

## **COURT OF KING'S BENCH OF MANITOBA**

### **B E T W E E N:**

HIS MAJESTY THE KING,	)	<u>Michael G. Himmelman</u>
	)	<u>Cole A. Gagne</u>
- and -	)	for the Crown
	)	
KEITH FRANK TROUT and	)	<u>Bruce F. Bonney</u>
MARISA HAZEL REDHEAD,	)	<u>David Barbour</u>
accused.	)	for the accused, Keith Frank Trout
	)	
	)	<u>Crystal L. Antila</u>
	)	<u>Candace A.D. Olson</u>
	)	for the accused, Marisa Hazel
	)	Redhead, on a watching brief
	)	
	)	Judgment Delivered:
	)	May 31, 2023

***RESTRICTION ON PUBLICATION:*** Pursuant to s. 648(1) of the ***Criminal Code***, this decision shall not be published in any document or broadcast or transmitted in any way until a jury has heard the evidence and retired to consider its verdict. This publication ban has expired on October 4, 2023.

## **GRAMMOND J.**

### **INTRODUCTION**

[1] The accused are charged with second degree murder in the death of Grant Redhead (the "Deceased") on August 19, 2021 at Shamattawa, Manitoba.

[2] At trial, the Crown will seek to rely upon a video-recorded statement given by the accused Keith Frank Trout ("Trout") on October 3, 2021 (the "Statement"). Trout challenges the admissibility of the Statement pursuant to s. 24(2) of the ***Canadian Charter of Rights and Freedoms***, on the basis that his rights under s. 10(b) of the ***Charter*** were violated, and that the Statement was involuntary.

### **BACKGROUND**

[3] The evidence led by the Crown at the *voir dire* consisted of the testimony of four police officers, a series of audio and video recordings of their interactions with Trout, and a video interview constituting the Statement. Mr. Trout did not testify at the *voir dire*, and the defence did not lead any evidence.

[4] A timeline of the relevant events to which the officers testified is as follows:

- a) **August 19, 2021:** The Deceased was last seen in the community of Shamattawa. He was later reported missing, and the RCMP undertook a missing persons investigation including search efforts to locate the Deceased, which were unsuccessful;
- b) **October 2, 2021 at 8:20 p.m.:** The accused Marisa Hazel Redhead ("Redhead"), the common law partner of Trout, rang the doorbell at the RCMP detachment and spoke to Constable Paydli. She advised him that she knew who killed the Deceased, and that his blood was in her house;
- c) **October 2, 2021 at 8:43 p.m.:** Constable Paydli and his partner Constable Maruzin were en route to Trout and Redhead's residence when they encountered Trout on the side of the road. Trout advised the

officers that he wanted to turn himself in for the murder of the Deceased, and they arrested him. Constable Paydli advised Trout at the roadside that he did not have to say anything, but if he did so it could be used against him, and that he had the right to speak to a lawyer. Constable Paydli gave the police caution and right to counsel from memory, without a script. Trout advised the officers that he wished to speak to a lawyer, and to give a statement to police. Constable Paydli testified that Trout was emotional and appeared to be under the influence of alcohol at the time;

- d) **October 2, 2021 at 8:53 p.m.:** The officers took Trout into the RCMP detachment and into a cell, where Constable Paydli read to Trout his **Charter** rights. All interactions between the officers and Trout were video recorded, but only the initial portion of their interactions were audio recorded, because the battery died in Constable Paydli's audio recorder. Constable Paydli testified that he read to Trout his **Charter** rights "verbatim", meaning that Constable Paydli read the rights from a script. Constable Paydli advised Trout that he was under arrest for the murder of the Deceased and for failing to comply with an undertaking<sup>1</sup>. Constable Paydli asked Trout whether he wanted to call a lawyer and Trout responded "no, fuck that shit". Constable Paydli then gave Trout a **Prosper** warning<sup>2</sup>, to which Trout responded "whatever".

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<sup>1</sup> Apparently, at the material time, Trout was bound by a condition not to have contact with Redhead.

<sup>2</sup> Defined in paragraph 5 below.

Constable Paydli again asked Trout if he wanted to call a lawyer, to which Trout responded "whatever".

- e) **October 2, 2021 at 9:50 p.m.:** Constable Paydli re-arrested<sup>3</sup> Trout and read his *Charter* rights "verbatim" for the second time. That encounter was both video and audio recorded. Trout interrupted Constable Paydli multiple times as his rights were being read. When asked if he wanted to call duty counsel or any other lawyer, Trout responded: "No, nothing. I wanna sleep". Constable Paydli later stated "we do want you to contact a lawyer", to which Trout responded "No, I don't want to talk to nobody";
- f) **October 3, 2021 at 8:40 a.m.:** Constable Doucette of the RCMP awoke Trout, escorted him to the telephone room, and read to Trout from a scripted arrest sheet<sup>4</sup>, including that Trout was under arrest for the murder of the Deceased and failing to comply. He also read Trout his right to counsel. In response, Trout advised Constable Doucette that he wished to speak with a Legal Aid lawyer, and he did so, privately, from 8:47 a.m. until 8:53 a.m. After the call, Constable Doucette confirmed with Trout that he spoke to the lawyer that he chose, that he was satisfied with his opportunity to speak with the lawyer, that he understood what the lawyer said to him, and that he was expecting a phone call from a lawyer the next morning; and

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<sup>3</sup> Constable Maruzin had contacted the RCMP Major Crimes Unit in Winnipeg and spoke to Constable Hunt, who instructed that Trout be re-arrested.

<sup>4</sup> Constable Doucette was instructed to do so by Constable Hunt.

- g) **October 3, 2021 at 12:40 p.m.:** Constable Hunt met with Trout and took the Statement. The interview lasted approximately three and one-half hours. Near the beginning of the interview Trout advised Constable Hunt, in response to questions posed, that he spoke with counsel, that he was satisfied with their conversation, and that he understood the advice he was given.

## **SECTION 10(b) BREACH**

### **The Law**

[5] Section 10(b) of the *Charter* provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right. As noted by McKelvey J. in *R. v. Laquette*, 2021 MBQB 177, the s. 10(b) right to counsel was well articulated in *R. v. Willier*, 2010 SCC 37, where the court stated:

[27] As we describe in *Sinclair*, the right to silence in s. 7 and the right to counsel in s. 10(b) work together "to ensure that a suspect is able to make a choice to speak to the police investigators that is both free and informed" (para. 25). Section 10(b) aims to realize this purpose by ensuring that detainees have an opportunity to be informed of their rights and obligations under the law and to obtain advice on how to exercise those rights and perform those obligations. As Lamer C.J. wrote in *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 191:

This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty: Brydges, at p. 206; *R. v. Hebert*, [1990] 2 S.C.R. 151, at pp. 176-77; and Prosper. Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. As this Court suggested in *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at p. 394, the right to counsel protected by s. 10 (b) is designed to ensure that persons who are arrested

or detained are treated fairly in the criminal process. [Emphasis deleted.]

[28] Accordingly, s. 10(b) provides detainees with an opportunity to contact counsel in circumstances where they are deprived of liberty and in the control of the state, and thus vulnerable to the exercise of its power and in a position of legal jeopardy. The purpose of s. 10(b) is to provide detainees an opportunity to mitigate this legal disadvantage.

[29] The purposes of s. 10(b) serve to underpin and define the rights and obligations triggered by the guarantee. In *Bartle*, Lamer C.J. summarized these rights and obligations in terms of the duties imposed upon state authorities who make an arrest or effect a detention (p. 192). Section 10(b) requires the police

(1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;

(2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and

(3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[30] The first duty is an informational duty, while the second and third duties are implementational in nature and are not triggered until detainees indicate a desire to exercise their right to counsel. As explained in *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, these duties are triggered immediately upon an individual's arrest or detention, as "the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected" (para. 41).

[31] The informational duty imposed on the police is relatively straightforward. However, should a detainee positively indicate that he or she does not understand his or her right to counsel, the police cannot rely on a mechanical recitation of that right and must facilitate that understanding: *R. v. Evans*, [1991] 1 S.C.R. 869. Additionally, there are specific, narrowly defined circumstances in which s. 10(b) prescribes an additional informational obligation upon the police. In *R. v. Prosper*, [1994] 3 S.C.R. 236, Lamer C.J. described this additional informational duty, and the circumstances that trigger it, as follows, at p. 274:

In circumstances where a detainee has asserted his or her right to counsel and has been reasonably diligent in exercising it, yet has been unable to reach a lawyer because duty counsel is unavailable at the time of detention, courts must ensure that the *Charter* -

protected right to counsel is not too easily waived. Indeed, I find that an additional informational obligation on police will be triggered once a detainee, who has previously asserted the right to counsel, indicates that he or she has changed his or her mind and no longer wants legal advice. At this point, police will be required to tell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity. This additional informational requirement on police ensures that a detainee who persists in wanting to waive the right to counsel will know what it is that he or she is actually giving up.

[32] Thus, when a detainee, diligent but unsuccessful in contacting counsel, changes his or her mind and decides not to pursue contact with a lawyer, s. 10(b) mandates that the police explicitly inform the detainee of his or her right to a reasonable opportunity to contact counsel and of the police obligation to hold off in their questioning until then. This additional informational obligation, referred to in this appeal as the duty to give a "*Prosper* warning", is warranted in such circumstances so as to ensure that a detainee is informed that their unsuccessful attempts to reach counsel did not exhaust the s. 10(b) right, to ensure that any choice to speak with the police does not derive from such a misconception, and to ensure that a decision to waive the right to counsel is fully informed.

[33] Detainees who choose to exercise their s. 10(b) right by contacting a lawyer trigger the implementational duties of the police. These duties require the police to facilitate a reasonable opportunity for the detainee to contact counsel, and to refrain from questioning the detainee until that reasonable opportunity is provided. However, these obligations are contingent upon a detainee's reasonable diligence in attempting to contact counsel: *R. v. Tremblay*, [1987] 2 S.C.R. 435; *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Smith*, [1989] 2 S.C.R. 368. What constitutes reasonable diligence in the exercise of the right to contact counsel will depend on the context of the particular circumstances as a whole. As Wilson J. stated in *Black*, at pp. 154-55:

A rider is attached to these police obligations, namely that the accused must be reasonably diligent in attempting to obtain counsel if he wishes to do so. If the accused person is not diligent in this regard, then the correlative duties imposed upon the police to refrain from questioning the accused are suspended: see *R. v. Tremblay*, [1987] 2 S.C.R. 435.

[6] McKelvey J. in *Laquette* also stated that:

[36] Once a detainee has been afforded a reasonable opportunity to consult counsel, there is no continuing obligation on the police to provide further opportunities to again speak with counsel unless a change in circumstances or in the person's jeopardy has occurred. A change in circumstances might involve the detainee not having understood the right to counsel, or the involvement of a new procedure, such as placement in an identification lineup: *R. v. Sinclair*, 2010 SCC 35, [2010] 2 SCR 310, para. 65; *R. v. McCrimmon*, 2010 SCC 36, [2010] 2 SCR 402, para. 22; and *R. v. Willier*, 2010 SCC 37, [2010] 2 SCR 429, paras. 29, 30, 39.

[37] There is no obligation on the authorities to endeavour to weigh the adequacy of the legal advice imparted to a detainee. The police are entitled to assume the adequacy of the advice unless the detainee indicates dissatisfaction with it. This is so even if the consultation with counsel has been brief: *Willier*, paras. 40, 41, 42. It goes without saying that privacy must be afforded to a detainee while exercising the right to consult legal counsel.

### **Analysis**

[7] In this case, the right to counsel was given to Trout on four occasions: once at the roadside, twice in his cell on the evening of October 2, 2021, and once in the telephone room on the morning of October 3, 2021. Trout then spoke with a lawyer, in private, after which he confirmed that he spoke to the lawyer that he chose, that he was satisfied with his opportunity to speak with the lawyer, that he understood what the lawyer said to him, and that he was expecting a phone call from a lawyer the next morning. In addition, near the beginning of the video interview on October 3, 2021, Trout confirmed to Constable Hunt that he spoke with counsel, that he was satisfied with their conversation, and that he understood the advice he was given.

[8] Trout raised as an issue on the *voir dire* his level of intoxication on the night of October 2, 2021 when his rights were read to him. He noted that although officers observed that he was intoxicated they did not test his blood alcohol level. Having said



that, Constable Maruzin testified that Trout was intoxicated, Constable Paydli also observed signs consistent with intoxication, and Trout told officers that he was intoxicated. On the basis of the evidence before me, I accept that when Trout encountered police at the roadside and was arrested, he was intoxicated.

[9] Having said that, I also accept that at all material times Trout was alert, coherent, and able to answer questions. This much is clear from the audio and video surveillance of Trout at the material time. Certainly, Trout spoke repetitively at times, in the main asking officers why Redhead had not been arrested also, and expressing the view that she should have been arrested given her involvement in the murder of the Deceased. Trout also exhibited various emotions during his interactions with officers on October 2, 2021, including anger, frustration and exasperation. Constable Maruzin described him as “amped up” and excitable, speaking a lot and repeating himself. Having said that, when left alone in his cell, Trout took time to arrange the mattresses and blankets before lying down. In my view, he was clearly aware of his surroundings, and although he was intoxicated, he was alert and coherent.

[10] Constable Paydli attempted to downplay Trout’s level of intoxication by testifying on cross-examination that Trout was “under the influence” of alcohol as opposed to “intoxicated”, even though he characterized Trout as “intoxicated” on the prisoner log sheet<sup>5</sup>. In fairness, on the prisoner log sheet he also characterized Trout’s stance as “sure”, his speech as “clear” and his consciousness as “alert”. These observations are supported by the audio and video surveillance of the material time, though I will add

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<sup>5</sup> Constable Paydli testified that he did so by force of habit and that his report could have been more accurate.

that at times Trout's speech sounded slurred. Having said that, the officers were able to understand what he said, and I note that his manner of speech on the evening of October 2, 2021 was consistent with the way he spoke on the morning of October 3, 2021. More particularly, at all times Trout tended to speak quickly, and run his words together. In my view, these are characteristics of his speech pattern rather than the result of intoxication.

[11] I will add that, when Trout spoke with officers on October 3, 2021 about the events of October 2, 2021, at no point did he assert that he had any difficulty recalling what had transpired. To the contrary, he appeared to recall his interactions with officers on October 2, 2021, including that they treated him with respect, and did not threaten him. In addition, he recalled walking on the highway, and seeing officers at the roadside when he was on his way to the detachment.

[12] Similarly, in the video interview, Trout relayed to Constable Hunt the events of the evening of October 2, 2021 prior to his attendance at the detachment, including Redhead's movements, the guests who attended at their home, and an argument with Redhead. In other words, Trout clearly remembered the events of the previous evening.

[13] I accept that at the roadside, Trout said he wanted to contact counsel, but changed his mind once he entered the detachment. He waived his right to counsel at that time, and appropriately, officers gave the *Prosper* warning, and took no steps to question him. Constable Paydli recorded in his notes that he gave a "purged" warning,

but he explained in his testimony that his note was incorrect and that he gave the ***Prosper*** warning at the material time. I accept his evidence on that point.

[14] I will add that although there were a few other errors in Constable Paydli's notes<sup>6</sup>, I accept that in the main the contents of his notes and reports were accurate, including with respect to reading Trout his rights. Constable Paydli testified that he took his notes contemporaneously with events, or shortly thereafter, and most of his evidence was unchallenged.

[15] I note that during Trout's interactions with police his main focus was whether Redhead had been or would be arrested also. At no time did he advise officers that he did not understand his rights, or that he had questions with respect to his rights. Put simply, there is no evidence before me that Trout did not understand his rights.

[16] On the basis of the foregoing, I am satisfied that on October 2, 2021, police complied with their informational duty pursuant to s. 10(b). Having said that, the second and third duties, which are implementational in nature, were not triggered on October 2, 2021, because although at the roadside Trout indicated a desire to exercise his right to counsel, he changed his mind in the detachment and refused to contact counsel despite encouragement by police to do so.

[17] I will now comment upon the events of the morning of October 3, 2021. Trout argued that Constable Doucette surprised him by entering his cell and awakening him from a long sleep, as a result of which he sprung out of bed and struggled to put his clothes on. Trout argued that he was not given time to orient himself, and was not told

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<sup>6</sup> For example, in at least one instance in his notes he referred to Trout as "Frankie Redhead".

what day it was or what time of day it was. Instead, he was “marched” to the telephone room without being offered coffee or a chance to wake up. As such, Trout was at a disadvantage, and although he spoke with counsel very briefly, he could not understand the advice he was given, such that the value of that advice was undermined.

[18] I accept that Constable Doucette awoke Trout, after which he exercised his right to access counsel. Constable Doucette testified that Trout was sober when he spoke with counsel, which is consistent with the video and audio recordings of their interactions, and there is no evidence of any issues with his access to counsel. Moreover, I do not accept, nor has any authority been provided, that officers were required to offer Trout an opportunity to conduct his morning routine before speaking to counsel, as the defence suggested. On the contrary, the law is clear that contact with counsel must be facilitated at the first reasonable opportunity (*R. v. Taylor*, 2014 SCC 50).

[19] I accept that Trout was given the right to counsel on three occasions on the evening of October 2, 2021, while he was intoxicated but coherent, and on one occasion on the morning of October 3, 2021, while he was sober, after which he spoke to counsel. In addition, near the beginning of the video interview Trout confirmed to Constable Hunt that he spoke with counsel, that he was satisfied with their conversation, and that he understood the advice he was given.

[20] Early on in the interview, Constable Hunt asked Trout for his understanding of why he was there, to which Trout responded “I’m not really sure”. Constable Hunt then

advised Trout that he was arrested for failing to comply with conditions and for the murder of the Deceased. Shortly thereafter, Constable Hunt said to Trout "So back to when I said do you know why you're here" to which Trout responded "Yeah, a breach of my condition". The fact that Trout did not mention the murder of the Deceased was self-serving, in my view. Trout was aware from his interactions with officers on October 2, 2021, from his interactions with Constable Doucette on the morning of October 3, 2021, and from Constable Hunt in the early stages of the video interview that he was there relative to the murder of the Deceased. There was no change in Trout's jeopardy as the interview progressed and I reject Trout's argument that he should have been given another opportunity to contact counsel during the interview.

[21] Given all of the foregoing, I have concluded that there was no breach of Trout's s. 10(b) *Charter* rights.

## **SECTION 24(2)**

### **The Law**

[22] If I am wrong, and the breach of s. 10(b) occurred, a s. 24(2) analysis is necessary. Section 24(2) of the *Charter* requires that evidence be excluded where it was obtained in a manner that infringed or denied a *Charter* right, and admitting the evidence would bring the administration of justice into disrepute.

[23] Trout bears the onus of establishing both aspects of this test on a balance of probabilities (*R. v. Henrikson*, 2005 MBCA 49, at para. 17).

[24] Pursuant to *R. v. Grant*, 2009 SCC 32, the analysis under s. 24(2) requires a flexible, multifactored analytic approach in which the court must assess and balance the

effect of admitting the evidence on society's confidence in the justice system, having regard to:

- a) the seriousness of the **Charter** infringing state conduct;
- b) the impact of the breach on the **Charter** protected interests of the accused; and
- c) society's interest in the adjudication of the case on its merits.

[25] I acknowledge that Trout's right to access counsel is a fundamental principle, given the imbalance of power as between the state and an accused person. As such, speaking generally, an infringement of an accused's s. 10(b) rights will often result in their statement being excluded from evidence. Having said that, in this case, speaking generally, all of the officers who interacted with Trout reflected in their conduct an awareness of and respect for their constitutional obligations and his constitutional rights. More particularly, Trout was informed of his right to counsel multiple times, he was not questioned until after he spoke to counsel, and two officers confirmed that Trout was satisfied with his access to counsel. In addition, Trout did not indicate that he wished to speak with counsel a second time.

[26] For all of those reasons, I have concluded that officers acted in good faith in their dealings with Trout, and in those circumstances, a breach would have been technical in nature. As such the need for the court to disassociate itself from the state conduct would be reduced in this case (**R. v. Blake**, 2010 ONCA 1, at para. 24).

[27] I am satisfied, however, that the impact of a breach upon Trout's interests in this case would be significant given the nature of the Statement, which includes a

confession to involvement in a very serious offence. In addition, Trout provided details to police of the location of physical evidence related to the offence, which police later recovered.

[28] I must also consider society's interests in the adjudication of this case on its merits, and certainly there is a strong public interest in seeing cases of this nature resolved on their merits. Accordingly, the third aspect of the *Grant* test would weigh heavily in favour of admitting the Statement.

[29] Considering all of these circumstances I have determined that if there was a s. 10(b) breach, admitting the Statement would not bring the administration of justice into disrepute.

## **VOLUNTARINESS**

### **The Law**

[30] The law is clear that to be admissible at trial, an accused's statement must have been provided voluntarily, and the Crown is required to prove voluntariness beyond a reasonable doubt. When assessing voluntariness, the court must consider the circumstances surrounding the giving of a statement, and the applicable test includes the following components:

- a) the statement must be the product of an operating mind;
- b) the statement must not have been obtained by police through the operation of trickery, oppression, threats or promises;
- c) the statement must not have been obtained as a result of a breach of the accused's right to silence; and

- d) there must not be oppressive conditions in existence that would have rendered the statement involuntary.

(*R. v. Oickle*, 2000 SCC 38)

[31] The court in *Oickle* also stated:

57 ... Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne.

...

63 ... [I]n *Whittle, supra*, ... Sopinka J. explained that the operating mind requirement "does not imply a 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" (p. 936). I agree, and would simply add that, like oppression, the operating mind doctrine should not be understood as a discrete inquiry completely divorced from the rest of the confessions rule. Indeed, in his reasons in *Horvath, supra*, at p. 408, Spence J. perceived the operating mind doctrine as but one application of the broader principle of voluntariness: statements are inadmissible if they are "not voluntary in the ordinary English sense of the word because they were induced by other circumstances such as existed in the present case".

### **Analysis**

[32] In addition, *R. v. Beaver*, 2022 SCC 54, the Supreme Court of Canada stated:

[47] Voluntariness, broadly defined, is the "touchstone" of the confessions rule. Voluntariness is a shorthand for a complex of values engaging policy concerns related to not only the reliability of confessions, but also to respect for individual free will, the need for the police to obey the law, and the fairness and repute of the criminal justice system. Involuntary confessions can be unreliable, unfair, and harmful to the reputation of the criminal justice system. A statement may be 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".

[48] The application of the confessions rule is necessarily flexible and contextual. When assessing the voluntariness of a confession, the "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 trial judge must consider all relevant factors,



including the presence of threats or promises, the existence of oppressive conditions, whether the accused had an operating mind, any police trickery that would “shock the community”, and the presence or absence of a police caution. These factors are not a checklist that supplants a contextual inquiry.

[citations omitted]

[33] The only issue raised by Trout in this case is whether the Statement was the product of an operating mind.

[34] As set out above, Trout was intoxicated during his interactions with police on October 2, 2021. During those interactions, Trout spontaneously confessed to involvement in the Deceased’s death, and stated that the guilt was eating him up. Trout did not challenge the voluntariness of those utterances.

[35] I note that according to the prisoner log sheet Trout slept from 10:45 p.m. on October 2, 2021 until 8:40 a.m. on October 3, 2021, except for one or two minor interactions with officers<sup>7</sup>. After his telephone call with counsel, which concluded just before 9:00 a.m. on October 3, 2021, he slept again until approximately 12:40 p.m., when Constable Hunt awoke him for the interview.

[36] I acknowledge that when Constable Hunt attended in Trout’s cell, he advised Constable Hunt that he had just closed his eyes and was a little dizzy, but he said that he was alright. During the interview Trout told Constable Hunt that he slept “all right”. He was provided with water and food before and during the interview, and with his prescription medication during the interview.

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<sup>7</sup> The log reflects that at 11:45 p.m., Trout requested a blanket and that the lights be dimmed. At 2:22 a.m. he was provided with water, but it is unclear whether he was awake at that time.

[37] I have also considered the audio and video surveillance which reflects that Trout was alert, lucid, engaged, and coherent during the interview. Constable Hunt testified that he was satisfied that Trout was not intoxicated or under the influence during the interview. He reported, and I accept, based on the audio and video surveillance, that Trout was respectful and co-operative throughout. At no time did Trout seem unable to understand the conversation with Constable Hunt, nor did he disengage from their discussions.

[38] I note also that Trout confirmed to Constable Hunt, in response to a series of questions, that the police officers in the detachment treated him with respect the night before, that no-one promised him anything or threatened him with anything, that he understood that he was not obligated to say anything to Constable Hunt, and that if he did say something, it could be used as evidence. Trout also confirmed that he understood that he was not obligated to repeat to Constable Hunt anything that he may have told any other police officer. When asked if he had questions about the information that Constable Hunt provided to him, Trout advised that he did not have questions.

[39] I have concluded that Trout was sober throughout the interview with Constable Hunt on October 3, 2021. I accept that Trout may have felt somewhat hungover from being intoxicated the night before, and I acknowledge that he told Constable Hunt so, but there is no evidence that Trout was suffering from withdrawal. He seemed to be alert and engaged throughout the interview.

[40] In addition, at no point did Trout ask for counsel or to take a break. Having said that, Trout at one point asked, "Can I go now, please? I'm getting sick here", to which Constable Hunt responded, "No, unfortunately, I can't bring you back. I can't leave this room with you right now." Trout later said "I don't mean to be rude, but can we get this thing going cause I want to go". Constable Hunt responded, "Unfortunately, no, I can't just end it."

[41] In addition, on five occasions, Trout expressed to Constable Hunt his wish to remain silent, as follows:

- a) Trout said: "I'm not going to say anything about anything, so I'm going to keep quiet, just going to listen to you." In response, Constable Hunt advised Trout that he did not have to talk if he did not want to, and Trout confirmed that he understood;
- b) Trout later said "I have no comment. I don't want to answer your questions", in response to which Constable Hunt confirmed that Trout understood that he did not have to do so;
- c) When Constable Hunt asked Trout, "What started it with [the Deceased]?", he responded, "No comment";
- d) When Constable Hunt asked Trout whether the Deceased was alive, he responded, "I have no comment on that"; and
- e) When Constable Hunt asked Trout "Is it fair you got arrested for this and [Redhead] didn't?" he answered, "No comment".

[42] Having said all of that, at approximately the midway point of the interview, and without being prompted, Trout stated to Constable Hunt: "Ok. I'll lay everything on the line for you. I'll tell you every single thing that happened." Thereafter, Trout described events surrounding the death of the Deceased, and stated "I don't want to be the only person responsible for this". These aspects of the Statement are consistent with what Trout told police the previous evening, and I do not accept that Trout felt he had no choice but to give the Statement. Moreover, there is no evidence before me that Trout was disoriented or unsure about giving the Statement.

[43] Given all of the foregoing, I am satisfied that Trout was sober and alert when he gave the Statement, and that it was the product of an operating mind in that Trout knew what he was saying, and that he was saying it to police who could use it to his detriment. I have concluded, therefore, that the Crown has met its onus, and proven beyond a reasonable doubt that the Statement was voluntary.

### **CONCLUSION**

[44] Trout's motion is dismissed and the Statement is admissible at trial.