am not persuaded that the appellant and CLA have demonstrated the need to amend the common law confessions rule to add a special presumption of inadmissibility about one specific interrogation technique,

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[17] Transcript December 3, 2018, at pp. 424-5.

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namely the Reid Technique. The existing confessions rule presumes inadmissibility generally and directs courts to consider all the circumstances surrounding the statement that was elicited, and the *Oickle* factors that inform such a consideration include the psychological inducements and oppression that loom large in critiques of the Reid Technique. As well, the appellant and CLA have not demonstrated that the existing confessions rule is "broken" and requires repair by adding the presumption of inadmissibility they proposed. Finally, to expand the "issues list" for a confession admissibility *voir dire* to include a threshold labelling of the questioning technique used in a specific circumstance would consume more judicial resources without a corresponding benefit because, at the end of any inquiry, the ultimate issue for the court to determine would remain unchanged from that stated in the current rule, as put in *Tessier*, at para. 89:

> [T]he 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.

VIII. SECOND ISSUE: DID THE TRIAL JUDGE ERR IN ADMITTING THE APPELLANT'S STATEMENT?

[92] I am persuaded by the appellant's submission that the trial judge erred in her analysis that resulted in her ruling the appellant's Statement to be voluntary. In my view, the trial judge's analysis that the Statement was voluntary was marked by two errors: (i) the trial judge failed to consider the circumstances of the interview as a whole and assess the cumulative effect or impact of the 13-hour interrogation

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on the Statement's voluntariness; and (ii) the trial judge made a palpable and overriding error of fact in finding that the appellant did not fall asleep during the interrogation.[18]

[93] Combined, these errors justify appellate intervention with the trial judge's admissibility ruling.

The trial judge's failure to consider the circumstances of the interview as a whole

[94] I am persuaded by the appellant's submission that the trial judge failed to consider the circumstances of the interview as a whole and assess the cumulative effect of the 13-hour interrogation on the Statement's voluntariness.[19]

[95] The jurisprudence on the confessions rule stresses that when considering whether a statement was made voluntarily, a court must consider all of the circumstances surrounding the making of the statement. And, indeed, the trial

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[18] By letter dated January 29, 2025, the court wrote to the parties noting that at para. 86 of her reasons the trial judge did not refer to or deal with the evidence given on the voluntariness *voir dire* by the interrogating officer, Det. Heyes. The court observed that the material in the record suggested that Det. Heyes acknowledged on cross-examination that the appellant had fallen asleep and this could suggest the trial judge made a palpable and overriding error in finding that she could not conclude that the appellant ever fell asleep.

The Crown filed supplementary submissions by letter dated February 7, 2025. The Crown argued that para. 86 of the reasons did not disclose a palpable and overriding error; the trial judge's conclusion that she could not find the appellant was in fact sleeping at any point was available to her on the record.

The appellant filed supplementary submissions by letter dated February 14, 2025. The appellant argued that the trial judge's failure to conclude the appellant fell asleep and take that into account in assessing voluntariness was a palpable and overriding error.

[19] The appellant also raised certain *Charter*-related issues concerning police conduct prior to the Heyes interview as impacting on the voluntariness of the Statement. I have found it unnecessary to address those issues to dispose of the appeal. Nothing in these reasons should be taken as a determination that events prior to interview are irrelevant to the voluntariness of the Statement.

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judge recognized that a confession analysis must consider all relevant factors, both in regard to police conduct and to its effect on a suspect's ability to exercise his free will: at paras. 75-76. However, in my view the trial judge erred in her application of that principle.

[96] *Oickle* identified "excessively aggressive, intimidating questioning for a prolonged period of time" as one factor that can create an atmosphere of oppression: at para. 60. The present case certainly involved questioning for a prolonged period of time – almost 13 hours – and the video records numerous instances of aggressive questioning, many prolonged. In such circumstances, the assessment of the voluntariness of the Statement necessarily required the trial judge to examine the cumulative impact of prolonged, aggressive questioning. In my respectful view, the trial judge failed to do so in the present case.

[97] The trial judge structured her reasons by first providing an overview of the interview that resulted in the Statement. The overview broke the interview into three sequential parts: a biographical discussion (approximately from 2:15 p.m. to 5:00 p.m.); the presentation of evidence by Det. Heyes to the appellant (5:00 p.m. to approximately 9:00 p.m.); and, finally, the appellant's admission (from approximately 8:45 p.m. until about 2:00 a.m. the following morning). The appellant started writing his Statement just before 11:00 p.m., finishing around 12:00 a.m. midnight.

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[98] After providing an overview of the interrogation, and the relevant legal principles, the trial judge conducted her voluntariness analysis by first assessing how the appellant presented himself during the interview – she concluded that he was "a cunning, calculating individual who held his own throughout" – and then examining the conduct of Det. Heyes under the headings of "Oppression" and "Inducements".

[99] Although the trial judge conducted an extensive review of police conduct under those headings, overall she took a "piecemeal" rather than a cumulative approach to assessing the effect or impact of specific police conduct. She limited her assessment of the impact to specific points of time and then gauged the lapse of time between the conduct and the appellant making admissions. Her reasons disclose several examples of this temporally-limited analytical approach:

- The appellant had complained about the cold temperature in the interrogation room and there was a lapse of time before the police provided warmer clothing. Food was not given to the appellant until close to 7:00 p.m., some six hours after his arrest and transport to the police station. Though the trial judge found the delay in providing the appellant with warmer clothing "somewhat disturbing", at para. 90, she concluded that since more than two hours elapsed between getting the warmer clothing and dinner and the start of the appellant's admissions, "[t]his suggests there is no causal connection

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between those factors and the admissions ultimately elicited from Ordonio": at para. 91;

- As part of his effort to develop a rapport with the appellant, Det. Heyes lied about the circumstances surrounding his son's death. The trial judge recognized that the police officer did so "undoubtedly to encourage Ordonio to follow the same example as the 'offender' who obtained forgiveness by admitting to his crime." The trial judge concluded that Det. Heyes's lie "did not work" since the appellant "remained insistent that he played no role in this crime until hours later, when the full weight of the *evidence* impacted him": at para. 113. This was one reason that led the trial judge to conclude that "there is no causal connection between Heyes' use of any aspects of the Reid method and the admissions ultimately elicited from Ordonio": at para. 114; and
- Around 6:00 p.m., the appellant asks Det. Heyes, "[h]ypothetically how, how much am I looking at?" A lengthy back and forth ensued, in which Det. Heyes stated that he could not tell the appellant for sure because he was not a judge. Defence counsel submitted that by suggesting to the appellant that he might get a lower prison sentence if he "comes forward" and explains "the circumstances", the police officer offered an improper inducement that contributed to the appellant's subsequent admissions. The trial judge did not

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accept that submission for several reasons, one of which, at para. 132, was that:

> [N]othing flows from this exchange. It is not until approximately 9:00 p.m. – *three hours later* – that Ordonio begins to reveal anything meaningful about his involvement, and that was triggered by various pieces of damning evidence that Heyes confronted him with.

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[100] These portions of her reasons suggest the trial judge approached her examination of police conduct on the basis that unless a particular instance of police conduct occurred close in time to when the appellant started to make his admissions, the conduct could not have affected the voluntariness of the appellant's Statement. Certainly, there has to be some connection between the police conduct and a confession: *Oickle*, at para. 84. But to render a statement involuntary an *Oickle* factor need not be the sole contributing factor: *R. v. Othman*, 2018 ONCA 1073, 144 O.R. (3d) 37, at para. 24, citing *Oickle*, at para. 57.

[101] Common sense suggests that for Det. Heyes to persist in questioning the appellant for 13 hours, having asserted at an early stage of the interrogation that the appellant was guilty, indicates that he thought the cumulative effect of his questioning likely would result in eliciting a confession. Such an approach heightens the need for the trial judge to stand back and assess the cumulative effect of the police conduct over the course of the lengthy interrogation.

[102] The obligation of a court to consider the effect of the circumstances of the interrogation as a whole requires a court to assess, especially during a lengthy

interrogation, whether the cumulative effect or impact of police interrogative conduct rendered the statement involuntary. At the end of her reasons the trial judge acknowledged that obligation when she stated, at para. 146:

> I recognize that even though none of the above issues raised sufficient concerns individually to render the statement involuntary, the court must consider their *collective* impact. Nonetheless, looking at the statement in its entirety, including its length, Ordonio's personal characteristics, and the dynamics between the two men, I am satisfied beyond a reasonable doubt that Ordonio's will was not overborne. He made a deliberate choice to speak and the statement was given voluntarily. [Emphasis added.]

[103] However, the portions of the trial judge's reasons set out at para. 99 above lead me to conclude that she lost sight of that obligation – she was more concerned about the lapse of time between troubling or disturbing police conduct and when the appellant started making admissions than the cumulative impact of the conduct during prolonged, aggressive questioning. With all due respect to a very experienced trial judge, I am not satisfied that her one-sentence assessment of the cumulative effect of police interrogation conduct was sufficient to satisfy her duty to assess the overall impact on voluntariness of all the circumstances surrounding the making of the Statement, especially when the interrogation went on for 13 hours, was marked by very aggressive police questioning and some police lies, and, as discussed below, drew an acknowledgement on cross-examination by the police interrogator that the appellant had fallen asleep during the interview.

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Whether the appellant fell asleep during the interrogation

[104] The videotape of the 13-hour interrogation shows the appellant periodically resting his head on a table and, at one point, lying on the floor for an extended period of time after Det. Heyes had left the room.

[105] In dealing with the issue of oppressive circumstances in his submissions on the *voir dire*, Crown counsel recognized that the appellant "was in an interview room for 13 hours and there is no doubt that there was some level of fatigue."[20] However, he argued that the appellant did not fall asleep while he was interacting with the police officer.[21] As to instances when the video showed the appellant lying on the ground when the officer came in or had his head on the table, Crown counsel contended there was no basis to conclude the appellant was sleeping at those times.[22]

[106] In his submissions, defence counsel argued that the appellant fell asleep at several points during the 13-hour interview, which indicated the interrogation took place under oppressive circumstances. Defence counsel submitted Det. Heyes woke the appellant up three times during the interview:

> I count three times. At least three times and then there's a number of other times when Heyes is briefly out of the room and Ordonio is either on the floor apparently trying to sleep or with his head down on the table. It's significant

[20] Transcript, December 3, 2018, at p. 325.
[21] Transcript, December 3, 2018, at p. 326
[22] Transcript, December 3, 2018, at p. 327.

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> that every time that Heyes is out of the room Ordonio seems to be trying to get some rest either on the table or the floor and every time Heyes comes in he interrupts that, he wakes him up and he confided to me I suppose on cross, well, maybe I should have let him sleep.[23]

[107] At para. 86 of her ruling on the admissibility of the Statement, the trial judge wrote:

> Defence counsel maintains that Ordonio fell asleep on one or more occasions. While he is certainly fatigued at points, I cannot conclude from watching the video that he ever fell asleep, and there is no evidence from Ordonio on this point. He certainly remained sufficiently alert during his interactions with Heyes, and it is clear throughout that he is carefully tracking the conversation. [Emphasis added.]

[108] While there was no evidence from the appellant on the point since he did not testify at the *voir dire*, there was evidence before the trial judge from the other person in the interrogation room, Det. Heyes.

[109] In his evidence, Det. Heyes acknowledged that there were times during the 13-hour interview when he found the appellant had fallen asleep and, on reflection, perhaps he should not have awakened the appellant but let him sleep. The following exchanges took place on the detective's cross-examination:

> Q. Well, he fell asleep a number of times in the room?
>
> A. Correct.
>
> Q. And you woke him up each time?

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[23] Transcript, December 3, 2018, at p. 431.

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A. When I came back in, yes.

Q. At least three times, he was sound asleep and you woke him up?

A. I don't know about sound asleep, but he was sleeping, yes.

Q. Well, maybe not sleeping that comfortably, but it was obvious to you he was tired?

A. Yes. Near the end, he was tired.

Q. Oh!

A. There's – I'm not arguing that, no.

Q. Not before the end?

A. No, like near the end, I would say probably around – again, I, I don't want to guess at that. So I'm going to say around 11:30ish maybe, somewhere around there.

Q. So you don't – you didn't perceive that before roughly 11:30 that he was tired?

A. Well, he had shown some signs of yawning, yes.

Q. Yawning?

A. Yes.

Q. Well, falling asleep might be an indication of being tired?

A. It could be.

Q. Is there any other way of interpreting it?

A. Well, somebody has a catnap. I – again....

Q. Well, when, when you were out of the, the room, some times, he put his head down on the table and seemed to be sleeping? You observed that on the video?

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A. His head was down. I don't know if he was sleeping or not.

Q. But it was consistent with him trying to sleep?

A. I don't know what he was doing. He may have just been putting his head on the table. I don't know whether he was sleeping or not.

Q. But, but repeatedly, he did that?

A. He put his head on the table, yes.

Q. A number of times?

A. I, I can't tell exactly how many times, but he put his head down, yes.

Q. Okay. You said he was yawning?

A. Yes, correct.

Q. And on occasion, he curled up and tried to – maybe he did actually go to sleep on the floor when you were out of the room?

A. He may have. I...

Q. Well, you saw it.

A. I don't...

Q. You came in and woke him up?

A. I believe on one occasion, yes, I woke him up.

Q. Mm.

A. I, I don't know if I woke him up on three occasions, 'cause I think my walk through the door on one occasion, he woke up.

Q. So, so you, you told us a few minutes ago and if it had come to your attention at 1:30 or whenever this started, that he was tired, that you would have let him sleep then?

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A. Yes, I would've.

Q. So when he was trying to sleep, you know, hours and hours later, on the hard floor without a pillow or a blanket, did you not think you should let him sleep then?

A. I didn't really have anywhere for him to sleep, sir.

Q. He was already sleeping on the floor.

A. I know, but you're talking about a pillow and a blanket. I...

Q. No, no.

A. ...I don't have that.

Q. You, you...

A. But...

Q. ...you, you know that's not the focus of the question. This young man has been there for hour after hour.

A. Correct.

Q. Every time you go out of the room, he's either got his head on the table or he's lying down on the floor. He's obviously tired to anyone who was looking at him?

A. Okay.

Q. Is my suggestion.

A. Okay.

Q. You come in three times, I suggest, when he's sleeping and you wake him up.

A. Okay.

Q. If, if you have had – if you would have had that concern at 1:30, if someone had told you he was tired, why wouldn't you have that concern when you actually go in there and see him sleeping?

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A. I, I accept that, sir, yes.

Q. You mean you accept that was a failure on your part?

A. Yes, I, I will give you that, yes.

Q. And – well, the next question is why would you wake him up in those circumstances? Why not let him out of – you know, just simple humanity have a bit of sleep?

A. Yes.

Q. Is it because you thought that he might be more vulnerable to the interrogation process if he was exhausted?

A. No.

Q. That never went through your head?

A. No, sir.

Q. Well, I'm suggesting to you that that is an explanation that sort of cries out. Can you give me any other explanation that might also explain why you woke him up?

A. I just wanted to talk to him. I was not trying to overbear him by any means. I just wanted to talk to him and, yes, I, I woke him up, yes.

Q. Well, would there have been a problem waiting half an hour?

A. Probably not, sir, no. [24] [Emphasis added.]

[110] The trial judge did not deal with this evidence from Det. Heyes in her reasons. In my respectful view, for the trial judge to find that the appellant did not

[24] Transcript, November 28, 2018, at pp. 201-205.

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fall asleep during the interview in the face of an unequivocal acknowledgement from the interrogating officer that the appellant did constitutes a palpable error of fact.

[111] As well, it was an error of fact on a very material point that affected the trial judge's assessment of the facts: *Oickle*, at para. 71. As recognized by *Oickle,* depriving the person questioned of sleep can create an atmosphere of oppression that leads to false confessions: at paras. 58-60.[25] Indeed, the trial judge recognized this very risk in her ruling on the application to admit expert evidence concerning the association between interviewing techniques and false confessions: 2019 ONSC 3017. In rejecting the appellant's application, the trial judge wrote at para. 12:

> The main concerns about the interview in this case involve its length; the aggressive and leading style of questioning; and the physical conditions throughout, such as fatigue, hunger and discomfort. To the extent those concerns exist, they do not require an "expert" to identify them. That is particularly so where, as here, the entire interview was audio and videotaped. Jurors can evaluate whether questions are manipulative or suggestive. They can see when someone is being bullied or badgered. They know that hunger and exhaustion do not bring out reliable answers. In other words, human experience and common sense will suffice. And to the extent they need direction on this, the court can and should provide it. [Emphasis added.]

[25] In *Thaher*, Schreck J., at para. 118, noted that among other "basic human needs" that had not been met in this case, the accused was "fatigued enough to fall asleep on the floor of the interview room".

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[112] While *Oickle* requires any judicial assessment of voluntariness to take into account all the circumstances surrounding the making of a statement, *Oickle* recognizes that oppressive conditions, on their own, are capable of producing false confessions stating, at para. 58:

> Oppression clearly has the potential to produce false confessions. If the police create conditions distasteful enough, it should be no surprise that the suspect would make a stress-compliant confession to escape those conditions. Alternately, oppressive circumstances could overbear the suspect's will to the point that he or she comes to doubt his or her own memory, believes the relentless accusations made by the police, and gives an induced confession.

[113] Accordingly, I conclude that in light of the evidence of Det. Heyes and the jurisprudence regarding depriving a suspect of sleep during an interrogation, the trial judge made a palpable and overriding error of fact in finding that the appellant did not fall asleep during the 13-hour interrogation.

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IX. CONCLUSION AND DISPOSITION

[114] For the reasons set out above, I conclude that the trial judge's ruling that the Statement was voluntary was tainted by error. In those circumstances, I would allow the appeal, set aside the conviction, direct a new trial, and remit the issue of the Statement's admissibility to the judge who presides at a new trial. Given that disposition, it is not necessary to address the other grounds of appeal advanced by the appellant.

Released: February 25, 2025 "J.S."

"David Brown J.A."
"I agree. Janet Simmons J.A."
"I agree. L. Favreau J.A."

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