

R v. Oickle
[2000] 2 SCR 3

IACOBUCCI J:

I. Introduction

[1] This appeal requires this Court to rule on the common law limits on police interrogation. Specifically, we are asked to decide whether the police improperly induced the respondent's confessions through threats or promises, an atmosphere of oppression, or any other tactics that could raise a reasonable doubt as to the voluntariness of his confessions. I conclude that they did not. The trial judge's determination that the confessions at stake in this appeal were voluntarily given should not have been disturbed on appeal, and accordingly the appeal should be allowed.

[2] In this case, the police conducted a proper interrogation. Their questioning, while persistent and often accusatorial, was never hostile, aggressive, or intimidating. They repeatedly offered the accused food and drink. They allowed him to use the bathroom upon request. Before his first confession and subsequent arrest, they repeatedly told him that he could leave at any time. In this context, the alleged inducements offered by the police do not raise a reasonable doubt as to the confessions' voluntariness. Nor do I find any fault with the role played by the polygraph test in this case. While the police admittedly exaggerated the reliability of such devices, the tactic of inflating the reliability of incriminating evidence is a common, and generally unobjectionable one. Whether standing alone, or in combination with the other mild inducements used in this appeal, it does not render the confessions involuntary.

II. Facts

[3] The facts surrounding the respondent's interrogation are obviously central to the resolution of this appeal, and I will refer to them throughout my legal analysis. At this point, I will simply give an overview.

[4] Between February 5, 1994 and April 4, 1995, a series of eight fires involving four buildings and two motor vehicles occurred in and around the community of Waterville, Nova Scotia. Most of the incidents occurred between 1:00 a.m. and 4:00 a.m. The vehicle fires involved a van belonging to the respondent's father, and a car belonging to the respondent's fiancée, Tanya Kilcup. The building fires occurred relatively close to where the respondent had lived when the various fires occurred. The fires appeared to have been deliberately set, with the possible exception of Ms. Kilcup's vehicle. The respondent was a member of the Waterville Volunteer Fire Brigade, and had responded to each of the fires in that capacity.

[5] The last fire involved Ms. Kilcup's vehicle. The car was parked in the driveway of the apartment building where the respondent and Ms. Kilcup lived. The fire was discovered by a passerby who extinguished it. The Fire Marshall investigated the fire and concluded that since the car was subject to a prior recall for a possible faulty ignition switch, the fire may have been accidental owing to an electrical fault.

[6] The police also conducted an extensive investigation of the fires. To help narrow the list of possible suspects, they asked a total of seven or eight individuals to submit to polygraph tests. Five or six individuals did so, passed the test, and were effectively removed from the list of suspects. Another person had agreed to take a polygraph, but was not examined after the respondent confessed to the crimes. The respondent, after initial doubts, agreed to submit to a test. Around 3:00 p.m. on April 26, 1995, the respondent went to the Wandlyn Motel for the test, according to a prior arrangement. The police audiotaped the events at the motel.

Sergeant Taker administered the polygraph test. The respondent was fully advised of his rights to silence, to a lawyer (including the availability of Legal Aid), and to leave at any time. Sergeant Taker also advised him that while Sergeant Taker's interpretation of the polygraph results was not admissible, anything said by the respondent was admissible. The respondent was given a pamphlet to review, which discussed the polygraph procedures, and he signed a consent form.

[7] Before conducting the test itself, Sergeant Taker conducted a lengthy "pre-test" interview, which involved a variety of questions, many of them personal in nature. This interview was designed to provide a basis for the polygraph test itself, to help Sergeant Taker compose "control questions" for the polygraph exam, and to foster a sense of intimacy between examiner and subject. An exculpatory statement, which formed the basis for the polygraph test itself, was taken at the conclusion of the pre-test. Sergeant Taker then conducted the polygraph exam, which lasted only a matter of minutes. During the test Sergeant Taker did not ask about any specific fire, but instead asked if the respondent's earlier statement had been truthful. At the conclusion of the test, around 5:00 p.m., Taker checked the charts and informed the respondent that he had failed the test. He reminded the respondent that his rights were still in effect, and proceeded to question him for approximately one hour. At one point the respondent asked "What if I admit to the car? ... Then I can walk out of here and it's over." Though Sergeant Taker replied "You can walk out at any time," the respondent did not leave.

[8] At 6:30 p.m. Sergeant Taker was relieved by Corporal Deveau, who reminded the respondent of his right to counsel. After 30 to 40 minutes, the respondent confessed to setting fire to his fiancée's car. He appeared emotionally distraught at this time. After a recitation of his rights, and an acknowledgement that he understood them, the police took a written statement, in which he continued to deny any involvement in the other fires. The respondent was arrested, warned of his right to counsel, given the secondary police warning, and driven to the police station at 8:15 p.m. En route he was very upset and was crying. He was placed in an interview room equipped with videotaping facilities, which recorded the subsequent interrogation where Corporal Deveau questioned him about the other fires. Around 8:30 p.m. and 9:15 p.m. the respondent indicated that he was tired, and wanted to go home to bed. He was informed that he was under arrest, and he could call a lawyer if he wanted, but that he could not go home. Questioning did not cease.

[9] Constable Bogle took over the interrogation at 9:52 p.m., after giving the respondent the secondary police warning. Constable Bogle questioned the respondent until about 11:00 p.m., at which time the respondent confessed to setting seven of the eight fires. He denied any involvement in the fire in his father's van. At this time, Constable Bogle left the room, and the respondent was seen crying with his head in his hands. Constable Bogle returned with Corporal Deveau, and took a written statement. The respondent's Charter rights and the police warning were on the statement, and were acknowledged by the respondent. The police warning stated that "[y]ou need not say anything. You have nothing to hope from any promise or favour and nothing to fear from any threat whether or not you do say anything. Anything you do say may be used as evidence." The statement concluded at 1:10 a.m. on April 27. After the police attended to various administrative tasks, the respondent was placed in a cell to sleep at 2:45 a.m. At 6:00 a.m., Corporal Deveau noticed that the respondent was awake and asked whether he would agree to a re-enactment. On the tape of the re-enactment, the respondent was given a Charter warning, the secondary warning, and was advised that he could stop the re-enactment at any time. The police drove the respondent around Waterville to the various fire scenes, where he described how he had set each fire. The respondent was charged with seven counts of arson.

[10] At trial, the trial judge held a *voir dire* to determine the admissibility of the respondent's statements, including the video re-enactment. The trial judge ruled that the statements were voluntary and admissible, and subsequently convicted him on all counts. However, the Nova Scotia Court of Appeal found that the statements were involuntary and thus inadmissible, and allowed the respondent's appeal. The Court of Appeal excluded the confessions, overturned the convictions, and entered acquittals.

III. Judicial Decisions

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IV. Analysis

A. Standard of Review for Voluntariness

[22] While determining the appropriate legal test is of course a question of law, applying this test to determine whether or not a confession is voluntary is a question of fact, or of mixed law and fact. See *R v. Ewert*, [1992] 3 SCR 161, at p. 161; *Ward v. The Queen*, [1979] 2 SCR 30, at p. 42 (per Spence J); *R v. Fitton*, [1956] SCR 958, at pp. 983-84 (per Fauteux J); *R v. Murakami*, [1951] SCR 801, at p. 803 (per Rand J, Locke J concurring). Therefore, as this Court held in *Ewert*, a disagreement with the trial judge regarding the weight to be given various pieces of evidence is not grounds to reverse a finding on voluntariness. Respectfully, I believe that the Court of Appeal did just that. Therefore, following *Ewert*, the appeal must be allowed.

[23] While the foregoing might suffice technically to dispose of this appeal, I believe it is important to take this opportunity to set out the proper scope of the confessions rule. There was much argument among the parties and interveners in this appeal on this point, and this Court has not directly addressed the issue since the introduction of the Canadian Charter of Rights and Freedoms. Because of this lack of clarity, it has been often difficult to discern in various cases what standards have been applied. In addition, several arguments not addressed by the trial judge were raised before our Court. It is therefore necessary to broaden the discussion to deal with these issues.

B. The Development of the Confessions Rule

1. Two Elements of the Rule

[24] As indicated by McLachlin J (as she then was), in *R v. Hebert*, [1990] 2 SCR 151, there are two main strands to this Court's jurisprudence under the confessions rule. One approach is narrow, excluding statements only where the police held out explicit threats or promises to the accused. The definitive statement of this approach came in *Ibrahim v. The King*, [1914] AC 599 (PC), at p. 609:

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

This Court adopted the "*Ibrahim* rule" in *Prosko v. The King* (1922), 63 SCR 226, and subsequently applied it in cases like *Boudreau v. The King*, [1949] SCR 262, *Fitton*, supra, *R v. Wray*, [1971] SCR 272, and *Rothman v. The Queen*, [1981] 1 SCR 640.

[25] The *Ibrahim* rule gives the accused only "a negative right—the right not to be tortured or coerced into making a statement by threats or promises held out by a person who is and whom he subjectively believes to be a person in authority": *Hebert*, supra, at p. 165.

However, *Hebert* also recognized a second, "much broader" approach, according to which "[t]he absence of violence, threats and promises by the authorities does not necessarily mean that the resulting statement is voluntary, if the necessary mental element of deciding between alternatives is absent" (p. 166).

[26] While not always followed, McLachlin J noted at p. 166 that this aspect of the confessions rule "persists as part of our fundamental notion of procedural fairness." This approach is most evident in the so-called "operating mind" doctrine, developed by this Court in *Ward*, supra, *Horvath v. The Queen*, [1979] 2 SCR 376, and *R v. Whittle*, [1994] 2 SCR 914. In those cases the Court made "a further investigation of whether the statements were freely and voluntarily made even if no hope of advantage or fear of prejudice could be found": *Ward*, supra, at p. 40. **The "operating mind" doctrine dispelled once and for all the notion that the confessions rule is concerned solely with whether or not the confession was induced by any threats or promises.**

[27] ... Clearly, the confessions rule embraces more than the narrow *Ibrahim* formulation; instead, it is concerned with voluntariness, broadly understood.

2. The Charter Era

[28] The Charter constitutionalized a new set of protections for accused persons, contained principally in ss. 7 to 14 thereof. The entrenchment of these rights answered certain questions that had once been asked under the aegis of the confessions rule. For example, while the confessions rule did not exclude statements elicited by undercover officers in jail cells (*Rothman*, supra), such confessions can violate the Charter: see *Hebert*, supra, and *R v. Broyles*, [1991] 3 SCR 595.

[29] In *Hebert*, supra, McLachlin J interpreted the right to silence in light of existing common law protections, such as the confessions rule. However, given the focus of that decision on defining constitutional rights, it did not decide the inverse question: namely, the scope of the common law rules in light of the Charter. **One possible view is that the Charter subsumes the common law rules.**

[30] But I do not believe that this view is correct, for several reasons. First, the confessions rule has a broader scope than the Charter. For example, the protections of s. 10 only apply "on arrest or detention." By contrast, the confessions rule applies whenever a person in authority questions a suspect. Second, the Charter applies a different burden and standard of proof from that under the confessions rule. Under the former, the burden is on the accused to show, on a balance of probabilities, a violation of constitutional rights. Under the latter, the burden is on the prosecution to show beyond a reasonable doubt that the confession was voluntary. Finally, the remedies are different. The Charter excludes evidence obtained in violation of its provisions under s. 24(2) only if admitting the evidence would bring the administration of justice into disrepute: see *R v. Stillman*, [1997] 1 SCR 607, *R v. Collins*, [1987] 1 SCR 265, and the related jurisprudence. By contrast, a violation of the confessions rule always warrants exclusion.

[31] These various differences illustrate that the Charter is not an exhaustive catalogue of rights. Instead, it represents a bare minimum below which the law must not fall. A necessary corollary of this statement is that the law, whether by statute or common law, can offer protections beyond those guaranteed by the Charter. The common law confessions rule is one such doctrine, and it would be a mistake to confuse it with the protections given by the Charter. While obviously it may be appropriate, as in *Hebert*, supra, to interpret one in light of the other, it would be a mistake to assume one subsumes the other entirely.

C. The Confessions Rule Today

[32] As previously mentioned, this Court has not recently addressed the precise scope of the confessions rule. Instead, we have refined several elements of the rule, without ever integrating them into a coherent whole. I believe it is important to restate the rule for two reasons. First is the continuing diversity of approaches as evidenced by the courts below in this appeal. Second, and perhaps more important, is our growing understanding of the problem of false confessions. As I will discuss below, the confessions rule is concerned with voluntariness, broadly defined. One of the predominant reasons for this concern is that involuntary confessions are more likely to be unreliable. The confessions rule should recognize which interrogation techniques commonly produce false confessions so as to avoid miscarriages of justice.

[33] In defining the confessions rule, it is important to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes. Martin JA accurately delineated this tension in *R v. Precourt* (1976), 18 OR (2d) 714 (CA), at p. 721:

Although improper police questioning may in some circumstances infringe the governing [confessions] rule it is essential to bear in mind that the police are unable to investigate crime without putting questions to persons, whether or not such persons are suspected of having committed the crime being investigated. Properly conducted police questioning is a legitimate and effective aid to criminal investigation. ... On the other hand, statements made as the result of intimidating questions, or questioning which is oppressive and calculated to overcome the freedom of will of the suspect for the purpose of extracting a confession are inadmissible. ...

All who are involved in the administration of justice, but particularly courts applying the confessions rule, must never lose sight of either of these objectives.

1. The Problem of False Confessions

[34] The history of police interrogations is not without its unsavoury chapters. Physical abuse, if not routine, was certainly not unknown. Today such practices are much less common. In this context, it may seem counterintuitive that people would confess to a crime that they did not commit. And indeed, research with mock juries indicates that people find it difficult to believe that someone would confess falsely. ...

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2. The Contemporary Confessions Rule

[47] The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not always) be unreliable. 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.

(a) Threats or Promises

[48] This is of course the core of the confessions rule from *Ibrahim*, supra. It is therefore important to define precisely what types of threats or promises will raise a reasonable doubt as to the voluntariness of a confession. While obviously imminent threats of torture will render a confession inadmissible, most cases will not be so clear.

[49] As noted above, in *Ibrahim* the Privy Council ruled that statements would be inadmissible if they were the result of "fear of prejudice or hope of advantage." The classic "hope of advantage" is the prospect of leniency from the courts. It is improper for a person in authority to suggest to a suspect that he or she will take steps to procure a reduced charge or sentence if the suspect confesses. ...

[50] Another type of inducement relevant to this appeal is an offer of psychiatric assistance or other counselling for the suspect in exchange for a confession. While this is clearly an inducement, it is not as strong as an offer of leniency and regard must be had to the entirety of the circumstances. A good example of this comes from *R v. Ewert* (1991), 68 CCC (3d) 207 (BCCA). In that case, the police made what Hinkson JA at the Court of Appeal described as a "bold offer to the accused to help him, in the sense of providing psychiatric help, if he told them what had happened" (p. 216). ... Ewert thus recognizes the importance of a contextual approach.

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[52] McIntyre JA offered, as examples of improper inducements, telling a mother that her daughter would not be charged with shoplifting if the mother confessed to a similar offence (see *Commissioners of Customs and Excise v. Harz*, [1967] 1 AC 760 (HL), at p. 821), or a sergeant-major keeping a company on parade until he learned who was responsible for a stabbing (see *R v. Smith*, [1959] 2 QB 35). ...

[53] The *Ibrahim* rule speaks not only of "hope of advantage," but also of "fear of prejudice." Obviously, any confession that is the product of outright violence is involuntary and unreliable, and therefore inadmissible. More common, and more challenging judicially, are the more subtle, veiled threats that can be used against suspects. The Honourable Fred Kaufman, in the third edition of *The Admissibility of Confessions* (1979), at p. 230, provides a useful starting point:

Threats come in all shapes and sizes. Among the most common are words to the effect that "it would be better" to tell, implying thereby that dire consequences might flow from a refusal to talk. Maule J recognized this fact, and said that "there can be no doubt that such words, if spoken by a competent person, have been held to exclude a confession at least 500 times" (*R v. Garner* (1848), 3 Cox CC 175, at p. 177).

Courts have accordingly excluded confessions made in response to police suggestions that it would be better if they confessed. ...

[54] However, phrases like "it would be better if you told the truth" should not automatically require exclusion. Instead, as in all cases, the trial judge must examine the entire context of the confession, and ask whether there is a reasonable doubt that the resulting confession was involuntary. ...

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[56] A final threat or promise relevant to this appeal is the use of moral or spiritual inducements. These inducements will generally not produce an involuntary confession, for the very simple reason that the inducement offered is not in the control of the police officers. If a police officer says "If you don't confess, you'll spend the rest of your life in jail. Tell me what happened and I can get you a lighter sentence," then clearly there is a strong, and improper, inducement for the suspect to confess. The officer is offering a *quid pro quo*, and it raises the possibility that the suspect is confessing not because of any internal desire to confess, but merely in order to gain the benefit offered by the interrogator. By contrast, with most spiritual inducements the interrogator has no control over the suggested benefit. If a

police officer convinces a suspect that he will feel better if he confesses, the officer has not offered anything. I therefore agree with Kaufman, *supra*, who summarized the jurisprudence as follows at p. 186:

We may therefore conclude that, as a general rule, confessions which result from spiritual exhortations or appeals to conscience and morality, are admissible in evidence, whether urged by a person in authority or by someone else. [Emphasis in original.]

[57] In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. 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. ...

(b) Oppression

[58] There was much debate among the parties, interveners, and courts below over the relevance of "oppression" to the confessions rule. 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.

[59] A compelling example of oppression comes from the Ontario Court of Appeal's recent decision in *R v. Hoilett* (1999), 136 CCC (3d) 449. The accused, charged with sexual assault, was arrested at 11:25 p.m. while under the influence of crack cocaine and alcohol. After two hours in a cell, two officers removed his clothes for forensic testing. He was left naked in a cold cell containing only a metal bunk to sit on. The bunk was so cold he had to stand up. One and one-half hours later, he was provided with some light clothes, but no underwear and ill-fitting shoes. Shortly thereafter, at about 3:00 a.m., he was awakened for the purpose of interviewing. In the course of the interrogation, the accused nodded off to sleep at least five times. He requested warmer clothes and a tissue to wipe his nose, both of which were refused. While he admitted knowing that he did not have to talk, and that the officers had made no explicit threats or promises, he hoped that if he talked to the police they would give him some warm clothes and cease the interrogation.

[60] Under these circumstances, it is no surprise that the Court of Appeal concluded the statement was involuntary. ...

[61] A final possible source of oppressive conditions is the police use of non-existent evidence. As the discussion of false confessions, *supra*, revealed, this ploy is very dangerous: see [R.J. Ofshe and R.A. Leo, "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions" (1997), 16 *Stud. L Pol. & Soc.* 189 (hereinafter Ofshe & Leo (1997))], at pp. 1040-41; [R.J. Ofshe and R.A. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997), 74 *Denv. UL Rev.* 979 (hereinafter Ofshe & Leo (1997a))], at p. 202. The use of false evidence is often crucial in convincing the suspect that protestations of innocence, even if true, are futile. I do not mean to suggest in any way that, standing alone, confronting the suspect with inadmissible or even fabricated evidence is necessarily grounds for excluding a statement. However, when combined with other factors, it is certainly a relevant consideration in determining on a *voir dire* whether a confession was voluntary.

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(d) Other Police Trickery

[65] A final consideration in determining whether a confession is voluntary or not is the police use of trickery to obtain a confession. Unlike the previous three headings, this doctrine is a distinct inquiry. While it is still related to voluntariness, its more specific objective is maintaining the integrity of the criminal justice system. Lamer J's concurrence in *Rothman*, supra, introduced this inquiry. In that case, the Court admitted a suspect's statement to an undercover police officer who had been placed in a cell with the accused. In concurring reasons, Lamer J emphasized that reliability was not the only concern of the confessions rule; otherwise the rule would not be concerned with whether the inducement was given by a person in authority ...:

It is of the utmost importance to keep in mind that the inquiry is not concerned with reliability but with the authorities' conduct as regards reliability.

[66] Lamer J was also quick to point out that courts should be wary not to unduly limit police discretion (at p. 697):

[T]he investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. *What should be repressed vigorously is conduct on their part that shocks the community.* ...

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(e) Summary

[68] While the foregoing might suggest that the confessions rule involves a panoply of different considerations and tests, in reality the basic idea is quite simple. First of all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Both the traditional, narrow *Ibrahim* rule and the oppression doctrine recognize this danger. 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.

[69] The doctrines of oppression and inducements are primarily concerned with reliability. However, as the operating mind doctrine and Lamer J's concurrence in *Rothman*, supra, both demonstrate, the confessions rule also extends to protect a broader conception of voluntariness "that focuses on the protection of the accused's rights and fairness in the criminal process": J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 339. Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible.

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[71] Again, I would also like to emphasize that the analysis under the confessions rule must be a contextual one. In the past, courts have excluded confessions made as a result of

relatively minor inducements. At the same time, the law ignored intolerable police conduct if it did not give rise to an "inducement" as it was understood by the narrow *Ibrahim* formulation. Both results are incorrect. Instead, a court should strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule discussed above. **Therefore a relatively minor inducement, such as a tissue to wipe one's nose and warmer clothes, may amount to an impermissible inducement if the suspect is deprived of sleep, heat, and clothes for several hours in the middle of the night during an interrogation:** see *Hoilett*, supra. On the other hand, where the suspect is treated properly, it will take a stronger inducement to render the confession involuntary. 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": *Schwartz v. Canada*, [1996] 1 SCR 254, at p. 279 (quoting *Stein v. The Ship "Kathy K"*, [1976] 2 SCR 802, at p. 808) (emphasis in Schwartz).

D. Application to the Present Appeal

[72] Applying the foregoing law to the facts of this appeal, and having viewed the relevant video- and audiotapes, I find no fault with the trial judge's conclusion that the respondent's confession was voluntary and reliable. The respondent was fully apprised of his rights at all times; he was never subjected to harsh, aggressive, or overbearing interrogation; he was not deprived of sleep, food, or drink; and he was never offered any improper inducements that undermined the reliability of the confessions. As the Court of Appeal reached a contrary conclusion with respect to a number of these issues, I will address them in turn.

1. Minimizing the Seriousness of the Crimes

[73] The Court of Appeal concluded that the police improperly offered leniency to the respondent by minimizing the seriousness of his offences and suggesting "that the same punishment would likely be given whether he confessed to one or a number of fires" (para. 156). This, in their opinion, was an improper inducement (at para. 126):

In the beginning, it was suggested that "there isn't much in a car fire." Once the admission relating to the car was obtained, then the suggestion was made—and on several occasions—that the accused was not really a criminal and that the police did not want to treat him as a criminal. In addition, it was stated to the accused—again more than once—that there was little difference between being found guilty of one fire as compared to 10.

[74] **Insofar as the police simply downplayed the moral culpability of the offence, their actions were not problematic.** As even the Court of Appeal recognized (at para. 126), "minimizing the moral significance of the offence is a common and usually unobjectionable feature of police interrogation." Instead, the real concern is whether the police suggested that "confession will result in the legal consequences being minimal" (para. 126). As discussed above, this is inappropriate.

[75] However, and with the greatest respect to the Court of Appeal, I believe they have mischaracterized the police interrogators' words. The offending passages are well represented by the following excerpt (A.R. [Arrest Report] at p. 552), made shortly after the respondent arrived at the police station subsequent to his initial confession:

If you done the other ones this—or some of the other ones this is the time—this is the time to just get them off your chest. This is the perfect opportunity because of what you've already told us, okay. And everybody can see this, that it's—You didn't do one

fire and then years down the road you did—this is a series of fires we've been having in Waterville. *So we can look at it—we look at it as a one-package type of thing.* Okay. And it's—if you had a problem, I don't know what it is yet. Maybe we'll find out what it is, maybe you can help us on this. It's not unrealistic that you would set some more things on fire especially when you would do your girlfriend's vehicle, your fiancée's vehicle but you don't know why. So there's something that—there's something that triggers you into setting that fire. [Emphasis added.]

[76] The Court of Appeal focused on the underlined passage to suggest that the police were offering a "package deal," whereby the respondent would not be charged with multiple crimes if he confessed to them all. However, as the rest of the passage makes clear, the police were doing nothing of the sort. Instead, they were simply pointing out their reasons for believing that he was responsible for all the fires, not just one: namely, that it was a series of fires in issue, not isolated incidents. The police therefore treated the fires as a "package," all of which were likely set by the same person.

[77] This interpretation is confirmed by the police's consistent refusal to accept Oickle's own suggestions of a "package deal." Shortly before confessing to the vehicle fire, the following exchange took place between the respondent and Corporal Deveau (A.R. at pp. 519-20):

A: No, hang on, hang on. If [I] admit to her car and are the other ones looked at too?

Q: Richard, all I can tell you now is I want the truth out. I don't want—you said, "If I admit to her car," which leads me to believe that maybe you're involved in that.

A: Um.

Q: Well, if you're involved in it, tell me the truth and then we'll look—you know, if—I don't think for one minute that you're involved in everything. Okay? But if you did the car, Richard, tell me you did the car. And if I believe that's it, if we believe that you did not do the other one, I mean, we're—remember I said, we're not here to trick you into anything?

A: I trust you.

Q: I'm not here to bring everything down on you. The last thing I want to do, Richard. You've been good to me and I'm trying to be good to you.

A: Uh-huh.

Q: And I want you to tell me the truth. So if you did the car, tell me you did the car. *But I want the truth. I just don't want you to say, "I did the car, so I'm free from all the others."* Okay? That's why it's important here that—

A: Uh-huh.

Q: It's the truth that we want. [Emphasis added.]

As this passage reveals, it was the respondent, not the police, who was seeking a "package deal"—a deal Corporal Deveau squarely rejected. While the police did minimize the moral significance of the crimes, there was never any suggestion by the police that a confession would minimize the *legal* consequences of the respondent's crimes.

2. Offers of Psychiatric Help

[78] The Court of Appeal also found that the police improperly offered psychiatric help in return for a confession. ... The distinction here is between the police suggesting the potential benefits of confession, and making offers that are conditional upon receiving a confession. The former is entirely appropriate—it is not an inducement because there is no *quid pro quo*.

The latter is improper. However, the police made no such offer in the course of their interrogation of the respondent.

3 "It Would Be Better"

[79] The transcripts are indeed rife with these sorts of comments. The police suggested that a confession would make the respondent feel better, that his fiancée and members of the community would respect him for admitting his problem (para. 120) and that he could better address his apparent pyromania if he confessed (para. 122). However, read in context, none of these statements contained an implied threat or promise. Instead, they were merely moral inducements suggesting to the respondent that he would feel better if he confessed and began addressing his problems. And indeed, after his confession, Corporal Deveau asked him "[s]o how do you feel now, Richard?" His answer was "[b]etter."

[80] To hold that the police officers' frequent suggestions that things would be better if the respondent confessed amounted to an improper threat or inducement would be to engage in empty formalism. The tapes of the transcript clearly reveal that there could be no implied threat in these words. The respondent was never mistreated. Nor was there any implied promise. The police may have suggested possible benefits of confession, but there was never any insinuation of a *quid pro quo*. ...

4. Alleged Threats Against the Respondent's Fiancée

[81] As discussed in connection with *Jackson* [(1977), 34 CCC (2d) 35], a threat or promise with respect to a third person could be an improper inducement. The Court of Appeal stated, at para. 128, that the police effectively told the respondent that "If he confessed, it would not be necessary to continue the investigation or put his fiancé [*sic*] through extensive interrogation."

[82] The majority of references during the interrogation to the respondent's fiancée, Tanya Kilcup, centered on the respondent's reliance on her as an alibi witness: see, e.g., A.R. at p. 570. However, the Court of Appeal is correct that there were moments when the police intimated that it might be necessary to question Ms. Kilcup to make sure she was not involved in the fires at all, either alone or in collaboration with the respondent:

Q. You know, this whole thing is—we might even ask Tanya if she would take a polygraph on this because we don't know where she stands, okay.

A. Do I have to sit here for that?

Q. Oh, no, no, not until she takes the polygraph. She's not going to take the polygraph tonight. But if you can tell us anything—[A.R. at p. 574]

• • •

Q. Do you realize the other reason is that we—that you've got to come clean with everything with us is for Tanya.

A. Um.

Q. We don't want to put Tanya through any—I mean she's going to be going through enough trying to—we don't want to—and I'm sure you don't want her to get—to go through half or what you went through today. It's no fun.

A. No, no.

Q. It won't be any fun for her. But in order for her to—in order for us to be one hundred percent we have to do it. So if there's anything that you can tell us that can put her—that we say, okay, we don't need you, Tanya, we have it here, you know, and

we have some stuff. But we're not convinced on everything else. So don't put Tanya through that if there's something you can tell me, okay. [A.R. at pp. 603-4]

[83] The relationship the respondent had with Ms. Kilcup was, in my opinion, strong enough potentially to induce a false confession were she threatened with harm. However, I do not believe any such threat ever occurred. There were no pending charges against Ms. Kilcup that the police were offering to drop; they never threatened to bring charges against her; indeed, the police never seriously suggested her as a suspect. The most they did was promise not to polygraph her if the respondent confessed. Given the entire context, the most likely reason to polygraph her was not as a suspect, but as an alibi witness. In my opinion, this is not a strong enough inducement to raise a reasonable doubt as to the voluntariness of the respondent's confessions.

[84] ... Moreover, soon after Constable Bogle took over the interrogation, the respondent himself made it clear that he thought the police were only talking to Ms. Kilcup in order to verify his alibi (A.R. at p. 611):

Q. Okay. I mean we have to go and—we asked Cst. Taker to talk to Tanya, okay. (Inaudible).

A. But I didn't tell her.

Q. What?

A. I didn't tell her.

Q. Yeah.

A. Totally by myself.

The "inducements" regarding the respondent's fiancée lacked both the strength and causal connection necessary to warrant exclusion.

5. *Abuse of Trust*

[85] The Court of Appeal suggests at para. 129 that the police in general, and Corporal Deveau in particular, improperly abused the respondent's trust to obtain a confession. With respect, I cannot agree. In essence, the court criticizes the police for questioning the respondent in such a gentle, reassuring manner that they gained his trust. This does not render a confession inadmissible. To hold otherwise would send the perverse message to police that they should engage in adversarial, aggressive questioning to ensure they never gain the suspect's trust, lest an ensuing confession be excluded.

6 *Atmosphere of Oppression*

[86] To hold that the police conduct in this interrogation was oppressive would leave little scope for police interrogation, and ignore Lamer J's reminder in *Rothman*, supra, at p. 697, that "the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules." Quite simply, the police acted in a proper manner. Viewing the videotapes and listening to the audiotapes reveal that at all times the police were courteous; they did not deprive the respondent of food, sleep, or water (at para. 119); they never denied him access to the bathroom; and they fully apprised him of his rights at all times (see, e.g., A.R. at pp. 370, 497 and 650). They did not fabricate evidence in an attempt to convince him denials were futile. They comforted him, with apparent sincerity, when he broke down in tears upon confessing. While the re-enactment was admittedly done at a time when the respondent had had little sleep, he was already awake when they approached him, and was told that he could stop at any time. And indeed, the Court of Appeal did not directly

claim that the police created an atmosphere of oppression sufficient to exclude the statements.

[87] The absence of oppression is important not only in its own right, but also because it affects the overall voluntariness analysis. In the preceding sections, I have concluded that the police offered the respondent, at best, extremely mild inducements. In particular, they suggested that "it would be better" if he confessed, and suggested that his girlfriend could be spared questioning if he confessed. However, given the entirely non-oppressive atmosphere maintained by the police, I do not believe that any of the alleged inducements are sufficient to render the confessions involuntary.

E. The Relevance of the Polygraph Test

[88] In addition to the issues addressed above, the Court of Appeal found the police use of a polygraph particularly problematic. Because of the growing frequency with which police are using the polygraph as an investigative tool, and the absence of any direction thus far from this Court regarding the proper use of polygraphs in interrogations, I will now briefly discuss how polygraphs fit into the analytical framework set out above. The Court of Appeal identified several problems with the police's use of a polygraph in this appeal. I will address each in turn.

1. Informing the Suspect of the Uses to Which the Polygraph Test Can Be Put

[89] The Court of Appeal first stated that the police failed "to inform the accused clearly that the polygraph test was not admissible in court to show whether the accused was lying or telling the truth" (para. 156); see also *R v. James*, Ont. Ct. (Gen. Div.), January 25, 1991; *R v. Ollerhead* (1990), 86 Nfld. & PEIR 38 (Nfld. SCTD); *R v. Fowler* (1979), 23 Nfld. & PEIR 255 (Nfld. CA).

[90] To the contrary is *R v. Alexis* (1994), 35 CR (4th) 117 (Ont. Ct. (Gen. Div.)). As noted at para. 159 of Hill J's lucid reasons in that case,

confrontation of a suspect with polygraph test results, in such circumstances, is not qualitatively dissimilar from such permissible techniques of persuasion as the police showing a detained suspect a co-accused's confession inadmissible in evidence against the suspect, or police trickery, for example, the ruse of relating to the suspect that his or her fingerprint has been discovered at the scene of the crime.

On this view, police trickery or use of inadmissible evidence is not necessarily grounds for exclusion.

[91] I agree that merely failing to tell a suspect that the polygraph is inadmissible will not automatically produce an involuntary confession. Courts should engage in a two-step process. First, following *Rothman*, supra, and *Collins*, supra, the confession should be excluded if the police deception shocks the community. Second, even if not rising to that level, the use of deception is a relevant factor in the overall voluntariness analysis. At this stage, the approach is similar to the one used with fabricated evidence, ...—though of course the use of inadmissible evidence is inherently less problematic than fabricated evidence. Standing alone, simply failing to tell the suspect that the polygraph results are inadmissible will not require exclusion. The most it can do is be a factor in the overall voluntariness analysis.

[92] Moreover, in this particular appeal, the police made it abundantly clear to the respondent just what was admissible and what was not. For example, as recognized by the Court of Appeal at para. 81, Sergeant Taker told the respondent at the outset of the polygraph that his "opinion based on the results of your polygraph test is not admissible in court.

However, anything said between you and I may be admissible." Moreover, the respondent demonstrated during the interrogation that he understood this (A.R. at p. 464):

Q. ... Because your heart has told me that you haven't been truthful.

A. I don't care what that thing says.

Q. That thing cannot say anything. (Inaudible)

A. I don't care what you interpret from that thing.

Q. Just a minute now, Richard. Hear me out. Hear me out. That does not say anything, okay. Your body is what says it. That only records things, like I told you earlier—

A. *I know that.* [Emphasis added.]

[93] This passage clearly demonstrates the respondent's understanding that the bare polygraph readouts are irrelevant; what matters is the polygrapher's opinion of these readings. Since Sergeant Taker clearly told the respondent that his interpretation of the readings was not admissible, I agree with MacDonald Prov. Ct. J that "[t]here is no evidence here whatsoever that Mr. Oickle was confused on this point."

2. *Exaggerating the Polygraph's Validity*

[94] The Court of Appeal also noted, correctly in my opinion, that the police made "repeated assertions to the accused that the polygraph was an infallible determiner of truth" (para. 156). Throughout the interrogation that produced the respondent's initial admission that he set Ms. Kilcup's vehicle on fire, both Sergeant Taker and Constable Deveau emphasized that the polygraph did not make mistakes, and that if Sergeant Taker interpreted it to indicate deception, then the respondent must have lied. For example, the Court of Appeal cited the following passage (at paras. 141-42):

[Oickle:] But if you read the chart and it says they are lying, then they are.

[Taker:] That's right. That's right.

• • •

Deveau: There's no doubt in anybody's mind now that you are involved in some of these fires.

Oickle: Because I failed that ...

Deveau: Yes, very simple Richard ... and when asked the question about these eight fires, the polygraph says that you are not truthful ... *the machine does not lie.* You found that out today. [Emphasis added.]

[95] I agree that the police exaggerated the accuracy of the polygraph.

As many sources have demonstrated, polygraphs are far from infallible: see, e.g., D.T. Lykken, *A Tremor in the Blood: Uses and Abuses of the Lie Detector* (1998); J.J. Furedy, "The 'control' question 'test' (CQT) polygrapher's dilemma: logico-ethical considerations for psychophysiological practitioners and researchers" (1993), 15 *Int. J Psychophysiology* 263; C.J. Patrick and W.G. Iacono, "Validity of the Control Question Polygraph Test: The Problem of Sampling Bias" (1991), 76 *J App. Psych.* 229. Similarly, this Court recognized in *R v. B eland*, [1987] 2 SCR 398, that the results of polygraph examinations are sufficiently unreliable that they cannot be admitted in court.

[96] The Quebec Court of Appeal concluded in *R v. Amyot* (1990), 58 CCC (3d) 312, at p. 324, that representing the polygraph as infallible rendered a confession involuntary. In that case the polygrapher told the accused that [TRANSLATION] "the test showed him that he is not telling the truth." This, the court found, was inappropriate in that it

[TRANSLATION] pushed what the examination consisted of much too far, into the absolute. The result was presented to the appellant as a certitude which obviously was going to shake him up and it made him say "but what is going to happen now?." It seems to me that, as a result, the appellant was led into error on the infallibility of the test and this manner of proceeding could naturally induce a person to "confess."

See also *Fowler*, supra. The Court of Appeal in *Amyot* put particular emphasis on the fact that the suspect confessed almost immediately after hearing the polygraph results, suggesting that his will was overwhelmed upon being confronted with the damning, supposedly incontrovertible evidence.

[97] Without expressing an opinion as to whether *Amyot* was correctly decided, I note that the facts of the present appeal are very different. As the following passages demonstrate, the respondent repeatedly rejected the accuracy of the polygraph results:

A. I think you could bring a completely innocent person in here and with a bunch of nerves could do the same thing I just did. [A.R. at p.495]

• • •

Q. So you're telling me that this test today is a bunch of shit. Is that what you're trying to tell me?

A. In my opinion, yeah. [A.R. at p. 505]

The respondent was not overwhelmed by the polygraph results. While the police clearly relied heavily on them to elicit a confession, this was not a situation like *Amyot* where the confession followed almost immediately after the announcement of the results.

[98] Other courts have excluded confessions obtained through use of a polygraph only where the suspect took some time before eventually confessing. For example, in *Ollerhead*, supra, the court cited the following passage from *R v. Romansky* (1981), 6 Man. R (2d) 408 (Co. Ct.), at p. 421:

[T]he psychological tactics employed by him created an aura of oppression. The will of the accused quickly crumbled with his emotional disintegration. As evidenced by the concomitant amenability and/or responsiveness to suggestions, his will was overcome and overborne by the will of the person in authority. Various lower courts have thus taken very different approaches to determining whether polygraphs create an oppressive atmosphere. The contrasting approaches in cases like *Amyot* and *Ollerhead* demonstrate that the timing of the confession *vis-à-vis* the polygraph cannot be determinative. Instead, it is but a piece of evidence for the trial judge to consider in determining whether the confession was voluntary.

[99] Granted that the police misled the respondent with regards to the accuracy of the polygraph, the question remains whether, in light of the entire circumstances of the interrogation, this rendered the confessions inadmissible. In my opinion it did not. As discussed above, there was no emotional disintegration in this case. The mere fact that a suspect begins to cry when he or she finally confesses, as the respondent did, is not evidence of "complete emotional disintegration"; tears are to be expected when someone finally

divulges that they committed a crime—particularly when the suspect is a generally law-abiding and upstanding citizen like the respondent.

[100] Nor, as discussed above, do I believe that the police created an oppressive atmosphere. Simply confronting the suspect with adverse evidence, like a polygraph test, is not grounds for exclusion: see *Fitton*, supra. This holds true even for inadmissible evidence: see *Alexis*, supra. Nor does the fact that the police exaggerate the evidence's reliability or importance necessarily render a confession inadmissible. Eyewitness accounts are by no means infallible; yet in *Fitton*, this Court ruled admissible a statement taken after the police told a suspect they did not believe his denials because several eyewitnesses had come forward against him. In short, merely confronting a suspect with adverse evidence—even exaggerating its accuracy and reliability—will not, standing alone, render a confession involuntary.

3. *Misleading the Accused Regarding the Duration of the Interview*

[101] The final ground on which the Court of Appeal challenged the use of the polygraph, at para. 156, was the police's

misleading the accused about the expected duration of the test procedure, particularly concerning the interrogation to follow and immediately commencing intense questioning upon informing the accused that he had "failed" the test. ...

A similar argument was made in *Nugent*, supra. Since this Court has ruled that polygraph results are not admissible in evidence, *Béland*, supra, "then the administering of a test must be clearly separated from questioning for the purpose of obtaining statements" (*Nugent*, supra, at p. 212). According to the Court of Appeal, a statement directly following a polygraph should not be admissible because the defence cannot adequately explain the context of the statement—which it might wish to do in order to attack the weight of the statement before the jury—without notifying the jury that the accused failed a polygraph test.

[102] Drawing on these arguments, the intervener, the Criminal Lawyers' Association, argued that the police have only two options when using polygraphs. One is to ensure that the suspect has consulted with counsel before consenting to the test. The other is to "clearly separate any post-test interrogation from the test itself." I do not believe that it is necessary to limit the police's discretion in this manner. It is true that the police procedures present the defence with the unpalatable choice of either trying to explain away the confession without using the polygraph, or admitting that the accused failed the test. However, this is true any time a suspect confesses after being confronted with inadmissible evidence, and it does not necessarily render the confession involuntary. Tactical disadvantage to the defence is not relevant to the voluntariness of the defendant's confession; instead, if anything, it simply suggests prejudicial effect. However, given the immense probative value of a voluntary confession, I cannot agree that exclusion is appropriate.

[103] The final argument in favour of separating the interrogation from the polygraph test is related to the alleged "abuse of trust" addressed above. It is submitted that the intimacy fostered during the pre-test interview improperly carries over to the post-test interrogation. Whether this is true or not, I do not believe it would be grounds to exclude the confession. On this point, I agree with the Ontario Court of Appeal in *R v. Barton* (1993), 81 CCC (3d) 574, at p. 575:

There is no question that the procedure is intrusive and purports to use expertise in psychology to create a relationship between the interviewer and the candidate which is conducive to making the technical analysis more accurate. It is also true that the appearance of intimacy carries over into the third stage when, in this case, the

inculpatory statement was made. Yet, all police interrogations may include these features in one form or another. The "good cop, bad cop" routine is the best known.

Moreover, in this appeal the respondent did not confess until Corporal Deveau took over the questioning from Sergeant Taker. Therefore, any intimacy created by the pre-test interview could not have precipitated the respondent's confessions.

F. Summary on Voluntariness

[104] In summary, there were several aspects of the police's interrogation of the respondent that could potentially be relevant to the voluntariness of his confessions. These include the comments regarding Ms. Kilcup; the suggestions that "it would be better" for the respondent to confess; and the exaggeration of the polygraph's accuracy. These are certainly relevant considerations when determining voluntariness. However, I agree with the trial judge that neither standing alone, nor in combination with each other and the rest of the circumstances surrounding the respondent's confessions, do these factors raise a reasonable doubt about the voluntariness of the respondent's confessions. The respondent was never mistreated, he was questioned in an extremely friendly, benign tone, and he was not offered any inducements strong enough to raise a reasonable doubt as to voluntariness in the absence of any mistreatment or oppression. As I find no error in the trial judge's reasons, the Court of Appeal should not have disturbed her findings.

ARBOUR J (dissenting): ...