

CANADA / JUDGMENT

R. v. McIntyre

2024 BCSC 2026

COURT

Supreme Court of British Columbia

DECIDED

5 November 2024

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2024 BCSC 2026 R. v. McIntyre

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McIntyre,

2024 BCSC 2026

Date: 20241105

Docket: 35950

Registry: Cranbrook

Rex

v.

Mitchell Earl McIntyre

Corrected Judgment: The text of the judgment was corrected on November 15, 2024

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Crown:

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G. Verdurmen

D. Verdurmen

Place and Dates of Hearing:

Cranbrook, B.C.

April 29-30 and May 1, 2024

Kamloops, B.C.

May 6-10, 13-17 and 27-31, 2024

July 2-5, 8-12, 16-18, 2024

Place and Date of Judgment**with Written Reasons to Follow:**

Kamloops, B.C.

July 19, 2024

Place and Date of Written Reasons:

Kamloops, B.C.

November 5, 2024

Introduction

- [1] The accused Mitchell Earl McIntyre is charged with the second degree murder of Julia Howe, on 6 February 2022, in Creston, British Columbia. Mr. McIntyre has elected trial by judge alone. On 19 July 2024, at the conclusion of a seven-week voir dire, I gave a ruling on the admissibility of (i) a series of statements Mr. McIntyre made to the police between 8 February 2022 and 5 March 2022, and (ii) statements Mr. McIntyre made to doctors and other staff at the East Kootenay Regional Hospital in Cranbrook between 7 February 2022 and 16 March 2022.
- [2] In relation to the police statements, the issue was whether they were admissible under the common law confessions rule. I was satisfied beyond a reasonable doubt that all of Mr. McIntyre's statements to the police were free from any threats, inducements, or other circumstances that would have deprived him of his voluntary choice to speak with the police. I therefore ruled all of Mr. McIntyre's statements to the police admissible.
- [3] In relation to the hospital statements, the two issues to be decided were: (i) whether the doctors and other hospital staff to whom Mr. McIntyre made the statements were "non-conventional persons in authority", and (ii) if so, whether the Crown had proven beyond a reasonable doubt that Mr. McIntyre's statements were free from any threats, inducements, or other circumstances calling into question their voluntariness. In my ruling, I concluded that the doctors and other hospital staff with whom Mr. McIntyre was dealing were entirely independent of the police, until 10:59 a.m. on 18 February 2022. After that point in time, at least some members of Mr. McIntyre's treatment team were sufficiently connected with the

police investigation to make the entire hospital staff non-conventional persons in authority. I was not satisfied beyond a reasonable doubt that Mr. McIntyre's statements to doctors and other hospital staff after the operative point in time were made freely and voluntarily. In the result, I ruled that all of Mr. McIntyre's statements to doctors and hospital staff up to 10:59 a.m. on 18 February 2022 were admissible, and that all of his statements after that point in time were not.

- [4] In relation to both categories of statements -- the police statements and the hospital statements -- my reasons for judgment were skeletal, owing to the press of time and the need to move on with the trial proper. I indicated that I would give further written reasons explaining the outcome. These are those reasons.

Factual Overview

- [5] Mr. McIntyre and Ms. Howe were tenants of adjacent properties in Creston, both owned by the same landlord, Mr. Reiner. At the time of her death, Ms. Howe was in a relationship with and living most of the time with Mr. Reiner in a residence situated across the road from the residence where Mr. McIntyre lived. There is evidence of acrimony between Mr. McIntyre and Ms. Howe in the two or three years prior to her death. The Crown's theory is that some time before noon on 6 February 2022, Mr. McIntyre entered Mr. Reiner's house and shot and killed Ms. Howe while Mr. Reiner and another man were doing construction work on an addition to the residence.
- [6] A most unusual feature of this case is that when Ms. Howe's body was first discovered, lying lifeless in a pool of blood on the bathroom floor, it was believed that she had fallen and suffered some kind of a medical trauma. Owing to the amount of blood, there was no visible bullet entry wound. Nor were there any other signs of intrusion or an altercation. Thus, both the attending police officer and the coroner formed the belief that Ms. Howe died of natural causes. It was not until an autopsy was performed, two days after Ms. Howe's death, that the bullet wound was located, and the police realized her death was a homicide.
- [7] In the meantime, just past 4:00 p.m. on 6 February 2022, Mr. McIntyre showed up at the emergency room of the East Kootenay Regional Hospital ("EKRH") in Cranbrook, a 65-minute drive from Creston. Mr. McIntyre reported chest pains and stated he was having a heart attack. However, after a full examination, an emergency room physician determined that Mr. McIntyre was physically fine. Mr. McIntyre was released from the hospital and evidently spent the night in his car.
- [8] On the morning of 7 February 2022, Mr. McIntyre appeared at the Cranbrook RCMP detachment stating that he wanted to speak with a police officer. He said he needed to be arrested and locked up, but would not say what, if anything, he had done. The police repeatedly told Mr. McIntyre they could not arrest him without reason. They gave Mr. McIntyre several chances to speak with counsel, and he did so. The police checked into Mr. McIntyre's background and learned that he lived in Creston, across the road from a place

where a woman had died the day before, although at that time the police did not believe the death was suspicious. After conversing with several police officers over the course of the day, Mr. McIntyre would still not tell them what, if anything, he had done. He eventually asserted that he was mentally unstable and a danger to himself and others. Acting on this statement, the police apprehended Mr. McIntyre under the Mental Health Act, R.S.B.C. 1996, c. 288 and took him to the hospital.

- [9] Within less than an hour of his admission to EKRH under the Mental Health Act, Mr. McIntyre began making statements to doctors and other hospital staff that he had shot his landlord's girlfriend. Hospital staff tried to determine whether these statements were real or delusional, but all the police would initially say was that a woman had been found dead in circumstances deemed not to be suspicious. The next day, upon learning about the results from Ms. Howe's autopsy, the police told hospital staff that someone had been killed in Creston. Later, the police told hospital staff that Mr. McIntyre was a person of interest. The police would not provide any further details.
- [10] Meanwhile, Mr. McIntyre also made statements to hospital staff indicating that he had killed another person, in Kimberley, which is a town that is approximately 135 kilometers from Creston and 30 kilometers from Cranbrook. The doctors struggled to figure out whether Mr. McIntyre's statements were reality-based or delusional. At the same time, for confidentiality reasons, doctors did not want to reveal to the police any more than necessary about the content of what Mr. McIntyre had said in the course of treatment for an apparent psychiatric condition. For their part, the police -- who were by that time actively investigating the death of Ms. Howe -- had no information about any suspicious death in Kimberley.
- [11] Mr. McIntyre remained in the inpatient psychiatric unit ("IPU") at EKRH for some three weeks. He was initially admitted for involuntary treatment under the Mental Health Act, but when it became clear to the doctors that he was willing to stay in the hospital of his own volition, he was re-classified as a voluntary patient. At a certain point, the treating physicians reached the conclusion that Mr. McIntyre had no identifiable psychiatric illness and was not in need of continuing treatment. On 1 March 2022, Mr. McIntyre was discharged from the IPU, and he left the hospital.
- [12] Throughout the time Mr. McIntyre was in the IPU, the police were continuing their investigation of the Howe homicide. Among other things, the police executed a search warrant on Mr. McIntyre's car, leading to the discovery of a handgun.
- [13] The police also made considerable efforts to obtain information from EKRH staff about Mr. McIntyre. In particular, the police repeatedly enquired about whether Mr. McIntyre was an involuntary patient, whether he could leave of his own volition, and when he would be discharged. From time to time, the police also tried to get more information from doctors and other hospital staff about what specifically Mr. McIntyre had said about his role in the death of Ms. Howe, about whether he had done anything else wrong, and about whether he posed any ongoing risk of harm to others. The treating physicians resisted police efforts to

obtain disclosure of Mr. McIntyre's statements about past crimes, taking the position that if the police wanted such information they would have to obtain a court order for Mr. McIntyre's medical file. However, the doctors did disclose to the police that Mr. McIntyre had made comments about a list of people he wanted to harm. Doctors and medical staff under their direction also gave the police regular updates about Mr. McIntyre's treatment status and his anticipated discharge date.

- [14] Following Mr. McIntyre's discharge from EKRH on 1 March 2022, it appeared that he had nowhere to go. He went to the police station almost immediately after he got out of the hospital, indicating that he intended to go to visit a friend in Kimberley but had no way to get there. After some discussion about what to do, the police arranged to put Mr. McIntyre up in a hotel for one night. On 3 March 2022, Mr. McIntyre was able to obtain his car from the police impound lot, and at some point thereafter he drove to Kimberley, where he stayed overnight with a friend.
- [15] Early in the morning of 5 March 2022, Mr. McIntyre showed up once again at the EKRH emergency room. He said he did not feel right in the head and had thoughts of harming people. The police came to the hospital to speak with him, but again Mr. McIntyre would not disclose that he had committed any offence. Ultimately, given Mr. McIntyre's assertions that he was struggling with thoughts of harming people and needed help, the attending psychiatrist agreed to admit Mr. McIntyre to the IPU, on a voluntary basis, for the second time.
- [16] Mr. McIntyre's second stay in the IPU lasted approximately two weeks. In the course of this stay, Mr. McIntyre continued to make statements to medical staff about what he had done, although it is not entirely clear that he made any new disclosures, apart from adding to the list of people he said he intended to harm.
- [17] Meanwhile, the police had obtained a production order for Mr. McIntyre's medical records. On 9 March 2022, one of the investigators came upon entries in the doctors' notes referencing Mr. McIntyre's statements about shooting a former friend, "Mr. Creamly", in Kimberley. Police database checks quickly revealed that a man named David Creamer had been found dead in his home in Kimberley on 6 February 2022, the very same day that Ms. Howe had been found dead in Creston, some 95 minutes away by car. When Mr. Creamer's body was discovered, he had a small wound just below his left ear, and there were no signs of a struggle. The first person to observe him, an adult son, assumed Mr. Creamer had banged his head and died of natural causes. A police officer attended the scene and, after consultation with a coroner, concluded that the death was an accident. Mr. Creamer's body was released to a funeral home and later cremated. As a result of all of this, literally no forensic evidence was gathered in connection with Mr. Creamer's death.
- [18] When the officers leading the Howe homicide investigation learned that Mr. McIntyre had made statements implicating himself in the death of Mr. Creamer, the officers were upset that EKRH staff had not disclosed the details to the police. On 12 March 2022, two RCMP

officers went to EKRH and spoke with one of Mr. McIntyre's treating physicians. The officers expressed frustration about not having been given more timely information about Mr. McIntyre's possible role in the death of Mr. Creamer, and the consequent loss of opportunity to obtain forensic evidence. The officers also enquired about whether Mr. McIntyre could be re-certified for involuntary treatment under the Mental Health Act, given the potential danger he could pose to public safety. The treating physician rebuffed the officers, explaining that he could not disclose any further details about what Mr. McIntyre said to treatment providers, and that Mr. McIntyre did not fit within the criteria for involuntary admission under the Mental Health Act. The doctor did agree that hospital staff could provide the police with updates about Mr. McIntyre's status and when he would be discharged from the hospital.

- [19] On 16 March 2022, Mr. McIntyre was discharged for the second time from the IPU. Mr. McIntyre did not agree with the doctor's decision that he should be discharged. He maintained that he did not feel right and repeatedly stated that he had a list of people whom he intended to harm. However, the doctors concluded that despite these statements, Mr. McIntyre did not have an identifiable psychiatric condition that required ongoing hospitalization, and that any risk Mr. McIntyre might pose to the safety of the community was a law enforcement concern, not a medical issue. In keeping with the earlier commitment to do so, staff at EKRH notified the police of the time when Mr. McIntyre would be released from the IPU. When Mr. McIntyre walked out of EKRH at 1:00 p.m. on 16 March 2022, police were waiting for him and immediately arrested him on a warrant for the murder of Ms. Howe.

Facts

Chronology

- [20] I would summarize the key events as follows:

- a) At approximately 12:00 p.m. on 6 February 2022, Mr. Reiner returned to his residence in Creston to find Ms. Howe's body in a pool of blood on the bathroom floor.
- b) At 4:10 p.m. on 6 February 2022, Mr. McIntyre attended the emergency room of EKRH in Cranbrook, complaining of chest pains possibly attributable to a heart condition. Mr. McIntyre was medically cleared and discharged from the hospital at 9:10 p.m.
- c) At around 9:30 a.m. on 7 February 2022, Mr. McIntyre appeared at the Cranbrook RCMP detachment. He was referred to Cpl. Kletzel, the watch commander for the day. Over the course of the next few hours, Mr. McIntyre made a number of statements to Cpl. Kletzel. He said he wanted to be arrested and locked up, but he would not say what, if anything, he had done. [oral police statement #1]

- d) At 1:35 p.m. on 7 February 2022, Mr. McIntyre gave an audio-recorded statement to Cpl. Tent, an officer in the Cranbrook General Investigation Section ("GIS"). The statement was several hours in duration. Mr. McIntyre still wanted to be arrested but would not say what, if anything, he had done. The statement concluded at 4:14 p.m., at which point Cpl. Tent apprehended Mr. McIntyre under the Mental Health Act. [recorded police statement #1]
- e) At 4:30 p.m. on 7 February 2022, Cpl. Kletzel walked Mr. McIntyre into the emergency room at EKRH. He was admitted to the hospital under the Mental Health Act. He was placed in a seclusion room, and later moved to a bed in the emergency ward. In the course of his time in the emergency ward, Mr. McIntyre made a number of statements to doctors and other hospital staff.
- f) Some time prior to 2:45 p.m. on 8 February 2022, Mr. McIntyre was transferred to the IPU at EKRH. Over the following three weeks, while in the IPU, Mr. McIntyre made a number of additional statements about the circumstances leading up to his attendance at the police station on 7 February 2022. There were also multiple meetings and exchanges of information between hospital staff and police, although the lines of communication were by no means fully open. Mr. McIntyre was ultimately discharged from the EKRH on 1 March 2022.
- g) Meanwhile, on 8 February 2022, the police received the results of the autopsy and determined that Ms. Howe's death was a homicide. The RCMP's Southeast District Major Crimes Unit ("MCU") assumed conduct of the investigation. The lead investigator was Cst. Beggs (now Cpl. Beggs). Mr. McIntyre was a suspect from the outset. On 11 February 2022, the police searched Mr. McIntyre's vehicle and located a pistol that fired ammunition consistent with the bullet fragment found in Ms. Howe's head. On or about 23 February 2022, the police obtained a production order for Mr. McIntyre's medical records at EKRH, covering the period from 6 March 2022 to 22 February 2022.
- h) At 12:55 p.m. on 1 March 2022, almost immediately after his discharge from EKRH, Mr. McIntyre once again appeared at the Cranbrook RCMP detachment. Over the course of the next few hours, he made a number of oral statements [oral police statement #2] and one audio-recorded statement to Cst. Parker (now Cpl. Parker) [recorded police statement #2]. Eventually, arrangements were made for Mr. McIntyre to spend the night at the Lazy Bear Lodge in Cranbrook.
- i) At 9:05 a.m. on 2 March 2022, Cpl. Beggs and Cst. Flaman attended the Lazy Bear Lodge and spoke briefly with Mr. McIntyre while they returned several seized devices to him. The conversation was recorded. [recorded police statement #3]

- j) At 9:37 a.m. on 3 March 2022, Cpl. Beggs and Cst. Flaman met Mr. McIntyre at the RCMP Southeast District Traffic Section impound lot in Cranbrook, where Mr. McIntyre was able to retrieve his vehicle insurance papers. This interaction was also recorded [recorded police statement #4]. Several hours later, Mr. McIntyre returned to the lot and his car was returned to him.
- k) Later in the day on 3 March 2022, Mr. McIntyre went to visit a friend, Mr. Stewart, in Kimberley. Mr. McIntyre had dinner with Mr. Stewart and his wife, and then stayed overnight in a camper or motorhome on Mr. Stewart's property.
- l) At 12:28 a.m. on 5 March 2022, Mr. McIntyre appeared at the emergency room at EKRH. He said he was having thoughts of harming other people. The police were contacted.
- m) At 1:25 a.m. on 5 March 2022, Cst. Banich and Cst. Silitto met with Mr. McIntyre at EKRH. The conversation was recorded [recorded police statement #5]. Mr. McIntyre maintained that he was having thoughts of harming others and declined to say anything about what, if anything, he had done in the past. The officers eventually walked Mr. McIntyre back to the emergency room.
- n) At 2:00 a.m. on 5 March 2022, Mr. McIntyre returned to the care of staff in the EKRH emergency room. Later in the day he spoke with one of his treating psychiatrists, Dr. Khosroshahy, who decided to re-admit Mr. McIntyre to the IPU for voluntary treatment. Mr. McIntyre remained in the IPU until 16 March 2022. Over the course of this stay, Mr. McIntyre again made a number of statements to doctors and other hospital staff about his past activities and his current state of mind. Once again, there were multiple meetings and exchanges of information between hospital staff and police.
- o) Meanwhile, the police continued with their investigation of the Howe homicide. On 9 March 2022, an officer reviewing Mr. McIntyre's hospital records (which the police had obtained by way of a production order) came upon hospital notes in which Mr. McIntyre claimed to have killed a man named David Creamly in Kimberley, B.C. Police database checks quickly revealed that a person named David Creamer had been found dead in his home on the afternoon of 6 February 2022.
- p) On 12 March 2022, members of the MCU attended EKRH, where they met with Mr. McIntyre's treating psychiatrist, Dr. Shope. There was a frank exchange of positions. To address future public safety risks, Dr. Shope agreed that the hospital would provide the police with updates as to Mr. McIntyre's status and would tell them when Mr. McIntyre was ultimately discharged from the hospital.
- q) Mr. McIntyre was discharged from EKRH at 1:00 p.m. on 16 March 2022. The police were waiting at the door when Mr. McIntyre exited, with a warrant for his arrest in connection with the Howe homicide. Mr. McIntyre was arrested without incident.

Mr. McIntyre's Initial Statements to Cpl. Kletzel

- [21] When Mr. McIntyre attended the Cranbrook RCMP detachment on the morning of 7 February 2022, he was referred to Cpl. Kletzel, the watch commander. Cpl. Kletzel was wearing a full uniform, a police vest, and a duty belt. As watch commander, Cpl. Kletzel was in and out of the detachment all day, assisting other officers and responding to calls.
- [22] Cpl. Kletzel initially met Mr. McIntyre in the vestibule or public entranceway of the Cranbrook RCMP detachment. Cpl. Kletzel obtained Mr. McIntyre's driver's license from the staff member at the information desk, and then went to speak with Mr. McIntyre. The two men initially spoke in or around the doorway between the front vestibule and the fingerprint room. The door to the room was open. Mr. McIntyre had his face covered with a COVID mask. He was wearing a work jacket or vest with high-visibility fluorescent flashing. Cpl. Kletzel identified himself by name. Cpl. Kletzel was only able to speak with Mr. McIntyre for a few minutes, in the doorway between the vestibule and the fingerprint room, before the officer was called away on another urgent matter.
- [23] Cpl. Kletzel returned to the detachment about 30 to 40 minutes later. At that point, Mr. McIntyre was curled up on a bench in the vestibule, asleep. Cpl. Kletzel woke Mr. McIntyre up and invited him into the fingerprint room. It was a ten-foot by ten-foot room with a table for taking fingerprints at one end and a desk with a computer at the other end. There were two chairs in the room. The room had two doors. One door (which was unlocked) led from the public vestibule into the fingerprint room. The other (which was locked) led from the fingerprint room into the non-public side of the detachment.
- [24] Once Cpl. Kletzel and Mr. McIntyre were inside the room, Cpl. Kletzel closed the door to the vestibule, for privacy. Mr. McIntyre sat down on a chair and Cpl. Kletzel sat opposite him. The conversation thereafter unfolded as follows:
- a) Cpl. Kletzel again introduced himself and asked how he could help. Mr. McIntyre responded that he needed to be arrested and locked up.
 - b) Cpl. Kletzel said he could not arrest someone without a reason to do so. Mr. McIntyre said he did not want to put his cards on the table. Cpl. Kletzel did not know what that meant.
 - c) Cpl. Kletzel noted a hospital band on Mr. McIntyre's wrist, and possibly another on his ankle. He asked Mr. McIntyre if he had been in the hospital. Mr. McIntyre said he had driven to Cranbrook from Creston the night before. He said that he went to the hospital in Cranbrook because he thought he was having a heart attack, that the hospital staff checked him out and released him, and he then spent the night in his car. Mr. McIntyre said he had some "weed" in his car. He said he did not want the police to check out his car, at least not yet.

- d) Cpl. Kletzel told Mr. McIntyre it seems like he is a good guy and Cpl. Kletzel would like to help him. Mr. McIntyre responded that he was not a good guy, he needed to be arrested and locked up.
 - e) Cpl. Kletzel said he did not know what he could arrest Mr. McIntyre for. Mr. McIntyre responded that he was thinking about spitting in Cpl. Kletzel's face, because if he did that then Cpl. Kletzel would have to arrest him.
 - f) Cpl. Kletzel said it seemed like Mr. McIntyre was having a mental health issue. He said he did not want to have to arrest Mr. McIntyre for spitting in his face. He asked Mr. McIntyre if he had gotten any help at the hospital. Mr. McIntyre responded that he felt calm at the hospital, but they determined that he was not having a heart issue, so he was released. Mr. McIntyre added that only the police could help him.
 - g) Cpl. Kletzel then excused himself from the room so he could speak with a colleague.
- [25] Cpl. Kletzel left Mr. McIntyre in the fingerprint room and went into the detachment. He went to GIS where he spoke with Cpl. Parker. Cpl. Kletzel asked Cpl. Parker to contact the Creston RCMP detachment and the hospital in Cranbrook to see if she could get any information about Mr. McIntyre.
- [26] Cpl. Kletzel then returned to the fingerprint room where he continued his discussion with Mr. McIntyre as follows:
- a) They had general conversation for some time. Mr. McIntyre said that he was a truck driver and talked about trips he had taken to Las Vegas and Arizona.
 - b) Mr. McIntyre stated that he was trying to figure out what Cpl. Kletzel could arrest him for. He wanted to be arrested so he could speak with counsel.
 - c) Cpl. Kletzel responded that Mr. McIntyre did not have to be arrested in order to speak with counsel. Cpl. Kletzel said he could try to facilitate that.
 - d) Mr. McIntyre said he wanted to have a face to face discussion with counsel, not a telephone conversation. Cpl. Kletzel said he was not sure if he could arrange that. He said the Crown's office was upstairs and the courthouse was nearby.
 - e) Cpl. Kletzel asked if Mr. McIntyre wanted to speak with Crown counsel, and Mr. McIntyre said no, he needed to speak with a defence lawyer.

Consultation with Counsel

- [27] Cpl. Kletzel stepped out of the fingerprint room again, to ask Cpl. Parker to arrange for Mr. McIntyre to speak with counsel. Cpl. Parker arranged for Mr. McIntyre to speak with duty counsel, Mr. Yates. Mr. McIntyre did not want to speak to counsel on a police phone, but accepted Cpl. Kletzel's offer to use a victim services phone.

- [28] Cpl. Kletzel led Mr. McIntyre into the non-public part of the detachment, down the hallway to an interview room in the GIS portion of the building. The officer left Mr. McIntyre in the room to speak on the phone with Mr. Yates. Cpl. Kletzel waited outside for Mr. McIntyre to complete his consultation with counsel. Mr. McIntyre was in the room for quite some time. At one point, the officer knocked on the door and poked his head inside to see that Mr. McIntyre was still on the phone. After a consultation that lasted about 30 minutes, Mr. McIntyre knocked on the door to indicate that he was finished.
- [29] At 12:01 p.m. on 7 February 2022, while waiting outside the interview room for Mr. McIntyre to complete his phone call, Cpl. Kletzel was advised by Cpl. Parker that there had been a "sudden death" in Creston, across the road from where Mr. McIntyre lived. The file had already concluded and was determined not to be a suspicious death. Cpl. Kletzel was not given any other details.
- [30] When Mr. McIntyre finished his phone call with Mr. Yates, he told Cpl. Kletzel that he wanted to contact a different lawyer, Mr. Strahl, whom Mr. McIntyre referred to as a "defence lawyer".
- [31] At 12:37 p.m. on 7 February 2022, Cpl. Kletzel began to think he might be dealing with something other than a mental health matter. He thought there could be "more to it". Cpl. Kletzel read Mr. McIntyre the police caution from a pre-printed card, advising Mr. McIntyre that he did not have to say anything, but anything he did say could be used against him. Mr. McIntyre responded that he knows that from watching television. Mr. McIntyre said two years is too long, he wanted to get the matter over with so he could be locked up. In cross-examination, Cpl. Kletzel confirmed that he did not advise Mr. McIntyre of his s. 10(a) or s. 10(b) Charter rights, because Mr. McIntyre was not arrested or detained. Cpl. Kletzel explained in his testimony that he had no basis to detain or arrest Mr. McIntyre.
- [32] Arrangements were then made for Mr. McIntyre to speak on the phone with Mr. Strahl, in the GIS interview room. After about five minutes on the phone with Mr. Strahl, Mr. McIntyre concluded his call and told Cpl. Kletzel that Mr. Strahl would call Mr. McIntyre back later, at the RCMP detachment.

Start of the GIS Investigation

- [33] Cpl. Kletzel then decided to pass Mr. McIntyre off to someone in the GIS, so that Cpl. Kletzel could get back to his duties as watch commander. Cpl. Kletzel left Mr. McIntyre in the interview room, and went to speak with Cpl. Tent, an officer in Cranbrook GIS. After bringing Cpl. Tent up to speed, Cpl. Kletzel returned to the interview room and asked Mr. McIntyre if he would speak with Cpl. Tent in GIS. Mr. McIntyre said he knew about police tricks and knew what Cpl. Kletzel was doing. Cpl. Kletzel denied trying to trick Mr. McIntyre, who replied that he knew Cpl. Kletzel was fibbing but he was okay with it. Cpl. Kletzel testified that he had no idea what Mr. McIntyre was talking about. In cross-examination, Cpl. Kletzel agreed that the point when he passed Mr. McIntyre off to Cpl. Tent was the start

of the GIS investigation.

Mr. McIntyre's Statement to Cpl. Tent

- [34] Cpl. Tent testified that after being approached by Cpl. Kletzel, he took some steps to gather information about Mr. McIntyre and what had taken place in Creston. Between 12:55 p.m. and 1:10 p.m. on 7 February 2022, Cpl. Tent spoke with two different officers at the Creston RCMP detachment (Cst. Wright and Cpl. Silwersky). As a result of these inquiries Cpl. Tent learned that on 6 February 2022, there had been a sudden death at the residence across the road from where Mr. McIntyre lived. Cpl. Silwersky confirmed that the death was "deemed non-suspicious", but nevertheless asked Cpl. Tent to obtain a "warned statement" from Mr. McIntyre. At some point prior to the commencement of his interview with Mr. McIntyre, Cpl. Tent also directed Cpl. Parker to contact the Creston RCMP detachment with instructions to do a "wellness check" on Mr. McIntyre's residence.
- [35] Cpl. Tent proceeded to take an audio and video recorded statement from Mr. McIntyre, in a GIS interview room at the Cranbrook RCMP detachment. The statement began at 1:35 p.m. and concluded at 4:10 p.m. In the course of the statement:
- a) Cpl. Tent got Mr. McIntyre a coffee. He asked Mr. McIntyre if he wanted anything to eat, and Mr. McIntyre requested fried chicken, French fries, and four oranges. Cpl. Tent left the room and made arrangements through Cpl. Kletzel to fulfill Mr. McIntyre's request.
 - b) Cpl. Tent confirmed that Mr. McIntyre (i) was not detained and was free to leave, and (ii) had spoken with two other officers that day -- Cpl. Kletzel and Cpl. Parker -- neither of whom had made any threats or inducements to Mr. McIntyre.
 - c) Mr. McIntyre said the "number one reason" he wanted to be "arrested and detained" was so he could speak with a lawyer. Cpl. Tent confirmed that Mr. McIntyre had spoken with counsel and received legal advice.
 - d) Cpl. Tent asked why Mr. McIntyre showed up at the police station and asked what was going on. Mr. McIntyre replied that Cpl. Tent will "get everything [he] wants", and will not be able to shut Mr. McIntyre up, but Mr. McIntyre wanted to sit down with a lawyer first.
 - e) Mr. McIntyre went on to say he wanted to get the ball rolling, he will speak with counsel, and then they can speak with the prosecutor. He stated that his only concern was that he did not want to be "chucked in the open population" where he might be "ass raped".
 - f) Cpl. Tent went on to explain the charge approval process. Mr. McIntyre interjected to say he wanted to avoid all of that, so that two years down the road he was not "still sitting in this room talking to the police".
 - g) Mr. McIntyre said he did not want to tell Cpl. Tent how to do his job, that he was just trying to make Cpl. Tent's job easier. However, he said that if he put "everything on the table right now", then his "options" would be limited.

- h) Mr. McIntyre suggested Cpl. Tent might have the authority to grant him certain things and Cpl. Tent replied that he did not have the authority to grant anything. After further discussion about promises, Mr. McIntyre summarized what Cpl. Tent had said earlier, "no promises, no threats". Cpl. Tent confirmed he was not there to make any promises.
- i) Mr. McIntyre responded, "yeah, you're trying to get to the bottom of the situation". He said he knew he was "being investigated".
- j) Cpl. Tent then related what he knew about the background, namely (i) something happened in Creston the preceding day, (ii) Mr. McIntyre showed up at the police station and some of the things he said to Cpl. Ketzler raised some concerns, (iii) police did a wellness check at Mr. McIntyre's house in Creston, and (iv) Mr. McIntyre's house is right across the road from where "this lady died".
- k) After listening to all of this, Mr. McIntyre stated, "I'm not going to say it out loud" and that he was intent on "listening to [his] lawyer".
- l) Mr. McIntyre then launched into a diatribe about geopolitics and environmental issues.
- m) Returning to his current situation, Mr. McIntyre said, "I wanna tell you some stuff but I can't; I'm sorry". He said he was not going anywhere and if the police did not arrest him, his lawyer said he could just sit in the reception area. Mr. McIntyre said he was of the opinion that he should not be let loose.
- n) Cpl. Tent said that at this point he had no reason to arrest or detain Mr. McIntyre. Mr. McIntyre confirmed his understanding that Cpl. Tent could not arrest him unless there was a valid reason to do so.
- o) Mr. McIntyre then said, "you need to detain me, because I will harm myself and possibly others". Cpl. Tent replied that with that information he could detain Mr. McIntyre and take him to the hospital to be assessed by a doctor, who would then determine whether Mr. McIntyre was in a state where he would harm himself or others. Mr. McIntyre responded that if that happened, they would not let him out and the police would lose him to the hospital.
- p) Cpl. Tent said, "if you did something bad, you can tell me what you did and you don't have to talk to me anymore and I will arrest you, but not without a reason to arrest you". Mr. McIntyre responded that he was "fucked in the head" and he attended the police station to "help out the RCMP" and that is "the end of the game". Mr. McIntyre then corrected himself to say it was not a game.
- q) Cpl. Tent enquired if he could ask a question with a yes-or-no answer. Mr. McIntyre replied that he may or may not answer. Cpl. Tent asked if, when he was "at Frank and Julia's house yesterday", at which point Mr. McIntyre interjected to ask whether he said he was at Frank and Julia's house. Mr. McIntyre said he was not at Frank and Julia's house. Cpl. Tent attempted to clarify, asking if it was because they were not married, and Mr. McIntyre

deemed it not to be their house. Mr. McIntyre responded, "now we are getting somewhere". Cpl. Tent asked to clarify something else, and Mr. McIntyre replied, "now I decline to answer, politely".

- r) Mr. McIntyre said he did not feel right "from the neck up". Cpl. Tent suggested that Mr. McIntyre was torn because on the one hand he wanted to say what happened and on the other hand he was trying to listen to his lawyer's advice. Mr. McIntyre said Cpl. Tent was about 35% to 40% right.
- s) At 14:21 p.m., in the course of the statement, Cpl. Kletzel entered the interview room to deliver Mr. McIntyre's chicken dinner, and then the interview continued.
- t) Mr. McIntyre and Cpl. Tent then had a lengthy conversation about a number of completely irrelevant things, including swimming, vacationing, drug use, cigarettes, and restaurants. Mr. McIntyre said he was "wasting time", until the lawyer called, or the police stuck him in a cage.
- u) Cpl. Tent said Mr. McIntyre came to the police station obviously with something on his mind. The officer asked if Mr. McIntyre wanted to share it. Mr. McIntyre replied, "no".
- v) Cpl. Tent said he cannot arrest people on assumptions. The officer then suggested, "let's just say you made a bad decision and you want to make amends". Mr. McIntyre said he actually did not feel that way.
- w) The parties then had further idle discussion about various topics including golfing and local golf courses.
- x) Cpl. Tent asked Mr. McIntyre if he still felt the same way that he did when he came to the station in the morning. Mr. McIntyre responded that yes, mentally, he felt the same.
- y) Cpl. Tent asked Mr. McIntyre why he felt that he would harm himself or someone else. Mr. McIntyre responded that he felt that way because he was "mentally disturbed". Mr. McIntyre said he did not feel right from the neck up.
- z) There was some discussion about what Mr. McIntyre did the night before. He said he went to the hospital, got released, drove around a bit, and then parked in the lot for the night.
- aa) Cpl. Tent asked Mr. McIntyre what he knew about a lawyer calling him back. Mr. McIntyre responded that he was expecting Mr. Strahl to phone him or to show up at the police station.
- bb) Cpl. Tent asked Mr. McIntyre if he had seen Mr. Reiner the day before. Mr. McIntyre said no. Cpl. Tent asked Mr. McIntyre if he had seen Ms. Howe the day before. Mr. McIntyre replied, "no comment". Cpl. Tent asked Mr. McIntyre if he caused any harm to Ms. Howe. Mr. McIntyre replied that he did not want to answer.
- cc) Mr. McIntyre said he was feeling tired and that he had not had a good night's sleep in six or seven days.

dd) Cpl. Tent asked what should happen to someone if they caused Ms. Howe's death. Mr. McIntyre responded that they should be put through the justice system.

ee) Mr. McIntyre went on to discuss his prior experience with the justice system, arising from an impaired driving matter.

ff) Mr. McIntyre suggested that they get on with the process and put him in a cell to wait for his lawyer. Cpl. Tent responded that he needed a reason to put Mr. McIntyre in a cell, otherwise it would be an unlawful detention. Cpl. Tent asked Mr. McIntyre to feed him a reason or give him a bone. Mr. McIntyre responded that he needed to speak with his lawyer first.

gg) Mr. McIntyre asked if Cpl. Tent could contact Mr. Strahl or leave him a message. Cpl. Tent said he would speak with Cpl. Kletzel about it and left the room.

hh) While Cpl. Tent was out of the room, Mr. McIntyre went to the opposite side of the table (where Cpl. Tent had been sitting) and looked through the officer's notebook. When Cpl. Tent returned to the room, Mr. McIntyre stated, "you've got a lot more there than I thought you had".

ii) Cpl. Tent told Mr. McIntyre that a message had been left for Mr. Strahl. Cpl. Tent told Mr. McIntyre that he was going to apprehend him under the Mental Health Act, and then take him to the hospital so that he could speak with a doctor and possibly a psychologist. Mr. McIntyre responded, "okay", and "I appreciate that".

jj) Mr. McIntyre told Cpl. Tent he was doing his job and doing the right thing. Cpl. Tent responded that he would not want to see Mr. McIntyre walk out of the police station and hurt himself or someone else. Mr. McIntyre replied that could happen.

kk) After further inconsequential dialogue, the statement concluded at 4:14 p.m.

Mr. McIntyre's Admission to the East Kootenay Regional Hospital

[36] At 4:30 p.m. on 7 February 2022, Cpl. Kletzel drove Mr. McIntyre to EKRH in a marked police vehicle. There was no conversation en route. There is no evidence about whether Mr. McIntyre was handcuffed or otherwise restrained.

[37] At 4:35 p.m. on 7 February 2022, Cpl. Kletzel brought Mr. McIntyre into the hospital through the ambulance bay, which Cpl. Kletzel conceded on cross-examination was a non-public entrance. Cpl. Kletzel took Mr. McIntyre to the emergency room admissions desk. Mr. McIntyre sat on a chair next to the intake clerk's desk. Cpl. Kletzel stood at a counter about 10 feet away. He could overhear the conversation between Mr. McIntyre and the intake clerk.

- [38] While Mr. McIntyre was answering questions from hospital staff, Cpl. Kletzel filled out an RCMP mental health occurrence form. The form documented that Mr. McIntyre had been apprehended under s. 28 of the Mental Health Act. The document Cpl. Kletzel referenced in his voir dire testimony was incomplete photocopy of the original. It was a two-page, double-sided form, but the second page had not been copied. It was never marked in evidence.
- [39] In one of the boxes on the form, Cpl. Kletzel checked that Mr. McIntyre was "refusing to talk". Cpl. Kletzel explained in his testimony that he checked this box because Mr. McIntyre expressed reluctance to answer the admitting clerk's questions, stating at the time that he was worried the conversation was being recorded, or that the hospital staff would have to tell the police what he said to them.
- [40] The RCMP mental health occurrence form also contained a box to document the subject's thought processes. Cpl. Kletzel checked the box for abnormal thinking. In his testimony, Cpl. Kletzel explained that he checked this box based on Mr. McIntyre's statement to the clerk during the admissions process that he was thinking about driving into oncoming traffic, and he did not care who he drove into.
- [41] Cpl. Kletzel testified that after completing both sides of the form, he made a copy for the hospital staff and later took the original back to the police station, leaving it in the GIS mail slot. The original, complete RCMP mental health occurrence report was never located and was not marked in evidence in the voir dire.
- [42] At approximately 5:00 p.m. on 7 February 2022, Mr. McIntyre was placed in a "secure room" in the emergency room. The room was 15 feet long and 10 feet wide, with several chairs near the front and a toilet at the back. It had a heavy metal door with a window in the centre. There was conflicting evidence about whether the door was ever fully closed while Mr. McIntyre was in the room.
- [43] I heard evidence from a number of witnesses about what happened while Mr. McIntyre was in the secure room in the EKRH emergency department. In particular, I heard testimony from Cpl. Kletzel, Cpl. Tent, Dr. Yu, Ms. Griffin, and Ms. Ackison. The witness testimony was not entirely consistent as to whether the door remained open throughout Mr. McIntyre's time in the room, and what if anything Mr. McIntyre could see and hear about what was happening outside the room. My conclusions, based on an assessment of all the evidence, are that:
- a) for a significant proportion of the time Mr. McIntyre was inside, the door to the room was not closed or fully closed;
 - b) while Mr. McIntyre was initially in the room, Cpl. Kletzel was positioned outside, some five feet away from the entrance;

- c) when hospital staff went into the room, Cpl. Kletzel moved further away, perhaps five to ten feet from the entrance, which was most likely out of the earshot of what was being said inside the room;
 - d) later, Cpl. Tent arrived in the emergency room and joined Cpl. Kletzel, with both officers standing some ten feet from the entrance to the room;
 - e) at various points in time the attending psychiatrist Dr. Yu (and perhaps other hospital staff) consulted with the officers, from their position some ten feet from the entrance to the secure room;
 - f) Mr. McIntyre was likely not able to hear what was being said between the hospital staff and the police officers; and
 - g) it is possible and indeed likely that Mr. McIntyre was able to see hospital staff conversing with the police officers during the time he was in the seclusion room.
- [44] At this point I should also note that the Crown tendered a book of EKRH records as an exhibit in the voir dire. This book appeared to consist of the entire EKRH file on Mr. McIntyre from 6 February 2022 through to 16 March 2022. Many of the records in the book were never referenced in evidence and were created by individuals who did not testify in the voir dire. With regard to the records that were referenced in the evidence, for the most part they were ruled admissible under the hospital records exception to the hearsay rule established in *Ares v. Venner*, [1970] S.C.R. 608, 1970 CanLII 5. I will address the principles of admissibility of such evidence and the limitations on its use in my legal analysis below. For the time being, it is enough to note that many of the hospital witnesses identified particular records that they personally created, and these specific records were ruled admissible. These witnesses testified with the aid of the records, and on many instances had no independent recollection of certain events or details at the time of their testimony. They were, however, able to offer testimony concerning the context and circumstances surrounding their creation, which is of course relevant to the evidentiary weight that may be given to any such record.
- [45] Ms. Griffin, a social worker at EKRH, met with Mr. McIntyre in the seclusion room. Before meeting with Mr. McIntyre, she was given to believe that Mr. McIntyre had been taken to the emergency room by the police saying he needed to be locked up, that he was considering driving into traffic, and that he was suffering from some apparent emotional distress. In the course of her discussion with Mr. McIntyre in the seclusion room, he expressed concern about how much he could share and asked if everything he said would be confidential. Ms. Griffin responded that she could only share what he said with those within his circle of care at the hospital unless Mr. McIntyre said something about causing future harm to someone. Mr. McIntyre appeared to be looking out of the room in the direction of the police officers, in an apparent effort to see where they were while he was discussing the limits of confidentiality with Ms. Griffin. In cross-examination, Ms. Griffin agreed that Mr. McIntyre asked her about the limits of confidentiality more than once, as a result of which she went

back over the rules with him several times.

- [46] Ms. Griffin recounted that Mr. McIntyre was "vague" in his discussions with her, explaining that he did not want to harm her with his thoughts. He expressed anger or frustration about various social and political issues, including U.S. politics and COVID protests. Mr. McIntyre told Ms. Griffin that he went to the police about something he may or may not have done. Mr. McIntyre admitted to "homicidal thoughts" but was not specific. He said he did not feel safe because he could hurt someone, or someone could hurt him. In cross-examination, Ms. Griffin agreed that Mr. McIntyre was vague in his answers and might have been acting a bit paranoid. Ms. Griffin also admitted telling Mr. McIntyre she could not help him if he would not talk to her. Ms. Griffin recounted that in consultation with the emergency room physician, Mr. McIntyre would be referred to the on-call psychiatrist, Dr. Yu.
- [47] Dr. Yu, a practicing psychiatrist, was serving in a locum position in the IPU. He was the on-call psychiatric doctor on 7 February 2022. He first met Mr. McIntyre in secure room in the emergency ward. Dr. Yu testified that his initial meeting with Mr. McIntyre lasted approximately 20 to 30 minutes. He had no specific recollection of how he introduced himself to Mr. McIntyre but testified that invariably his practice would be to introduce himself as the on-call psychiatrist.
- [48] Dr. Yu received some information directly from Mr. McIntyre in the interview, and some information from other medical staff and the attending police officers. It was not clear from Dr. Yu's testimony or his notes (admitted under *Ares v. Venner*) what portions of the information he obtained on this date originated from Mr. McIntyre and what portions originated from the other parties.
- [49] By way of background, Dr. Yu's notes reflect that Mr. McIntyre "presented himself to police voicing very vague fear that he may or may not have committed a crime". Dr. Yu's notes also indicate that "the police officers did report to our social work team that there is a suspicious body found in the neighbourhood".
- [50] At one point, Dr. Yu came out of the secure room and asked the attending police officers (Cpl. Tent and Cpl. Kletzel) where they found the body. Cpl. Tent responded that there was a situation in Creston with a deceased female. After this brief exchange, Dr. Yu went back into the seclusion room.
- [51] Based on his interview and discussions with the staff and police, Dr. Yu was uncertain whether Mr. McIntyre was delusional, or alternatively whether his statements were "reality-based". Mr. McIntyre may or may not have committed a crime. He was expressing concern or fear about committing future crimes. The police report and the social work team indicated that a body was found in the neighbourhood where Mr. McIntyre lives. Dr. Yu obtained some biographical information directly from Mr. McIntyre. He disclosed no history of mental illness but had been feeling sad and lonely for the past several years. Mr. McIntyre had no family members who could be contacted for collateral information to ascertain whether his statements were reality-based or delusional.

- [52] Dr. Yu's initial diagnosis was that Mr. McIntyre had "psychosis NOS", meaning "psychosis not otherwise specified". Dr. Yu explained in his testimony that it was difficult to determine whether Mr. McIntyre's beliefs were reality-based. A psychiatric diagnosis requires concrete information from collaterals including family who would know the patient. A story reported by a patient can be real or delusional. Without concrete collateral information, one cannot determine whether an asserted belief is based in reality or of a psychotic nature. In this case, Dr. Yu's notes reflected that Mr. McIntyre was considered to be "quite socially isolated", making it difficult to "obtain collateral information from family and friends with regards to his recent mental state".
- [53] Dr. Yu decided to admit Mr. McIntyre for involuntary treatment of mental illness under the Mental Health Act. His initial treatment plan for Mr. McIntyre had four components. First, he wanted the social work team to get further collateral information. In cross-examination, Dr. Yu added that he could not recall who the social worker was, or what specifically he asked the social worker to look into or investigate. Second, he wanted to start Mr. McIntyre on olanzapine, a drug used to treat psychosis. Later in his testimony, Dr. Yu testified that the dose Mr. McIntyre was relatively low, and commonly prescribed in such circumstances. Third, he wanted Mr. McIntyre to undergo a CT head scan to determine whether he was suffering from any encephalopathy. Fourth and finally, Dr. Yu signed a Form 4 under the Mental Health Act, certifying that Mr. McIntyre should be admitted for involuntary treatment, given that he could be a risk to the safety of himself or others.
- [54] Ms. Ackison, a nurse in the emergency department, started her shift at 7:00 p.m. on 7 February 2022. At that point, Mr. McIntyre was still in the seclusion room. The door to the room was open. Ms. Ackison testified that Cpl. Tent asked her to notify him if Mr. McIntyre left or tried to leave the hospital. Ms. Ackison agreed to do so. She said there was nothing unusual about this. It was a normal request for the police to make in relation to a patient who may pose a risk to him or herself or others. Ms. Ackison testified that this particular conversation took place 25 to 30 feet from the entrance to the seclusion room.

Mr. McIntyre's Initial Committal under the Mental Health Act

- [55] At 7:05 p.m. on 7 February 2022, Dr. Yu completed a Form 4 document certifying Mr. McIntyre as a patient in need of involuntary care under the Mental Health Act. On the form, Dr. Yu wrote: "Patient appears to be rather perplexed with high likelihood of paranoid delusion. Patient voices vague threats about others; unable to contract for safety for self and others". Dr. Yu explained in his testimony that this was the first of two certifications required to hold Mr. McIntyre for involuntary treatment under the Mental Health Act. A second certificate would have to be completed by another physician within the following 48 hours in order to hold Mr. McIntyre involuntarily for a period of 30 days.

Mr. McIntyre's Placement in an Emergency Room Bed

- [56] At 7:20 p.m. on 7 February 2022, Mr. McIntyre was relocated to one of the 14 private beds in the emergency room, separated from each other by curtains. Ms. Ackison did a head-to-toe assessment of Mr. McIntyre's physical status, and also completed a mental status exam. Mr. McIntyre did not present with any physical health concerns. When Ms. Ackison asked to take a COVID swab, Mr. McIntyre expressed the view that she was part of a government conspiracy to collect his DNA. Ms. Ackison assured Mr. McIntyre that she was not part of any conspiracy.
- [57] Cpl. Tent and Cpl. Kletzel both left EKRH some time between 7:00 and 8:00 p.m. on 7 February 2022.
- [58] At 7:52 a.m. on 8 February 2022, Cpl. Tent returned to the emergency room at EKRH and spoke with Mr. Grauer, a nurse who had started his shift that morning. In response to Cpl. Tent's enquiry about Mr. McIntyre's status, Mr. Grauer advised that: (i) Mr. McIntyre slept through the night, (ii) Mr. McIntyre would not be discharged imminently, and (iii) he (Mr. Grauer) or some other staff member would advise Cpl. Tent if Mr. McIntyre were to leave the hospital.

The Howe Autopsy and the Police Response

- [59] At 9:00 p.m. on 8 February 2022, Dr. Doyle conducted an autopsy on Ms. Howe's body, locating a bullet or bullet fragment in her head, and concluding that the cause of death was a gunshot wound. This evidence is hearsay, as Dr. Doyle did not testify as a witness in the voir dire. This evidence was elicited through the voir dire testimony of Cpl. Tent, Cpl. Beggs, and Sgt. Smart, for narrative purposes. The first of these officers to learn of the autopsy result was Sgt. Smart, who was then the officer in charge of the RCMP's Southeast District MCU, based in Kelowna. Sgt. Smart learned about the autopsy result some time during the morning of 8 February 2022. Shortly thereafter, he assigned Cpl. Beggs, another MCU officer, as the lead investigator in relation to the Howe homicide. Sgt. Smart, Cpl. Beggs, and a number of other officers had a lengthy briefing about the status of the investigation on the morning of 8 February 2022.

Mr. McIntyre's Further Consultations with Counsel

- [60] Meanwhile, at 11:43 a.m. on 8 February 2022, back in Cranbrook, Cpl. Parker spoke on the phone with Mr. Strahl, who was believed to be Mr. McIntyre's counsel. Cpl. Parker related her current knowledge of the situation to Mr. Strahl. In particular, she told Mr. Strahl that the police had become aware of a sudden death in Creston, but they were not able to say that there had been any criminal offence at that point in time. (Obviously, by this time, Cpl. Parker's information was out of date, but she clearly had not yet been made aware of the results of the Howe autopsy). Cpl. Parker advised Mr. Strahl that Mr. McIntyre could be reached at the hospital, and she provided him with the phone number.

- [61] At 11:50 a.m. on 8 February 2022, Mr. Grauer, on duty in the emergency room at EKRH, answered a call from Mr. Strahl asking to speak with Mr. McIntyre. Mr. Grauer brought the phone to Mr. McIntyre, who then spoke with counsel on the telephone.

Seizure of Mr. McIntyre's Clothes

- [62] At 12:09 p.m. on 8 February 2022, Cpl. Parker received an update from Sgt. Smart at the MCU, advising that Ms. Howe's death was determined to be a homicide. In cross-examination, Cpl. Parker agreed that thereafter she kept in frequent contact with MCU in Kelowna regarding Mr. McIntyre's status. Cpl. Parker confirmed that she acted on a number of specific requests from the MCU members, including going to the hospital to get updates about Mr. McIntyre. Cpl. Parker agreed that the Cranbrook detachment was acting in an assisting capacity. Directions were given by MCU and Cpl. Parker was expected to perform tasks and update MCU. Cpl. Parker agreed that, among other things, she relayed information between hospital staff and MCU members.
- [63] At 2:03 p.m. on 8 February 2022, acting on the instructions of Sgt. Smart, Cpl. Tent and Cpl. Parker attended the emergency room at EKRH to seize Mr. McIntyre's clothing. When the police arrived, Mr. McIntyre was asleep in one of the beds in the emergency room. He awoke as the officers were gathering his things. He clearly noticed them. Both officers were in plain clothes. Cpl. Parker testified that she was likely wearing her sidearm and a police badge on her hip. Cpl. Parker could not recall what they said but was certain that she identified herself as a police officer. The officers seized Mr. McIntyre's shirt, pants, shoes, watch, and passport. Mr. McIntyre was polite and cooperative. Cpl. Parker confirmed in cross-examination that the police had no search warrant or other judicial authorization to seize Mr. McIntyre's things. Nor was Mr. McIntyre under arrest at the time.

Further Consultation with Counsel

- [64] At 2:18 p.m. on 8 February 2022, while the police were still at or near Mr. McIntyre's hospital bed, he received another call from counsel. Mr. Grauer brought the phone over to Mr. McIntyre at his bed, and Mr. McIntyre then went into a bathroom in the emergency department to speak with his counsel in private.

Mr. McIntyre's Transfer to the IPU

- [65] Some time prior to 2:45 p.m. on 8 February 2022, Mr. McIntyre was moved from the emergency room to the IPU. Ms. Diethelm, a psychiatric nurse, was on duty in the IPU at the time. She testified that someone escorted Mr. McIntyre into the IPU, although she could not recall whether the escort was a police officer, a hospital security guard, or another member of the hospital staff. Ms. Diethelm briefly showed Mr. McIntyre around the unit and told him where he could and could not go.

- [66] The IPU was a ten-bed unit, with a common room for activities. There were two beds in each room. The common room had a TV, dining area, a fridge, and some recreational equipment including a pool table and a foldable ping pong table. There was also a smaller TV room with a DVD player, a shelf of DVDs, and two reclining chairs. There was an area with a treadmill and a stationary bike. There was a small library. The IPU had an outside patio, although it was not open all the time. The unit had five private bathrooms. It had shower facilities. There were two "secure rooms" for acutely ill patients, but neither of these rooms were required or in use during the time that Mr. McIntyre was in the IPU. The doctors also had a private space for meeting one-on-one with patients, adjacent to the nurse's station in the centre of the unit.
- [67] The doors to the IPU were locked. Patients, whether admitted voluntarily or involuntarily under the Mental Health Act), were not free to come and go from the unit as they pleased. A patient could leave the unit when accompanied by a staff member. A patient could also leave the unit with a doctor's order, but such orders were only issued on a case-by-case basis for specific purposes such as attending appointments or shopping for necessities. A voluntary patient could choose to be discharged, but the discharge process was deliberate and took some time. While in treatment in the IPU, a voluntary patient's ability to come and go from the unit was restricted in the same way that an involuntary patient's movements were restricted.
- [68] After showing Mr. McIntyre around the IPU, Ms. Diethelm reviewed Mr. McIntyre's physical and mental health history. She also discussed patient confidentiality with Mr. McIntyre. Ms. Diethelm explained the "circle of care" concept, under which hospital staff were expected to keep Mr. McIntyre's medical information confidential and not discuss it with anyone outside of the patient's circle of care. Ms. Diethelm cannot recall exactly how she explained this to Mr. McIntyre. Mr. McIntyre identified Rick Strahl, whom Ms. Diethelm believed to be a lawyer who sometimes gave pro bono advice to mental health patients, as a person in his circle of care.
- [69] Ms. Diethelm completed a collection of documents including a "Mental Health and Substance Use Suicide Risk" form. Some of the information recorded in the form came from the patient and other information came from other sources. The document was admitted under *Ares v. Venner*, subject to limitations regarding the source of the underlying information. The suicide risk form indicated that Mr. McIntyre had voiced "vague suicidal thoughts" to the police and denied feeling "suicidal or having suicidal thoughts at this time". According to Ms. Diethelm, the reference to "vague suicidal thoughts" came from secondary sources but the reference to an absence of such thoughts "at this time" came directly from Mr. McIntyre. The form also stated, "Patient believes he is connected to the suspicious death of his neighbour" and he is "being investigated by RCMP". Ms. Diethelm testified that this particular information "came from other sources", but she then "confirmed it" with Mr. McIntyre. She added in her testimony, "I recall him telling me he had harmed someone".

- [70] Ms. Diethelm testified that some of Mr. McIntyre's answers were "a bit evasive". He did not say directly who he had harmed. Ms. Diethelm believed it was a woman somehow connected to his landlord, but she could not say where she got that information.
- [71] Mr. McIntyre also told Ms. Diethelm that he felt safe in the hospital and that he had told the police he might harm himself because he really just wanted to speak with a lawyer. When Ms. Diethelm asked Mr. McIntyre about his current mental state or mental health, Mr. McIntyre replied, "not great, I have nothing right now".
- [72] Ms. Diethelm reviewed Mr. McIntyre's medical history and his history of drug and alcohol abuse. Mr. McIntyre reported that he drank two 40-ounce bottles of alcohol per week and smoked marihuana on a regular basis.
- [73] In cross-examination, Ms. Diethelm admitted that in the course of her dealings with Mr. McIntyre on 8 February 2022 and through the balance of his two stays at the IPU, Mr. McIntyre was polite and cooperative, although he was reluctant to speak about certain things. He was "quite happy" to be staying in the IPU, felt safe there, and said he wanted "help with his issues".

Completion of Mental Health Act Forms

- [74] At 2:45 p.m. on 8 February 2022, Ms. Diethelm showed Mr. McIntyre the Form 4 Mental Health Act involuntary admission certificate that had been completed by Dr. Yu. She then completed a Form 13 "Notification to Involuntary Patient of Rights under the Mental Health Act". She got Mr. McIntyre to sign the form acknowledging he had been advised of his rights. Ms. Diethelm also completed a Form 15 "Nomination of Near Relative" and a Form 16 "Notification of Near Relative" for Mr. McIntyre. Mr. McIntyre nominated Rick Strahl as the person to be notified of any admission, discharge, or review panel proceeding. Mr. McIntyre signed the Form 15 document confirming that he had nominated Mr. Strahl as his near relative.
- [75] Ms. Diethelm also completed a Mental Health and Substance Use Mental Status Exam Report ("status report") for Mr. McIntyre. She explained that the patient's assigned nurse does these reports once per shift. The evidence reflects that some of the information in this report comes from the nurse who completes the form, and other information can be carried over from prior assessments. With regard to the data entered by the nurse on each assessment, it comes from dropdown menus, with some spaces for the nurse to add their own comments.
- [76] Ms. Diethelm's status report for the day shift on 8 February 2022 was admitted pursuant to *Ares v. Venner*, as were many other such reports completed by nurses caring for Mr. McIntyre over the duration of his stay in the IPU. In this particular report, Ms. Diethelm made an entry reflecting that Mr. McIntyre was "[r]eluctant to engage with staff" as he is afraid "he is being charged with a crime and his lawyer has instructed him to make no statements". Ms. Diethelm testified that Mr. McIntyre said this to her directly. Ms. Diethelm did not know whether Mr. McIntyre had in fact spoken with a lawyer, but this is what he

said. Under the heading "Perceptual Abnormalities" Ms. Diethelm recorded Mr. McIntyre's statement to her that sometimes he hears things, but "it's more like thoughts from my heart".

Further Assessment by Dr. Yu

[77] At some point after 2:45 p.m. on 8 February 2022, Dr. Yu met with Mr. McIntyre in the IPU. Dr. Yu could not recall whether it was in Mr. McIntyre's room or another private area of the unit. At this time, Mr. McIntyre presented as less perplexed. He reported sleeping well and stated that his anxiety had improved. However, he was still convinced that he may have committed crimes against others. He was able to give "more details", and Dr. Yu had not yet been able to obtain "collaterals" to determine whether Mr. McIntyre's belief was real or delusional. Dr. Yu testified that he was unable to recall which further details of the alleged or suspected crime Mr. McIntyre disclosed on this date, or on subsequent dates. In cross-examination, Dr. Yu added that when discussing the alleged crimes, Mr. McIntyre disclosed details without Dr. Yu having to ask.

Collateral Enquiries with RCMP

[78] At 5:32 p.m. on 8 February 2022, Cpl. Parker, now back at the Cranbrook RCMP detachment, received a call from an EKRH social worker, Ms. Jovanovich. Ms. Jovanovich said she was working with the psychiatrist, who wanted more information about the woman who lived across the street from Mr. McIntyre. Cpl. Parker referred Ms. Jovanovich to Sgt. Smart at MCU.

Mr. McIntyre's Dealings with IPU Staff

[79] At 8:20 p.m. on 8 February 2022, Ms. Wagner, another psychiatric nurse working in the IPU, observed Mr. McIntyre sitting in the day room. She had a conversation with him. Ms. Wagner had no independent recollection of the discussion, but she documented it in a progress note that was admitted under *Ares v. Venner*. At one point, Mr. McIntyre said "I don't know why you nurses are so nice to me". He was pleasant and polite throughout the conversation. He "did not want to talk about" why he was admitted. Mr. McIntyre reported having no "homicidal ideations toward anyone in the unit", stating that they did not have to worry as long as he was "detained".

[80] In cross-examination, Ms. Wagner agreed that she was not supposed to speak with Mr. McIntyre about his past behaviour. She believed this was a direction given by one of the treating physicians. Ms. Wagner said it would be very unusual for her to ask a patient about past misconduct, for example having hurt someone in the past. She does not recall that ever happening in her practice. Ms. Wagner did not have any recollection of ever saying to Mr. McIntyre that, if he did not speak to the hospital staff, they could not help him.

Dr. Shope's Initial Assessment: No Continuing Basis for Involuntary Treatment

- [81] On 9 February 2022, Dr. Shope met with Mr. McIntyre in the IPU. Dr. Shope could not recall where the meeting took place, but he believed it was likely in the interview room within the IPU. It was a 15 to 20 minute meeting, the purpose of which was for Dr. Shope to make an initial assessment of the criteria for involuntary admission under the Mental Health Act. Dr. Shope further explained in his voir dire testimony that his role in meeting with Mr. McIntyre on this occasion was to give Dr. Yu feedback on whether Mr. McIntyre was properly classified as an involuntary patient under the Mental Health Act. At this point, Dr. Yu was the primary physician and Dr. Shope was assisting or advising Dr. Yu. Dr. Shope was also aware that Dr. Yu was performing a locum at EKRH, that his locum would be ending soon, and that Dr. Shope was likely to take over care of Mr. McIntyre going forward.
- [82] Dr. Shope concluded that Mr. McIntyre did not meet all four criteria for involuntary treatment under the Mental Health Act. The first criterion is that the patient must have a mental health condition. Dr. Shope was unsure whether Mr. McIntyre had such a condition. The second criterion is that the patient must require treatment in an inpatient facility. In Mr. McIntyre's case, if he had a mental health condition, then it was of a sort that would indeed require inpatient treatment. The third criterion is that the patient presents a risk to the safety of himself or others. In this case, based on the information from the RCMP, Mr. McIntyre did pose such risks. The fourth criterion was that the patient must be unsuitable for or unwilling to undergo voluntary treatment. In this case, Mr. McIntyre indicated a willingness to remain in the IPU for voluntary treatment. Dr. Yu explained that this last factor was the decisive one in Mr. McIntyre's case. He was clearly willing to remain for voluntary treatment. This meant he could not be committed for involuntary treatment under the Mental Health Act.
- [83] In cross-examination, Dr. Shope added that at the time Mr. McIntyre was admitted to the EKRH, he was an involuntary patient, but within 48 hours Dr. Shope determined that he did not meet the criteria for involuntary treatment. From that point forward, Mr. McIntyre remained in the IPU on a voluntary basis. Dr. Shope also admitted that throughout his dealings with Mr. McIntyre: (i) Mr. McIntyre answered all of Dr. Shope's questions; (ii) he was a cooperative patient; and (iii) he expressed a continuing desire to remain in the hospital.

Further Assessment by Dr. Yu

- [84] After Dr. Shope met with Mr. McIntyre on 9 February 2022, Dr. Yu -- the treating physician, or "most responsible physician" -- met with Mr. McIntyre again. Dr. Yu was unable to say exactly how long this meeting lasted, but estimated it was about 30 minutes. Dr. Yu was aware that his colleague Dr. Shope had met with Mr. McIntyre earlier in the day. Dr. Yu was under the impression that Dr. Shope had completed a second certificate under the Mental Health Act, although it is clear from Dr. Shope's testimony, and from the hospital records, that Dr. Shope was not in fact prepared to certify Mr. McIntyre for involuntary treatment.

- [85] In any event, Dr. Yu's belief was that after both he and Dr. Shope had interviewed Mr. McIntyre on 9 February 2022, they reached consensus that, "for the time being", until they were able to obtain collateral information either confirming or refuting the factual accuracy of Mr. McIntyre's statements, they would continue to treat Mr. McIntyre for psychosis.
- [86] Dr. Yu's plan was to continue to pursue collateral information from the police. Dr. Yu also made a note that he instructed the social workers not to disclose information about Mr. McIntyre to the police due to patient confidentiality concerns.

Further Collateral Inquiries with RCMP

- [87] At 9:51 a.m. on 9 February 2022, Sgt. Smart received a message to call EKRH. Sgt. Smart returned the call six minutes later. He then spoke on the phone with Fiona Bradford, who identified herself as a social worker at EKRH. Ms. Bradford explained that Mr. McIntyre had been admitted as a patient at EKRH and she was calling at the direction or request of the treating psychiatrist. (Sgt. Smart was unable to say whether the treating physician was Dr. Shope or Dr. Yu). Ms. Bradford asked "if a woman had died of natural causes or in suspicious circumstances in Creston, and also in Kimberley". Ms. Bradford also told Sgt. Smart that Mr. McIntyre was in a secure area at the EKRH, he was "not going anywhere", and there was "no timeline" for his discharge. In response to Ms. Bradford's enquiry, Sgt. Smart stated that there had been a suspicious death in Creston. He said nothing about Kimberley, because the police had no information about anything untoward happening in that town. In cross-examination, Sgt. Smart testified that when Ms. Bradford asked about a death in Creston and in Kimberley, at the time he took it as one death, or one incident. In other words, he took Ms. Bradford to be inquiring about whether there was a suspicious death in Creston or in Kimberley, and not a question about whether there had been suspicious deaths both in Creston and in Kimberley.
- [88] At 10:21 a.m. on 9 February 2022, Cpl. Parker spoke on the phone with Ms. Bradford. In her voir dire testimony, Cpl. Parker could not recall who had called who. At any rate, Ms. Bradford indicated that she was making enquiries on behalf of Mr. McIntyre's treating psychiatrist, who wanted further information about the incident or incidents in either Creston or Kimberley. Cpl. Parker said she had no awareness of an incident in Kimberley. Cpl. Parker wrote in her notebook that the doctors were requesting more information on a death in Creston and another in Kimberley. In cross-examination, Cst. Parker agreed that after this call the police had a concern about public safety in Kimberley. It could have been that someone in Kimberley was at future risk of harm, or that someone in Kimberley had already been harmed. Cpl. Parker agreed that the information from the social worker included some reference to a potential death in Kimberley, and this enquiry might have related to an incident of past harm. Cpl. Parker agreed that Cpl. Beggs at MCU wanted information about what, if anything, happened in Kimberley.

- [89] The EKRH records do not contain any documentation of a phone call from Ms. Bradford to anyone at the RCMP on 9 February 2022. This is despite the fact that the records do contain many documented contacts between Ms. Bradford and the RCMP on other dates. In her trial testimony, Ms. Bradford admitted to having a "vague recollection" of one of the psychiatrists giving her a phone number and the name of a police officer and asking her to contact the RCMP. Ms. Bradford could not remember which doctor it was but added that it must have been Dr. Yu, Dr. Shope, or Dr. Khosroshahy. Ms. Bradford also admitted more generally that it was possible she set up an arrangement with the police in which she would advise them of the status of the investigation every few days.
- [90] On the whole of the evidence -- including multiple documented instances when, on the instructions of the staff at the IPU, Ms. Bradford shared with the police details of Mr. McIntyre's status in the IPU, and the evidence that Dr. Yu's initial care plan for Mr. McIntyre included getting social workers to contact the police in an effort to obtain further collateral information -- I am satisfied that Ms. Bradford did in fact phone the police on this occasion.

Police Attendance at EKRH For Further Discussion with Hospital Staff

- [91] At 2:20 p.m. on 9 February 2022, acting on instructions from officers at MCU who were now directing the investigation into the Howe homicide, Cpl. Tent and Cpl. Parker attended EKRH intending to speak with hospital staff about Mr. McIntyre's status. Sgt. Smart gave Cpl. Tent the contact names of three people at the hospital: Dr. Shope, Dr. Yu, and Fiona Bradford.
- [92] Cpl. Tent, Cpl. Parker, Dr. Yu, and Dr. Shope all testified about this meeting. It is quite clear from the testimony of all four witnesses that the police and treatment providers had divergent interests, and that neither group was willing to tell the other everything they knew about Mr. McIntyre.
- [93] From the perspective of the doctors, they recognized that they had an ethical obligation to protect the confidentiality of anything that Mr. McIntyre told them in the course of his treatment. At the same time, the doctors wanted to obtain information from the police about the status of their investigation, to either confirm or refute the factual accuracy of what Mr. McIntyre was telling them. On the one hand, if Mr. McIntyre's statements were "reality-based" then the doctors could rule out the possibility of psychotic delusions. On the other hand, if the doctors were able to determine through their enquiries with the police that Mr. McIntyre's statements were not factually accurate, this would be a strong indication that his statements were the product of delusion or psychosis.
- [94] From the perspective of the police, they wanted to find out what Mr. McIntyre had said to the doctors and other hospital staff. Cpl. Parker was particularly interested in learning more about what the social worker may have been referring to regarding Mr. McIntyre's statements about causing harm to someone in Kimberley. At the same time, the police were reluctant to discuss the status of their investigation, including what they knew about Mr.

McIntyre's connection to the death of Ms. Howe, because they did not want to compromise their ongoing investigation. Among other things, they did not want any information about the status of their ongoing investigation to get back to Mr. McIntyre.

- [95] With respect to exactly who said what and in what order, none of the witness accounts were consistent. I would not attribute the conflict in testimony to a lack of truthfulness or veracity on the part of any of the witnesses. I am satisfied that they all did their best to give an accurate account of what occurred. Rather, this is an instance where the witness accounts varied based on differing recollections of what occurred, differing perspectives or interests, and to some extent on the fact that the witnesses were talking at cross purposes during the meeting.
- [96] It is clear from the evidence of Cpl. Tent and Cpl. Parker, who testified with the aid of contemporaneous notes that included specific entries at specific times, that the meeting began at 2:28 p.m. on 9 February 2022 in Dr. Yu's office, and that Dr. Shope did not join the meeting until 2:50 p.m.
- [97] I accept the testimony of the two police witnesses that Dr. Yu told them Mr. McIntyre was being held in the IPU for up to 30 days, and that the doctors were prepared to notify the police when Mr. McIntyre would be discharged.
- [98] I accept the testimony of the two doctors that they made it clear to the police there were limits on what they could disclose about what Mr. McIntyre had said to them, in order to respect patient confidentiality.
- [99] The most contentious aspect of the meeting had to do with what, if anything, the doctors disclosed about Mr. McIntyre's reference to harming someone in Kimberley. For his part, Cpl. Tent testified that the police had no prior knowledge of anything occurring in Kimberley and that Dr. Yu brought this up out of the blue. I do not accept that as accurate. It appears that prior to this meeting, Cpl. Tent was not aware of Mr. McIntyre making any statements about harming someone in Kimberley, but Cpl. Parker was clearly aware of this disclosure, based on her phone conversation with Ms. Bradford earlier in the day, and her subsequent phone conversation with Cpl. Beggs in which he instructed or directed her to find out more about harm befalling someone in Kimberley. I accept Cpl. Parker's testimony that she went into the meeting seeking to obtain further details about this from the doctors.
- [100] With regard to what was said about Kimberley at the meeting, Dr. Yu was insistent in his testimony that he did not tell the police anything Mr. McIntyre had disclosed to his treatment providers about harming someone in Kimberley. Indeed, Dr. Yu's recollection was that he only learned about the social worker's disclosure of this detail to the police during the meeting, that he immediately recognized it as a breach of confidentiality, and that after the meeting he took prompt steps to address the apparent breach of confidentiality. However, I accept the testimony of both Cpl. Tent and Cpl. Parker that at the meeting, Dr. Yu effectively confirmed Mr. McIntyre's statement about targeting someone in Kimberley. The phrase Cpl. Tent used in his testimony was that Dr. Yu said Mr. McIntyre

"target[ed] a friend in Kimberley" but it was "unknown where or when". This is the same phrase that Cpl. Parker used in her testimony.

- [101] My factual conclusion, on the whole of the evidence, is that when Cpl. Parker asked Dr. Yu for more information about Mr. McIntyre harming someone in Kimberley, Dr. Yu responded by effectively confirming that Mr. McIntyre had made a statement about "target[ing] a friend in Kimberley", although it was "unknown where or when" he had done so, and that Dr. Yu then made it clear that he was not prepared to provide any further information about this topic, or anything else that Mr. McIntyre said to the treatment providers. I accept Dr. Yu's testimony that he expressly told the officers if they wanted to get more information about Mr. McIntyre's statements to the treatment team, they would have to obtain a search warrant or subpoena for Mr. McIntyre's medical file.
- [102] Finally, I accept the testimony of the two police witnesses, supported by the testimony of Dr. Shope, that the doctors said they wanted more detail about the police investigation, to assist in ascertaining whether the things Mr. McIntyre was saying to his care providers were reality-based or delusional. I further accept the testimony of all three of these witnesses that, during this particular meeting, the two officers were unwilling to provide any detail about the status of the police investigation, and in particular about whether there was any connection between Mr. McIntyre and the death that had occurred in Creston.

Aftermath of the 9 February 2022 Meeting Between RCMP and EKRH Staff

- [103] With regard to the aftermath of the meeting, I accept Dr. Yu's testimony that after learning about the apparent breach of confidentiality that occurred when Ms. Bradford phoned the police to ask about whether anyone had been harmed in Kimberley, he had a meeting with hospital management. After discussions, phone calls, and emails, Dr. Yu determined that this was a "possible breach" of patient confidentiality. In the result, the hospital management team had a discussion with the risk assessment team about not providing further information to the police. It was also determined that they would have to notify Mr. McIntyre about the confidentiality breach.
- [104] Later on 9 February 2022, Dr. Yu met again with Mr. McIntyre and informed him about the breach of patient confidentiality that occurred when members of the treatment team made a disclosure to the police about a possible second victim at a different location. This occurred during a private conversation between Dr. Yu and Mr. McIntyre that lasted about 20 to 30 minutes. In cross-examination, Dr. Yu added that during the meeting with Mr. McIntyre, he explained that a social worker had advised the police about a body or a death in Kimberley. Dr. Yu could not recall precisely what he said to Mr. McIntyre in explaining the concept of confidentiality and how it had been breached.

[105] From the police perspective, I accept the testimony of Cpl. Parker, Cpl. Tent, and Cpl. Beggs that the information police received during the meeting with Dr. Yu and Dr. Shope on 9 February 2022 did not give any basis for expanding the investigation to include any offence committed by Mr. McIntyre in Kimberley. What little information the police received from Dr. Yu was ambiguous, and at the time they did not have any independent information about any crime having been committed in Kimberley.

Police Advise Doctors that Mr. McIntyre is a Person of Interest

[106] At 3:30 p.m. on 9 February 2022, Cpl. Parker had another phone conversation with Cpl. Beggs at MCU in Kelowna. In that conversation, Cpl. Beggs authorized Cpl. Parker and Cpl. Tent to return to the police station to inform the doctors that Mr. McIntyre was a "person of interest" in relation to the sudden death that had occurred in Creston.

[107] At 4:14 p.m. on 9 February 2022, Cpl. Parker and Cpl. Beggs returned to EKRH where they had another meeting with Dr. Yu and Dr. Shope. Cpl. Tent informed the doctors that Mr. McIntyre was a "person of interest" in a "homicide investigation" in Creston. Cpl. Tent also explained the difference between a person of interest and a suspect. Dr. Yu testified in the voir dire that the distinction was important to him because if Mr. McIntyre was determined to be a suspect, and not merely a person of interest, this might have given the doctors a firmer indication that Mr. McIntyre's statements were reality-based. However, since the police would only characterize Mr. McIntyre as a person of interest, the doctors were not in a position to confirm the factual accuracy of his statements, and as a consequence they continued to proceed on the basis that he was, or at least could be, delusional.

[108] There is no evidence that the police had any real appreciation of how the doctors would react to their characterization of Mr. McIntyre as person of interest rather than a suspect. It certainly was not part of any police plan or scheme to keep Mr. McIntyre in the hospital.

Further Interaction between Mr. McIntyre and EKRH Staff

[109] On 9 February 2022 at 4:35 p.m., Ms. Griffin, a crisis response social worker at EKRH, made a progress note describing a conversation she had with Mr. McIntyre in the IPU. Ms. Griffin was enquiring about helping Mr. McIntyre with a social assistance application. Mr. McIntyre said he did not need any help because he "is or will be incarcerated." He pointed to his belongings on a table in front of him and said they were the only things he would need. Mr. McIntyre "did not want to elaborate any further".

[110] On 9 February 2022 at 6:13 p.m., Ms. Pham, a psychiatric nurse at EKRH, made a progress note documenting a conversation with Mr. McIntyre in which he reported having no family, no friends, and no supports. He stated that he had been alone for many years, but not lonely. He said he was "afraid" that if he was "free" he would "harm others", and that he would "lose control". He said people who have "wronged" him "deserve to be harmed although he does not want to harm them". Mr. McIntyre also said he had been told that,

once discharged from the psych unit, he will be sent to jail, although he "would not elaborate further on why and who told him same".

- [111] On 9 February 2022 at 9:00 p.m., Dr. Ma, a hospitalist, assessed Mr. McIntyre for encephalopathy, that is, irregular brain function. Dr. Ma performed a complete neurological and physical examination of Mr. McIntyre and noted no evidence of encephalopathy.
- [112] On 10 February 2022 at 12:00 a.m., Ms. Wagner, a psychiatric nurse at EKRH, issued a Form 17 Mental Health Act "Notification to Near Relative (Discharge of Involuntary Patient)" advising Mr. McIntyre's designated near relative, Mr. Strahl, that Mr. McIntyre had been discharged as an involuntary patient under the Mental Health Act. Ms. Wagner issued the form on behalf of Ms. DaSilva, a hospital administrator. Ms. Wagner did not speak personally with Ms. DaSilva about this form. She simply completed the form to assist another nurse on duty with the paperwork. Ms. Wagner explained in her trial testimony that a patient can be discharged from treatment on an involuntary basis under the Mental Health Act, but then remain in the IPU for treatment of a psychiatric condition on a voluntary basis.
- [113] On 10 February 2022 at 11:40 a.m., Cpl. Parker spoke with Dr. Yu at the hospital. She asked Dr. Yu if and how he recorded his conversations with Mr. McIntyre. Dr. Yu responded that he made no recordings, but that his conversations with Mr. McIntyre would be documented in handwritten notes kept in the hospital file.
- [114] In a mental status exam report dated 10 February 2022 at 8:05 p.m., Ms. Diethelm noted that Mr. McIntyre's communication was "guarded" because he "did not want to say anything he shouldn't say that may be used against him". In cross-examination, Ms. Diethelm agreed that this note was a paraphrase of what Mr. McIntyre said directly to her at some point, although she could not recall what specific date it might have been. Later in cross-examination, Ms. Diethelm said that throughout his stay at the IPU, Mr. McIntyre presented as "guarded". When she asked him how he felt, he would often reply that he was feeling "anxious" or "upset". When Ms. Diethelm asked him if he wanted to say more about that, Mr. McIntyre would say he could not talk about it. Ms. Diethelm said this was a typical interaction of the sort that she had with Mr. McIntyre on many of her shifts at the IPU. Ms. Diethelm agreed that he was generally happy to have social conversation or chit chat but was reluctant to say much about how he was thinking and feeling.
- [115] Ms. Diethelm further agreed that the circumstances leading up to Mr. McIntyre's admission was a "subject of interest" to her because in her view it would be relevant to his treatment. Ms. Diethelm agreed that, in her testimony at the preliminary inquiry, she expressed the view that Mr. McIntyre was being "deliberately evasive" in declining to give more information about the circumstances leading up to his admission. When pressed in cross-examination, Ms. Diethelm did not agree that the circumstances leading up to Mr. McIntyre's admission was the topic of greatest interest to her from the outset. She explained that she was interested in everything that was relevant to "his state of mind" and "mental

health status". Ms. Diethelm had no recollection of ever telling Mr. McIntyre that giving more detail about what led to his admission would make it easier to treat him. Ms. Diethelm agreed that she had heard from some of the other medical staff that there was a directive not to ask Mr. McIntyre specifics about the circumstances leading to his admission. Ms. Diethelm said this was not a doctor's order, because if it had been, it would have been put in writing and formally communicated to everyone on the care team.

- [116] On 11 February 2022, Dr. Yu had a further 20-30 minute consultation with Mr. McIntyre. Mr. McIntyre continued to question whether his belief about the murders was "real or delusional". He was "perplexed". It was not until the day after the deaths that Mr. McIntyre developed more details about his involvement. In exploring where Mr. McIntyre might have obtained the details, Mr. McIntyre disclosed that he "flipped through" the police officer's notebook when the officer was out of the room, which might have given him additional detail about the location of the woman's body. Mr. McIntyre was still in treatment on a voluntary basis. There was no suicidal ideation. Dr. Yu's differential diagnosis included possible psychosis and possible psychotic depression. Dr. Yu testified that 11 February 2022 was the last date that he treated Mr. McIntyre. His locum at EKRH had concluded. Primary physician responsibility for Mr. McIntyre passed to another psychiatrist, either Dr. Shope or Dr. Khosroshahy.
- [117] On 11 February 2022 at 12:30 a.m., Ms. Klynsoon, a psychiatric nurse in the IPU, made a progress note documenting a conversation she had with Mr. McIntyre some time after lunch. Mr. McIntyre said he was feeling "numb" and had "nothing going on in his head". He said he wanted to "block it out" and "doesn't want to feel". He described his mood as 2 out of 10, but did not see any way of committing suicide in the IPU. When Ms. Klynsoon asked Mr. McIntyre if he was having any auditory hallucinations, he responded that he had something "like a voice in his soul".
- [118] At 1:38 p.m. on 11 February 2022, Dr. Yu had a phone conversation with Cpl. Parker. Dr. Yu testified that during this phone call he was unable to get any further information from the RCMP about the status of their investigation. Dr. Yu reminded Cpl. Parker that if they required information about Mr. McIntyre, they were to "go through the standard process". I interpret this to be a reference to Dr. Yu's earlier comment that the police would have to get a search warrant or subpoena to access Mr. McIntyre's medical file. For her part, Cpl. Parker testified that during this phone call, Dr. Yu advised that nothing had changed with respect to Mr. McIntyre's status at the hospital. He was not being released at that time. Dr. Yu asked if anything suspicious had occurred in Kimberley and Cpl. Parker responded that there was no information about anything having happened in Kimberley.
- [119] At 8:05 p.m. on 11 February 2022, Ms. Diethelm made a progress note indicating that in the course of her dealings with Mr. McIntyre in the IPU on this date, he continued to make "vague" or "oblique" references to "something he might have done that the police are interested in, but not wanting to talk about it".

- [120] Meanwhile, some time during the day on 11 February 2022, Cpl. Beggs and two other RCMP officers executed a search warrant on Mr. McIntyre's car, which by that time had been towed to the RCMP Southeast District Traffic Section impound lot in Cranbrook. In the course of the search, the officers located a firearm, a Colt .22 calibre revolver, in the trunk wrapped in a towel.
- [121] On 12 February 2022, Dr. Shope -- who had now become Mr. McIntyre's treating psychiatrist -- met with Mr. McIntyre for the second time. In the course of the meeting, which lasted 30 to 45 minutes, Mr. McIntyre stated that:
- a) he was still convinced that he shot his female neighbour (Julia) while his landlord (Frank) was out;
 - b) he also went to Kimberley where he shot a former friend, "David Creamly", who had betrayed him in the past;
 - c) he then went to the police station and turned himself in because it was the right thing to do;
 - d) the gun he used to do the shootings was in his car, which was in the possession of the RCMP; and
 - e) he was hearing voices, asking him to yell out. Apart from that the voices did not tell him anything.
- [122] Dr. Shope observed that, from his perspective, a lot of what Mr. McIntyre said was still uncertain or "in the air". Dr. Shope explained in his testimony that the treatment team was still trying to tease out what was reality-based and what was not; they lacked collateral information. Mr. McIntyre did not present as reluctant to share any of this information.
- [123] With regard to exactly how the information came out during the meeting, Dr. Shope explained that some of the details, for example the name of the neighbour and the name of the landlord, came from follow up questions posed by Dr. Shope. In cross-examination, Dr. Shope said that he would generally start with open-ended questions, and then do follow-up, like asking specifically: "Where did you get the weapon?" The purpose was to "get clarity" to "determine whether the story made sense". At the time, Dr. Shope was concerned about whether the statements were "reality-based". His goal was to determine through collateral verification if Mr. McIntyre's statements were reality-based. This in turn would allow Dr. Shope to determine whether or not Mr. McIntyre had psychosis.
- [124] At 9:15 p.m. on 12 February 2022, Ms. Klynsoon wrote a progress note describing a conversation she had with Mr. McIntyre in the TV room at the IPU. Mr. McIntyre said he did not deserve to be treated so well. He wondered how long he would be in the IPU and said he was feeling better than when he first arrived. He had some anxiety about the future and said he might call his lawyer on Monday.

[125] On 13 February 2022, Dr. Shope met with Mr. McIntyre again. The meeting lasted 15 to 20 minutes. Dr. Shope's notes of this meeting reflect that:

- a) Mr. McIntyre was still under the "delusional belief" that he killed his neighbour and his friend;
- b) when informed that there had been no report of a murder in Kimberley, Mr. McIntyre responded with apparent shock or perplexity. This was Dr. Shope's impression based on the look on Mr. McIntyre's face at the time;
- c) Mr. McIntyre said the gun he used was in his vehicle, which had been impounded by the police. (Dr. Shope testified that one of the things he wanted to know about after this meeting was whether the gun was real); and
- d) Mr. McIntyre complained of being tired but displayed no signs of fatigue or difficulty communicating.

[126] In cross-examination, Dr. Shope agreed that his notes from the 13 February 2022 interaction include a heading called "plan", under which Dr. Shope made note to have a social worker contact the police to get more detail or to find out if there was a gun in Mr. McIntyre's car.

[127] On 15 February 2022, Dr. Shope again met with Mr. McIntyre. In the course of the meeting, Mr. McIntyre stated the following:

- a) his mood was fine, but he was tired and was having nightmares, although these had been ongoing for years;
- b) he had a list of people he intended to harm, including a particular individual (whom Mr. McIntyre identified by name) who had introduced him to cocaine;
- c) he denied any suicidal ideation; and
- d) it would be wrong to release him into the community because he had a list of people he intended to harm.

Meeting Between RCMP and Doctors on 15 February 2022

[128] At 10:10 a.m. on 15 February 2022, Cpl. Tent returned to the EKRH, seeking to speak with Dr. Yu or Dr. Shope. Cpl. Tent's testimony was that he wanted to check up on Mr. McIntyre's status at the hospital before going away on leave. He was able to meet with Dr. Shope. Dr. Shope also gave testimony about this meeting. Considering all of the evidence together, I find that the meeting unfolded as follows:

- a) Dr. Shope related that Mr. McIntyre was stable and no longer considered a threat to himself or others.

- b) Dr. Shope informed Cpl. Tent that if the police wanted to get records from the hospital, there was a form they needed to fill out to "get things started". Cpl. Tent's understanding was that the form had to be filled out in order to ensure that the records were retained and not destroyed.
 - c) Dr. Shope recounted Mr. McIntyre's assertion that the police had impounded his vehicle, which the officer confirmed.
 - d) Dr. Shope enquired if a gun had been located in the vehicle. The officer would not answer directly but did say a weapon had been located in the vehicle.
 - e) Dr. Shope enquired about the particular house in which the body had been discovered in Creston. Cpl. Tent "acknowledged" that a body had been found in the house of Mr. McIntyre's landlord in Creston.
- [129] Dr. Shope's notes refer to this conversation under a heading that read "collateral". The notes present as if Dr. Shope was endeavouring to gather information from the officer to verify or refute aspects of what Mr. McIntyre had told the doctor. Dr. Shope testified that both he and the officer were being circumspect about what they would say. The officer appeared to be "cautious about disclosing details" because they were "in the middle of an investigation".
- [130] When asked in direct examination whether he had any concerns about disclosure of confidential patient information to the police, Dr. Shope replied that it was a "tricky issue". He was trying to find out whether or not what Mr. McIntyre was saying to him was reality-based or delusional and the only way he had to do that was through collateral information. Dr. Shope also indicated that he was permitted to disclose information about risks to others in the community, or information relevant to the safety of the community.

Dr. Khosroshahy's Assumption of Treating Psychiatrist Role

- [131] On or about 16 February 2022, Dr. Khosroshahy took over from Dr. Shope as Mr. McIntyre's treating psychiatrist.
- [132] Dr. Khosroshahy had his first meeting with Mr. McIntyre on 16 February 2022. In his voir dire testimony, he could not recall where the meeting took place but believes it must have been in the private interview room in the IPU. Dr. Khosroshahy recalled that during the assessment, Mr. McIntyre said he was "quite sure" he had "murdered that woman". Beyond this, Dr. Khosroshahy had little or no independent recollection of what was said during the assessment. The doctor did, however, dictate some notes about what occurred at the assessment. In his voir dire testimony Dr. Khosroshahy said he was "95% confident" in the accuracy of his hospital notes, which I ruled admissible pursuant to *Ares v. Venner*.
- [133] Dr. Khosroshahy's notes, dictated at 6:13 p.m. on 16 February 2022, reflect that:

- a) Mr. McIntyre initially said, "I believe I did it". Dr. Khosroshahy asked for clarification and Mr. McIntyre confirmed that he when he said, "I believe I did it", he was referring to the murder of the woman. Dr. Khosroshahy asked Mr. McIntyre to clarify what he meant by using the term "I believe". in response to which Mr. McIntyre personally did not attach much significance to the term "believe" in this context. Mr. McIntyre was "quite sure" he murdered the woman.
 - b) Mr. McIntyre went on to explain the background of his dealings and conflict with the woman. This portion of Dr. Khosroshahy's note starts with the phrase, "He told me that they had a lot of conflict recently". Two summers ago, Mr. McIntyre and the deceased woman had a disagreement about a dog that was not on a leash. Mr. McIntyre complained to the landlord, Frank, three times. He went to the town counsel to complain about it, but they would not help because it was outside of city limits. Mr. McIntyre then went to the police about it, but after looking into it they said there was nothing they could do. Since then, the woman had been saying bad things about him all around town.
 - c) During the meeting, Mr. McIntyre presented as calm, but he got somewhat agitated when discussing the history of his conflict with the deceased woman. Dr. Khosroshahy observed no notable signs of anxiety, although Mr. McIntyre did appear quite angry about the woman.
- [134] In cross-examination, Dr. Khosroshahy testified that he dictated his notes some time after the events in question. He did not make any notes during the interview itself. His dictated report was based on his memory of the events earlier in the day. Even still, Dr. Khosroshahy maintained that the phrases that he put in direct quotes were exact words uttered by Mr. McIntyre. Dr. Khosroshahy said Mr. McIntyre was "talkative", although the doctor was the one who "initiated the conversation" with Mr. McIntyre.
- [135] At the preliminary inquiry, Dr. Khosroshahy testified that he could not actually remember whether Mr. McIntyre ever told him directly that he had killed someone. The doctor could not remember "whether he told me that". Some of the information in Dr. Khosroshahy's reports came from his review of notes written by Dr. Shope and Dr. Yu. Dr. Khosroshahy stated at the preliminary inquiry that in his own mind, what Mr. McIntyre told him directly was "muddled". In cross-examination at trial, Dr. Khosroshahy explained that his memory was "muddled" because there were three different psychiatrists, daily meetings, and a lot of discussions, therefore it was "not clear" in his head what Mr. McIntyre said to him personally.
- [136] Dr. Khosroshahy's notes went on to describe the opinions or diagnoses of his two colleagues (Dr. Shope and Dr. Yu), as to whether, on the one hand, Mr. McIntyre was in some form of psychosis or whether, on the other hand, he had actually killed the woman. For his part, Dr. Khosroshahy had not yet formed a diagnosis. Dr. Khosroshahy considered that it might be most appropriate for Mr. McIntyre to be in a forensic psychiatric unit, but for the time being he was being treated at EKRH IPU as a voluntary patient.

Further Interactions Between Mr. McIntyre and Hospital Staff

- [137] Ms. Wagner made a progress note dated 17 February 2022 at 8:26 p.m., describing a conversation with Mr. McIntyre in the TV room at the IPU. Mr. McIntyre said he was feeling depressed. He denied any thoughts of self harm. He said he had thoughts of harming others, but "reassured" Ms. Wagner that he had no thoughts of harming anyone "around here".
- [138] In a note dated 18 February 2022, Dr. Khosroshahy documented, however briefly, his assessments of Mr. McIntyre on 17 and 18 February 2022. Dr. Khosroshahy detected no formal thought disorder or any perceptual disturbance, and no delusional ideas. Dr. Khosroshahy considered it more or less impossible to determine whether or not Mr. McIntyre's statements about having committed "two murders" were delusional. Dr. Khosroshahy's notes recorded his view at the time that "a period of assessment in a forensic psychiatric unit" might shed light on the issue.

Conversation Between Dr. Khosroshahy and Cpl. Parker on 18 February 2022

- [139] The same note dated 18 February 2022 also contained an account of a phone call Dr. Khosroshahy had with Cpl. Parker on that date. I did not admit this portion of the note under *Ares v. Venner*, because in my view it did not relate to Dr. Khosroshahy's actual treatment of Mr. McIntyre. However, after hearing testimony about the note and submissions as to admissibility, I admitted this particular entry under the doctrine of past recollection recorded. I will discuss the basis for that ruling later in these reasons.
- [140] To continue with the content of the note, it reflects that Cpl. Parker asked Dr. Khosroshahy about Mr. McIntyre's status. Dr. Khosroshahy responded that he had no plans to discharge Mr. McIntyre at the time. The doctor's note of the conversation continued as follows:

In terms of his potential safety risk to others, he is as serious as it might get. He is claiming that he has murdered two people and there is this list of potential people that he is thinking of possibly murdering. With that profile, whether I am convinced that he has a mental illness or not, at least at this point in time, I am not willing to discharge him. I explained that the best option in my opinion, would be for the RCMP to direct him down the forensic psychiatric route.

- [141] In his voir dire testimony, Dr. Khosroshahy endorsed the aforementioned passage as an accurate account of his conversation with Cpl. Parker. Dr. Khosroshahy went on to explain that in his view, Mr. McIntyre "belonged in a forensic psychiatric hospital", but there was no such facility in Cranbrook. Dr. Khosroshahy believed that the forensic psychiatric hospital was located in the Vancouver area. He did not believe he had the ability to place Mr. McIntyre in a forensic psychiatric facility but was hopeful that the police would be able to affect that outcome. He referred to various forensic psychiatric facilities suitable for Mr. McIntyre but explained that "this route was only available if a person is charged or convicted by a court". In Dr. Khosroshahy's mind, placing Mr. McIntyre in a forensic psychiatric institution was "the right thing to do", but Dr. Khosroshahy did not have the

ability to do so.

- [142] Dr. Khosroshahy's 18 February 2022 note went on to reflect that Cpl. Parker was not in a position to say what the police would do if Mr. McIntyre were discharged, other than that they would attempt to interview him. Further, the police were evidently not prepared to interview Mr. McIntyre while he was still in the IPU, even if on a voluntary basis, due to concerns that the courts might consider any resulting statement to have been taken "under some form of duress as he is in a psychiatric confined area".
- [143] When asked in his testimony in chief how he reconciled his competing concerns about Mr. McIntyre, Dr. Khosroshahy responded that "it was a problem" because he was "struggling with a diagnosis" while at the same time considering the requirements of the Mental Health Act. Dr. Khosroshahy felt he was in a "dilemma" about how to reconcile thinking that Mr. McIntyre may not have a mental illness with the possibility of having to apply the Mental Health Act should he decide to leave. Later in his testimony in chief, Dr. Khosroshahy said he never expressed to Mr. McIntyre any concerns about discharging him from the hospital. The doctor explained that it was unnecessary to discuss this with Mr. McIntyre because he was in the hospital on a voluntary basis.
- [144] For her part, Cpl. Parker testified that she spoke with Dr. Khosroshahy on 18 February 2022 at 10:59 a.m. Cpl. Tent had asked Cpl. Parker to make the call. Cpl. Parker was seeking an update on Mr. McIntyre's status. In the phone call, Dr. Khosroshahy advised that he was now the treating psychiatrist, and Mr. McIntyre was "not going anywhere on his watch". Dr. Khosroshahy referenced Mr. McIntyre having other people on his target list or having a target list, and the doctor suggested a forensic psychiatric assessment of Mr. McIntyre "through the courts". At 11:00 a.m. on 18 February 2022, Cpl. Parker passed this information on to Cpl. Beggs at MCU.

Further Interactions between Mr. McIntyre and Hospital Staff

- [145] Dr. Khosroshahy met with Mr. McIntyre for further assessments on 19, 20, 21, and 22 February 2022. Dr. Khosroshahy observed no evidence of perceptual disturbances, delusional beliefs, or psychopathy. On 22 February 2022, the doctor decided to stop Mr. McIntyre's daily dose of olanzapine (an anti-psychotic), on the basis that he saw no signs of psychopathy and therefore considered the medication unnecessary.
- [146] Over the same time frame, Mr. McIntyre continued to make comments to IPU staff about his current state of mind. At 11:45 a.m. on 19 February 2022, Ms. Klynsoon created a progress note documenting conversations with Mr. McIntyre that morning. Mr. McIntyre's "only voiced concern" was a belief that the police could pick him up at any time. On 20 February 2022 at 10:10 p.m., Ms. Pham made a progress note referencing a conversation with Mr. McIntyre in which he said he had thoughts of hurting people. He said the thoughts were his own and not voices. Mr. McIntyre stated, "I'm happy I'm here", and "If I wasn't here, I might do something bad". Mr. McIntyre said he is "taking precautions" not to hurt

other people by "staying in the hospital".

[147] Meanwhile, police were continuing in their efforts to obtain a production order for Mr. McIntyre's medical records. On 19 February 2022, Cpl. Beggs spoke on the phone with an EKRH staff member to confirm that Mr. McIntyre's medical records were present. Cpl. Beggs advised that the police would be proceeding with an application for a production order. At 3:38 p.m. on 22 February 2022, Cpl. Parker received a call from a clerk at the IPU, calling on behalf of Dr. Khosroshahy, to confirm that the police had received all of the "paperwork" from the hospital. Cpl. Parker passed this information on to Cpl. Beggs.

[148] On 23 February 2022, Cpl. Beggs spoke on the phone with Dr. Khosroshahy, who advised that Mr. McIntyre was being assessed day-to-day. He was not taking any medications. He was sleeping a lot. Dr. Khosroshahy felt that Mr. McIntyre did not have a health issue, but he wanted to consult with Dr. Shope.

Dr. Shope's Resumption of Treating Psychiatrist Role

[149] It appears that on or about 23 February 2022, Dr. Shope resumed the role of Mr. McIntyre's treating psychiatrist. Dr. Shope met with Mr. McIntyre at least once per day from 23-to 27 February 2022. In particular:

- a) On 23 February 2022, Dr. Shope observed no change in Mr. McIntyre's condition. The doctor noted they were "awaiting feedback from RCMP". In his voir dire testimony, Dr. Shope explained that "feedback" from RCMP could help explain what was going on with Mr. McIntyre. In other words, he was still seeking "collateral information".
- b) On 24 February 2022, Mr. McIntyre disclosed "thoughts of harming some people from his past", although he did not currently have access to those people, had no contact with them for years, and did not know where any of them currently resided. Dr. Shope noted that a plan was taking shape to discharge Mr. McIntyre the following Tuesday (which would have been 1 March 2022). In his trial testimony, Dr. Shope explained that it was becoming clear to him, through personal conversations with Mr. McIntyre and feedback from nurses, that there was "no psychopathy being observed".
- c) On 25 February 2022, Dr. Shope noted that Mr. McIntyre gave no indication of experiencing hallucinations or persisting delusions. When Dr. Shope informed Mr. McIntyre about the plan to discharge him the following Tuesday (1 March 2022), Mr. McIntyre responded that the police would likely pick him up upon his discharge.
- d) On 26 February 2022, Dr. Shope once again discussed the pending discharge with Mr. McIntyre. At this point, Mr. McIntyre said he has access to some of those on his list of people to harm. Mr. McIntyre also said he had been or would be in communication with lawyer Rick Stahl, and said he still expected to be picked up by the RCMP upon his discharge.

- e) On 27 February 2022, Mr. McIntyre expressed the opinion that the decision to discharge him on 1 March 2022 was "probably not right". Mr. McIntyre spoke about some of the people on his "to harm list". Mr. McIntyre also said that upon his release, he intended to visit a friend in Kimberley, and then report to the police. He believed he was a danger to others, and the right thing for him to do was to report himself to the police and accept the "rightful consequences".
- [150] In his testimony, Dr. Shope explained that by 27 February 2022 he had concluded that any risk Mr. McIntyre posed to others was a policing issue, not a mental health issue. Dr. Shope cannot recall how he explained this to Mr. McIntyre, although he did remember Mr. McIntyre himself saying that if he was a danger to others, the right thing for him to do would be to report himself to the police and "face the rightful consequences". Dr. Shope maintained the view that Mr. McIntyre should be discharged as planned on 1 March 2022.

Further Communication Between Hospital Staff and Police

- [151] Over this time frame, hospital staff continued to communicate with the police with regard to Mr. McIntyre's status. At 12:14 p.m. on 24 February 2024 Ms. Bradford recorded in a progress note that she had been "asked by psychiatry" to connect with RCMP to advise of discharge planning for Mr. McIntyre. Ms. Bradford contacted Cpl. Beggs at MCU in Kelowna, advising him that the current plan was to discharge Mr. McIntyre from the IPU on 1 March 2022, and that Mr. McIntyre's intention upon discharge was to catch the Health Connections bus from Cranbrook to Creston. The officer asked to be notified if the plans changed, and Ms. Bradford agreed to do so. In the same conversation, Cpl. Beggs advised that a judge had granted an order requiring Interior Health to provide the police with Mr. McIntyre's health records, and that the police intended to act on the order that day.

Mr. McIntyre's Continuing Interactions with Hospital Staff

- [152] On 25 February 2022 at 9:15 p.m., Ms. Diethelm made a progress note indicating that, while on shift that night, Mr. McIntyre told her he was "feeling anxious" because "when he is discharged the police are going to pick him up". Ms. Diethelm asked how he knew this and Mr. McIntyre replied "this is what they told him in ER when he was admitted".
- [153] In a progress note written on 27 February 2022 at 8:25 a.m., Ms. Pham noted that Mr. McIntyre reported no homicidal or suicidal ideation. Mr. McIntyre stated that he had a "whole day of watching golf" ahead of him.
- [154] At 8:03 p.m. on 27 February 2022, Ms. Blissett, another psychiatric nurse working at the IPU, made a progress note indicating that Mr. McIntyre presented as cooperative and polite. He reported being in a good mood but was very anxious about his discharge. He said he was going to a "much worse place on Tuesday" (1 March 2022) but would not elaborate. Mr. McIntyre expressed no suicidal or homicidal ideation but did state that he "doesn't really know if [IPU] staff are really doctors and nurses". In an associated Mental Health Status

Report, Ms. Blissett noted that Mr. McIntyre suffered from feelings of "persecution" and quoted Mr. McIntyre's words directly that he did not "actually know" the hospital staff and could not "completely trust" that they were "actually nurses and doctors". Ms. Blissett was called as a defence witness on the voir dire. In cross-examination by Crown counsel, Ms. Blissett noted that her only dealings with Mr. McIntyre were in a three-hour window on the evening of 27 February 2022. She said Mr. McIntyre was cooperative and polite throughout her interaction with him and gave no sign of reluctance to speak with her.

Mr. McIntyre's Discharge from the IPU

- [155] At 9:50 a.m. on 28 February 2022, Ms. Bradford recorded in a progress note that she contacted Cpl. Beggs at the Kelowna RCMP to advise that Mr. McIntyre would be discharged from the IPU the following day. Mr. McIntyre was expected to be picked up by a friend and his intention was then to go to Kimberley. Ms. Bradford testified that she contacted the police to provide this information on the instructions of Mr. McIntyre's treatment team.
- [156] Dr. Shurshilova took over as Mr. McIntyre's treating physician on 28 February 2022, by which time it had already been decided that he would be discharged the next day. In her meeting with Mr. McIntyre on 28 February 2022, he reported "daily nightmares", but his mood was otherwise okay. Mr. McIntyre was aware of the planned discharge the following day and was okay with it. He said he was "possibly going to be charged and convicted", and he "accepts everything as long as he does not get raped in prison". He seemed euthymic and made some effort at humour. Mr. McIntyre expressed appreciation for the care he had received at the IPU. He had made his own plans to get a ride from the hospital.
- [157] At 6:34 p.m. on 28 February 2022, Ms. Pham made a progress note documenting that Mr. McIntyre was in a good mood and presented as euthymic and engaging in conversation. Mr. McIntyre stated that he had arranged for a friend to pick him up upon discharge the next day, and he planned to "spend one night in Kimberley and then go to the penitentiary".
- [158] At 8:45 p.m. on 28 February 2022, Ms. Diethelm made a progress note indicating that while she was on shift that night, Mr. McIntyre "[c]ontinues to express the belief that the RCMP will incarcerate him after discharge, but he seems resigned to this". Mr. McIntyre denied any suicidal ideation.
- [159] On the morning of 1 March 2022, Cpl. Beggs received a call from Ms. Bradford confirming that Mr. McIntyre would be discharged from the IPU at 10:00 a.m. Dr. Shurshilova completed the paperwork for Mr. McIntyre's discharge from the IPU at 10:50 a.m. Dr. Shurshilova encouraged Mr. McIntyre to follow up with outpatient care and Mr. McIntyre said he would do so.

[160] A great deal of energy was directed at cross-examination of Dr. Shurshilova on the medications she prescribed to Mr. McIntyre upon his discharge. I did not find this to be of any assistance in deciding the live issues in the voir dire, none of which have to do with the adequacy of Mr. McIntyre's medical treatment. Certainly, Dr. Shurshilova's explanation -- namely that she continued Mr. McIntyre on the medications he had been on up to his discharge, such as heart and blood pressure medications -- was entirely rational.

Mr. McIntyre's Attendance at the Cranbrook RCMP Detachment

[161] At 12:55 p.m. on 1 March 2022, Cpl. Parker, on duty at the Cranbrook RCMP detachment, received a call from the front counter advising that Mr. McIntyre showed up and wanted to speak with someone. Cpl. Parker went to the front counter to speak with him. Mr. McIntyre was wearing shorts, a grey sweatshirt, and carrying a plastic hospital bag. Cpl. Parker and Mr. McIntyre then had a discussion, in the vestibule of the RCMP detachment, which unfolded as follows:

- a) Cpl. Parker identified herself as a police officer and gave Mr. McIntyre the official police warning, namely that anything he said could be used as evidence. Mr. McIntyre said thank you.
- b) Mr. McIntyre said he had just been discharged from the hospital after having been there for three weeks. He thought he was told to go to the police station.
- c) Mr. McIntyre said he was planning to go to Kimberley, have a nice dinner with a friend, and then come back to the police station the next day. However, the friend cancelled at the last minute, and Mr. McIntyre had no ride and no plan.
- d) Mr. McIntyre claimed to be "anxious" about returning to Creston. He did not want to go back. He did not care about his belongings there.
- e) Mr. McIntyre said he only had 65 cents to his name. His car was uninsured, and he had no money to pay for vehicle insurance. He did not want to sell his car because he was fearful of what he would do with the money. He would buy cigarettes and alcohol, and the rest of the money would get him in trouble. His only other option was to go to the Husky station and catch a ride east.
- f) Mr. McIntyre told Cpl. Parker that it was in the best interests of the police for him to stay in custody.
- g) Cpl. Parker told Mr. McIntyre the situation was the same as it was the last time he showed up at the police station. He was not arrested for anything, he was not in police custody, and he was free to leave.
- h) Mr. McIntyre said he was a danger to himself and others.

- i) Cpl. Parker suggested the option of Mr. McIntyre staying the night in the Travel Lodge, as it sometimes serves as a homeless shelter in Cranbrook. Cpl. Parker said she would look into whether Mr. McIntyre could stay there for the night.
- [162] Cpl. Parker left Mr. McIntyre at the front desk. She contacted Cpl. Beggs at MCU in Kelowna. She learned that Cpl. Beggs was planning to meet up with Mr. McIntyre to return his cell phone and tablet, which the police had seized from Mr. McIntyre's residence pursuant to a search warrant. She went back to the public waiting area and spoke with Mr. McIntyre, who said he was eager to meet with Cpl. Beggs.
- [163] Mr. McIntyre then asked Cpl. Parker if he could phone his lawyer while at the police station. Mr. McIntyre gave Cpl. Parker his lawyer's number, and Cpl. Parker dialled the number on her cell phone and then handed it to Mr. McIntyre. At 1:49 p.m., Cpl. Parker brought Mr. McIntyre into the fingerprint room so he could speak with his lawyer in private. At 1:51 p.m., Cpl. Parker knocked on the door to see if he was still on the phone and he was not. Mr. McIntyre said he had left a message for his lawyer.
- [164] Cpl. Parker then left Mr. McIntyre in the public area at the Cranbrook detachment and went to make enquiries about the possibility of Mr. McIntyre staying the night at the Travel Lodge. She learned that there was a long waitlist and Mr. McIntyre was not likely to get a room.

Arrangements to Provide Mr. McIntyre with a Hotel Room

- [165] At 2:32 p.m. on 1 March 2022, acting on instructions from Cpl. Beggs at the MCU, Cpl. Parker returned to the fingerprint room to speak with Mr. McIntyre. She audio-recorded the conversation on a recording device that was visible to Mr. McIntyre. Cpl. Parker offered to book Mr. McIntyre a hotel room for the night, explaining that he did not have to accept the offer, and that he would be free to come and go from the hotel whenever he wanted. Mr. McIntyre asked if the hotel room would be "monitored" and Cpl. Parker confirmed that it would not be. Mr. McIntyre was appreciative and accepted Cpl. Parker's proposal. The recorded conversation lasted for eight minutes, concluding at 2:40 p.m.
- [166] Cpl. Parker contacted the Lazy Bear Lodge in Cranbrook and booked a room for Mr. McIntyre. She also purchased a chicken dinner for Mr. McIntyre and brought it to the hotel. Mr. McIntyre walked on his own from the Cranbrook RCMP detachment to the hotel. Cpl. Parker was at the hotel to collect the receipt when Mr. McIntyre arrived there, on foot, at around 4:00 p.m. on 1 March 2022.

Return of Mr. McIntyre's Devices

[167] At 9:05 a.m. on 2 March 2022, Cpl. Beggs and Cst. Flaman went to the Lazy Bear Lodge to see Mr. McIntyre. The purpose of the meeting was to return Mr. McIntyre's cell phone and tablet. The two officers knocked on the door of Mr. McIntyre's room, and he answered and let them inside. The officers spoke with Mr. McIntyre inside the hotel room. One of them made an audio-recording of the entire interaction, on a device that was clearly visible to Mr. McIntyre.

[168] Near the beginning of the conversation, Cpl. Beggs advised Mr. McIntyre that he was a suspect in a murder investigation, that he did not have to say anything, and that anything he did say could be used against him. Mr. McIntyre replied that he understood. Cpl. Beggs returned Mr. McIntyre's phone and tablet, which he explained had been seized when the police executed a search warrant at his residence in Cranbrook. Cpl. Beggs also told Mr. McIntyre that the police had searched his car. Mr. McIntyre said his lawyer told him not to say anything to the police, and that he needed to speak with his lawyer again. Cpl. Beggs encouraged Mr. McIntyre to consult with his lawyer whenever necessary. Mr. McIntyre asked if he could get his car back and Cpl. Beggs responded that it was currently in the impound lot but arrangements could be made to return it. Mr. McIntyre said it was "not cool" that the police had seized his clothing from the EKRH emergency room, without any search warrant. However, Mr. McIntyre did not present as particularly angry or upset during the conversation, which lasted for about 12 minutes and concluded at 9:21 a.m.

Further Stay at the Lazy Bear Lodge

[169] Mr. McIntyre ended up staying another night at the Lazy Bear Lodge, although he apparently paid for the second night himself.

Mr. McIntyre's Retrieval of his Car

[170] On 3 March 2022, Cpl. Beggs and Cst. Flaman met Mr. McIntyre at the vehicle impound lot of the RCMP Southeast District Traffic Unit, in Cranbrook. The purpose of this meeting was for the officers to allow Mr. McIntyre to retrieve the vehicle insurance papers from his car, which had been towed to the impound lot at some point after Mr. McIntyre abandoned it when he showed up at the police station on 7 February 2022. To return to the events of 3 March 2024, Mr. McIntyre arrived at the impound lot as the passenger in a vehicle driven by an apparent friend or acquaintance. The interaction between the two officers and Mr. McIntyre began at 9:37 a.m. and concluded at 9:49 a.m. Once again, one of the officers audio-recorded the entire interaction on a device that was visible to Mr. McIntyre. Mr. McIntyre retrieved his insurance papers. Cpl. Beggs testified that Mr. McIntyre later returned to the impound lot with valid insurance papers, at which point the impound lot released his vehicle to him and he drove away.

Mr. McIntyre's Visit with a Friend in Kimberley

[171] Some time later in the day on 3 March 2022, Mr. McIntyre travelled to Kimberley where he visited a friend, Mike Stewart. In his voir dire testimony, Mr. Stewart was unable to identify the date of Mr. McIntyre's visit. His recollection was that it was a week or two after Mr. Creamer's death. On all of the evidence, I have no difficulty finding that Mr. McIntyre's visit was in fact on the evening of 3 March 2022. Mr. Stewart recounted that Mr. McIntyre phoned ahead and said he wanted to come for a visit. Mr. McIntyre stayed for dinner and Mr. Stewart's wife made spaghetti. Mr. McIntyre slept overnight in a motorhome in Mr. Stewart's back yard. He left the next morning. Mr. Stewart did not observe anything unusual about Mr. McIntyre's physical state during the visit.

Mr. McIntyre's Return to EKRH

[172] On 5 March 2022 at 12:38 a.m., Mr. McIntyre returned the EKRH. Dr. Haiduk was the on-duty physician in the emergency room. She recalls a nurse advising her that Mr. McIntyre presented himself in the emergency room, indicating that he did not feel safe and had hurt people or was going to hurt people. The nurse advised that Mr. McIntyre had had some recent dealings with the police. Dr. Haiduk recalled a brief interaction between herself, the nurse, and Mr. McIntyre in the triage area within the emergency room. Dr. Haiduk felt the situation was unusual because this was the kind of matter that was normally dealt with by the police. At Dr. Haiduk's direction, the nurse called the police to advise that Mr. McIntyre was at the hospital.

[173] At some point thereafter, Cpl. Beggs received a call from Cpl. Dave Piket, another member of the MCU. The patient care coordinator at EKRH had contacted Cpl. Piket to advise that Mr. McIntyre was at the hospital. Cpl. Beggs contacted Cst. Banich and instructed her to speak with Mr. McIntyre and to audio-record the conversation.

Mr. McIntyre's Statement to Cst. Banich and Cst. Silitto

[174] At 1:25 a.m. on 5 March 2022, acting on the instructions of Cpl. Beggs, Cst. Banich and Cst. Silitto attended EKRH to speak with Mr. McIntyre. Both officers were in full uniform. They approached Mr. McIntyre in the public waiting area outside the emergency room. The officers introduced themselves. Cst. Banich suggested that they have a conversation in the chapel at EKRH. The entire conversation was audio-recorded by Cst. Banich. It began at 1:25 a.m. and unfolded as follows:

- a) Near the beginning of the conversation, Cst. Banich informed Mr. McIntyre that she was recording the conversation.
- b) Cst. Banich indicated that the police had attended because the hospital was concerned about "some comments" Mr. McIntyre had made.

- c) Mr. McIntyre said they would "get to that", but his only concern was that he did not have his lawyer with him.
- d) Cst. Banich began to give Mr. McIntyre a police caution indicating that he did not have to say anything.
- e) Mr. McIntyre interjected to say he was "losing his marbles" and already been in the hospital for three weeks.
- f) Cst. Banich returned to the police caution, stating again that Mr. McIntyre did not have to say anything. Mr. McIntyre interjected to say, "But anything can be used against me". Cst. Banich then completed her sentence, explaining that "anything you say can be used as evidence". Mr. McIntyre replied, "I know, I know".
- g) After some further preliminaries, Mr. McIntyre made a lengthy statement about his activities over the past several days. He said he had been told that when he got out of the hospital the police would take him into custody. But they did not. So, he went to visit a friend. Then he "spotted two people", "two different individuals", and "here I am".
- h) Cst. Banich replied that Mr. McIntyre's comments were "pretty cryptic". She asked whether Mr. McIntyre thought about harming the two people. Mr. McIntyre responded that he "more than thought about it;" he "thought long and hard about it".
- i) Mr. McIntyre then recounted how he went to visit a friend in Kimberley, stayed the night, and had a "glorious sleep" in his friend's camper. He went on to describe his activities over the next day and night. He drove back to Cranbrook, went to Tim Hortons several times, and was evidently planning to spend the night in his car.
- j) Cst. Banich asked what brought Mr. McIntyre to the hospital that night. Mr. McIntyre responded that he "can't do it anymore", and his mind would just "not shut off".
- k) Cst. Banich asked Mr. McIntyre if he felt safer at the hospital. Mr. McIntyre referred to the internal dialogue in his head. He said he could not hold it in. He said he wanted to go to the forest and punch trees.
- l) Mr. McIntyre referred to the staff in the hospital as angels. He said they had "mental tools".
- m) Cst. Banich suggested that the best thing might be for Mr. McIntyre to be hospitalized "until we figure things out". Cst. Banich said it was a good thing that Mr. McIntyre got himself to the hospital.
- n) Mr. McIntyre then told several long stories of no apparent significance. He said he was "babbling".
- o) Mr. McIntyre said he wanted to give the officers his car keys, because he was not going to need his car. The officers indicated they could not take his keys.

- p) Mr. McIntyre referenced Cpl. Tent ("John", from Cranbrook), whom he said was a "good guy" and whom he promised to tell everything. He believed Cpl. Tent was currently away in Mexico. This led Mr. McIntyre into another long story about travel.
 - q) Cst. Banich asked if Mr. McIntyre had hurt anyone "since ". Mr. McIntyre said "no". Cst. Banich said, "But you have been thinking hard about it". Mr. McIntyre responded with some irrelevant comments.
 - r) Cst. Banich asked Mr. McIntyre if he would feel better if he "let things out". Mr. McIntyre responded that he was trying to "use the correct words", without getting himself "into a situation". He said, "Who are you guys?", and "You're not my friends, I understand that".
 - s) Cst. Banich asked why they could not be friends. Mr. McIntyre said that he had "information", the officers "you all obviously know that", but Mr. McIntyre needed to talk to his lawyer because he needed "an advocate" on his side.
 - t) Cst. Banich asked what "information" Mr. McIntyre had. The officer referenced how Mr. McIntyre had admitted to "murdering somebody". Mr. McIntyre interjected to say, "I never said that".
 - u) Cst. Banich recounted her understanding that Mr. McIntyre had made statements to hospital staff, and that the police were now investigating him. Mr. McIntyre responded that he was "hearing some fibs".
 - v) There was some further discussion in which Cst. Banich suggested that the hospital was probably the best place for Mr. McIntyre to be at that point and Mr. McIntyre appeared to agree.
- [175] The recorded statement ended at 2:25 a.m., when Cst. Banich said she was going to speak with hospital staff, and Mr. McIntyre went outside to smoke. Cst. Silitto, who went with Mr. McIntyre, testified that Mr. McIntyre did not say anything else of note.

Mr. McIntyre's Readmittance to EKRH

- [176] Mr. McIntyre then returned to the emergency room. He was admitted and placed in room number 2, which Dr. Haiduk described in her testimony as a secure room with a door and an alarm on it. Dr. Haiduk had some safety concerns based on Mr. McIntyre's presentation and the history of the matter. Mr. McIntyre stated that he was having thoughts of harming people. He said he had seen two people he wanted to harm. Dr. Haiduk was aware that Mr. McIntyre had been in the IPU and had been discharged several days earlier. When Dr. Haiduk spoke with Mr. McIntyre he said, "I wasn't looking but I spotted two different individuals I wanted to hurt". Physically, Mr. McIntyre presented as normal and cooperative, but he did appear distressed. Dr. Haiduk was concerned about Mr. McIntyre's fixation on saying he would hurt people or had thoughts of hurting people. However, the doctor believed she could not commit Mr. McIntyre under the Mental Health Act because he had attended the hospital voluntarily. In her voir dire testimony, Dr. Haiduk recounted

that Mr. McIntyre did not appear to be having any difficulty communicating or understanding. He was not impaired by drugs or alcohol.

[177] Dr. Haiduk testified that at some point during her shift one or more uniformed police officers arrived in the emergency room. She had a conversation with one of the officers. Dr. Haiduk was unable to recall whether the police were present and in a position to overhear any of her conversations with Mr. McIntyre. In cross-examination, Dr. Haiduk agreed that it would have been possible for Mr. McIntyre to oversee her conversing with the police in the emergency room.

[178] At 7:55 a.m. on 5 March 2022, Dr. Haiduk phoned Dr. Khosroshahy (whom she knew to be one of the psychiatrists who had treated Mr. McIntyre in the IPU) and left a message. The emergency outpatient record indicates that another call was placed to Dr. Khosroshahy at 8:50 a.m.

Mr. McIntyre Readmitted to the IPU

[179] At 11:00 a.m. on 5 March 2022, Dr. Khosroshahy met with Mr. McIntyre at the hospital and conducted an assessment. Mr. McIntyre told Dr. Khosroshahy that, since his discharge, he had lived for two nights in a motel, and then in his car. He said he was afraid that if he goes back to his house in Creston, he was going to abuse others or others would abuse him. Mr. McIntyre could not or would not elaborate. Mr. McIntyre said he kept thinking about all the people who had wronged him recently and was afraid he would do "very bad things".

[180] Being aware that Mr. McIntyre had been "medically cleared" by Dr. Haiduk, Dr. Khosroshahy decided to re-admit Mr. McIntyre to the IPU as a "voluntary" patient. Although Dr. Khosroshahy had previously concluded that Mr. McIntyre did not suffer from any serious primary mental illness, the doctor decided to admit Mr. McIntyre to the IPU on a voluntary basis, considering the "potentially significant, serious, and severe consequences of what he is telling us".

Possible Referral to Hillside Tertiary Mental Health Facility

[181] Dr. Khosroshahy met with Mr. McIntyre at the IPU on 6, 7, and 8 March 2022. The details can be summarized as follows:

- a) During the 6 March 2022 meeting, Mr. McIntyre said he was having "some bad thoughts" but did not want to discuss them. His concentration was good, he displayed no signs of anxiety, and had no suicidal ideation. In his dictated notes, Dr. Khosroshahy recorded his assessment that Mr. McIntyre's prior statements regarding "the murders" were "either true or untrue", but beyond this Mr. McIntyre showed no evidence of perceptual disturbances or delusions.
- b) On 7 and 8 March 2022 Dr. Khosroshahy noted no clinical changes in Mr. McIntyre's position.

- c) During the 6 March 2022 session, Dr. Khosroshahy discussed with Mr. McIntyre the possibility of referring him to Hillside Mental Health Tertiary Care Centre ("Hillside"). This facility was described as a secure psychiatric facility, located in Kamloops. Mr. McIntyre was receptive. Dr. Khosroshahy said this was just a referral and there was no guarantee Mr. McIntyre would be admitted.
 - d) On 7 March 2022, Dr. Khosroshahy confirmed with Mr. McIntyre that he had made a referral to Hillside and that it would take some time to receive a response advising whether he would be admitted.
- [182] On 7 March 2022, Cpl. Beggs phoned EKRH to enquire about Mr. McIntyre's status. He spoke with patient care coordinator Ms. Callan, who advised that Mr. McIntyre was going to be transferred to Hillside.

Significant Development in Police Investigation

- [183] On 8 March 2022, Cpl. Beggs spoke with Cst. Saurrette, another MCU member assigned to the Howe homicide investigation. Cst. Saurrette said she had gone through Mr. McIntyre's medical records obtained by production order, and that the notes revealed that Mr. McIntyre made statements to EKRH staff admitting both that he killed Ms. Howe, and that he killed a man in Kimberley, named "David Creamly". This was the first time that Cpl. Beggs had heard anything about this individual. Cpl. Beggs conducted police database checks and determined that a man named David Creamer had been found dead in his home in Kimberley on 6 February 2022.

Dr. Shope's Resumption of Treating Psychiatrist Role

- [184] On 9 March 2022, Dr. Shope met with Mr. McIntyre in the IPU. Dr. Shope's understanding was that Mr. McIntyre had been discharged as planned on 1 March 2022, but was subsequently re-admitted on a voluntary basis. Mr. McIntyre reiterated his underlying belief that he had killed people. He gave some information about his family history. When Dr. Shope asked why he had been admitted to the hospital again, Mr. McIntyre cited his belief that he had killed some people. Dr. Shope discussed the outstanding referral to Hillside.
- [185] On 10 March 2022, Dr. Shope met again with Mr. McIntyre. His mood was euthymic. He expressed passive death wishes. He wished someone would suck the life out of him. He said he still had a list of people he wanted to harm or kill. Dr. Shope noted that Mr. McIntyre did not display any psychomotor abnormalities.

Meeting Between Hospital Staff and RCMP Members on 12 March 2022

- [186] On 12 March 2022, there was a meeting at EKRH attended by Dr. Shope, Ms. Pham, Cpl. Beggs, and Sgt. Smart.

- [187] Dr. Shope's recollection of the meeting is that the RCMP had indicated they obtained Mr. McIntyre's hospital records by a search warrant and subsequently reviewed them. The officers wanted Dr. Shope to consider holding Mr. McIntyre as an involuntary patient under the Mental Health Act. They were concerned that Mr. McIntyre had a list of people he wanted to harm. They had also determined through investigation that he had murdered two people. (To be clear, this is not a finding of fact but simply a recounting of Dr. Shope's recollection of the conversation.) The police believed Mr. McIntyre was a risk. Dr. Shope's response was that Mr. McIntyre could not be kept involuntarily under the Mental Health Act because (i) he was being treated on a voluntary basis, and (ii) there was no evidence of any underlying psychological or mental condition that required treatment. Cpl. Beggs requested that the hospital staff notify police before Mr. McIntyre was discharged. The police also wanted Dr. Shope to notify hospital management of the meeting, which Dr. Shope agreed to do.
- [188] In cross-examination, Dr. Shope agreed that he was aware, based on the 12 March 2022 meeting, that police would be informed when the hospital planned to discharge Mr. McIntyre. Dr. Shope added that he was not sure what the police would do after that i.e. if they would arrest Mr. McIntyre.
- [189] Cpl. Beggs' testimony about the 12 March 2022 meeting was largely consistent with that of Dr. Shope. The police wanted to know if the doctors would or could hold Mr. McIntyre in the hospital as an involuntary patient under the Mental Health Act. Dr. Shope explained that four criteria had to be met for involuntary committal and Mr. McIntyre did not meet those criteria. Cpl. Beggs was "shocked" because he believed Mr. McIntyre posed public safety risks. Cpl. Beggs was concerned about how the police would manage those risks if Mr. McIntyre could voluntarily leave the hospital at any time.
- [190] In cross-examination, Cpl. Beggs maintained that he was simply enquiring with Dr. Shope about the criteria and process for involuntary committal. He did not make any order or direction to the medical staff that they involuntarily commit Mr. McIntyre. Although his handwritten notes did not include the phrase "public safety", he maintained that this was his primary concern at the time. Cpl. Beggs testified that the meeting was cordial and that neither of the officers raised their voices or got angry. Cpl. Beggs was "shocked", but "not unhappy" and did not voice any disappointment.
- [191] Cpl. Beggs agreed that, after learning of the contents of Mr. McIntyre's medical file from Cst. Saurrette on 8 March 2022, the grounds to arrest Mr. McIntyre crystallized. The police had grounds to arrest Mr. McIntyre on 12 March 2022 but did not do so. In re-examination, Cpl. Beggs clarified that the grounds to arrest Mr. McIntyre were not limited to and did not turn on the information in the EKRH records about "Mr. Creamly". Apart from that information, the police had gathered other information from other sources, including the seizure of a gun from Mr. McIntyre's car and a gun holster from his residence, and statements from witnesses claiming to have seen Mr. McIntyre driving away from the Reiner property shortly after the time that Ms. Howe was believed to have been shot.

- [192] Sgt. Smart testified that he and Cpl. Beggs went to the 12 March 2022 meeting to find out why the doctors had not been more forthcoming about Mr. McIntyre's statements concerning a second incident in Kimberley. In the previous few days, Sgt. Smart had determined that after Mr. Creamer's death was reported as non-suspicious the body had been released and cremated, such that the police had lost the opportunity to gather forensic evidence about the crime. Sgt. Smart was frustrated and angry that EKRH staff had not given more information about this second suspicious death. Sgt. Smart said he was "trying to get information" about what happened, "without digging too much". Sgt. Smart recounted that when Dr. Shope was asked why he did not reach out to police and provide more information, he did not respond. He just "spoke in circles", and at one point he "shrugged his shoulders". Dr. Shope was guarded in what he said and "seemed uncomfortable". Sgt. Smart's impression was that the police came out of the 12 March 2022 meeting knowing nothing more than they knew entering the meeting. "[N]othing of interest" came out of the meeting.
- [193] In cross-examination, Sgt. Smart advised that when he went into the 12 March 2022 meeting at EKRH, he was upset with the responding police officer, the coroner, and the ambulance attendants for not taking any steps to bring the Creamer death to the attention of the Southeast District MCU. Sgt. Smart felt that the doctors should have provided "at least some of the information" about the Kimberley incident. Sgt. Smart felt that he was being "stonewalled" by Dr. Shope at the 12 March 2022 meeting. When asked in cross-examination about whether there was any concern about Mr. McIntyre's status in the hospital as of 12 March 2022, Sgt. Smart's initial response was there was not. However, when pressed, he testified that because Mr. McIntyre was being treated voluntarily, he could leave at any time, which posed a public safety risk. However, Sgt. Smart did not recall Cpl. Beggs asking Dr. Shope during the 12 March 2022 meeting to classify Mr. McIntyre as an involuntary patient.
- [194] Taking all of the evidence together, I accept the testimony of Dr. Shope and Cpl. Beggs as an accurate account of what occurred during the 12 March 2022 meeting. I accept Cpl. Beggs' testimony that his primary focus was Mr. McIntyre's status at the hospital, the risk that he might pose if he chose to leave the hospital, and the ability of the police to manage that risk. I also accept the officer's testimony that he was not trying to direct Dr. Shope's decision-making. Rather, he was trying to understand why the doctor was not willing to certify Mr. McIntyre under the Mental Health Act so that the hospital could hold him involuntarily.
- [195] I also accept Sgt. Smart's testimony, while noting that he appears to have gone into the meeting with a different focus than Cpl. Beggs. To explain, going into the meeting, Sgt. Smart was clearly upset about the state of the Creamer investigation, and his preoccupation was in trying to get an explanation from Dr. Shope as to why hospital staff had not volunteered more information to the police concerning what Mr. McIntyre had said about "David Creamly". While Sgt. Smart may have been frustrated or annoyed with Dr. Shope, the

fact is that Dr. Shope was trying to respect the limits of patient confidentiality and to exercise independent decision-making regarding Mr. McIntyre's medical treatment in an unusual situation.

Continued Interactions between Mr. McIntyre and Hospital Staff

- [196] During his session with Mr. McIntyre on 13 March 2022, Mr. McIntyre gave no indications of suffering from delusions or hallucinations. He expressed passive death wishes but no suicidal thoughts. The list of people Mr. McIntyre said he intended to harm had grown from five to ten people whom he felt had betrayed him in the past. Dr. Shope also noted that Mr. McIntyre was anxious about whether the RCMP wanted to speak with him. (Mr. McIntyre recounted that a nurse had told him the RCMP did not intend to do so. Dr. Shope believed this was some indirect reference to what was discussed between the medical staff and the RCMP on 12 March 2022, however, I find that this evidence has no probative value, as Dr. Shope's testimony about what Mr. McIntyre may or may not have heard on this topic involved multiple layers of hearsay and conjecture).
- [197] On 13 March 2022, Cpl. Beggs spoke on the phone with Ms. Bradford about Mr. McIntyre's status. The officer was seeking information about Mr. McIntyre's treatment plan. Cpl. Beggs asked Ms. Bradford to advise police of any changes in Mr. McIntyre's status, or plans to release him from the IPU, for public safety reasons.
- [198] At 1:59 p.m. on 13 March 2022, Ms. Pham created a progress note documenting a lengthy conversation with Mr. McIntyre in the IPU. Among other things, Mr. McIntyre asserted that he had homicidal ideation regarding people who commit sexual assault.
- [199] At 10:45 a.m. on 14 March 2022, Ms. Diethelm made a progress note indicating that Mr. McIntyre continued to be guarded regarding his mental health and the reason for his admissions.
- [200] When Dr. Shope met with Mr. McIntyre on 14 March 2022, Mr. McIntyre was still "convinced that he had murdered two people", referring to the murder of his neighbour in Creston and then a male friend in Kimberley. Mr. McIntyre said the hospital was the right place for him to be. He gave no indication that he believed he was under the control of forces outside of his own power. Dr. Shope testified that "it was becoming clearer to us that this was not being driven by any mental illness". In cross-examination, Dr. Shope said that at the time, he was inclined to the view that Mr. McIntyre's decision to attend the hospital was not for his mental health, as he did not appear to have a mental illness. It could have simply been a situation where Mr. McIntyre was feeling guilty and concerned that he should not be released. This evidence is not admissible either as any kind of a medical diagnosis, nor any other form of evidence as to Mr. McIntyre's state of mind. Rather, the sole relevance of this evidence is to provide an explanation for Dr. Shope's decision-making and conduct at the time.

- [201] At 9:40 a.m. on 15 March 2022, Ms. Diethelm noted in a progress report that Mr. McIntyre easily engaged at a social level, but "continued to be guarded when asked mental health questions" or asked about "events leading to admission". He expressed no suicidal ideation. Mr. McIntyre said he continued to have "thoughts that come and go", but with no urge to act upon them.
- [202] At 4:18 p.m. on 15 March 2022, Ms. Bradford contacted Cpl. Beggs to advise that Mr. McIntyre had been declined admission to Hillside and would likely be discharged from EKRH the following day, 16 March 2022. Cpl. Beggs requested that the hospital notify police of Mr. McIntyre's discharge time after the "morning rounds".
- [203] When Dr. Shope met with Mr. McIntyre on 15 March 2022, Mr. McIntyre presented as "bright and reactive". He denied suicidal thoughts. He displayed no psychomotor abnormalities. He was not agitated. He said he still had his "hit list". At this point Dr. Shope was planning to discharge Mr. McIntyre. Dr. Shope believed he had "done his duty" in terms of advising the police of the risk, so he did not continue to "probe" Mr. McIntyre.
- [204] Dr. Shope testified that at no time did the police influence or affect his medical advice or medical treatment of Mr. McIntyre. The only issue was on 12 March 2022, when Dr. Shope understood or believed the police to be asking him to have Mr. McIntyre held under the Mental Health Act, and even at that time Dr. Shope declined.
- [205] Dr. Shope further testified that none of the questions he asked Mr. McIntyre were for any purpose other than the medical care of Mr. McIntyre. The only qualification was when Mr. McIntyre referenced harming other people. Dr. Shope believed he had to ask about that due to concerns about safety, but that was the only subject where he asked questions of Mr. McIntyre for reasons other than Mr. McIntyre's own best interests.
- [206] In cross-examination, Dr. Shope agreed that his job was to treat Mr. McIntyre for a medical condition, not to investigate homicides. It was suggested to Dr. Shope that there were many questions he could ask the patient that did not involve discussion or admission of past crimes. The suggestion put to him was that it was not necessary to ask Mr. McIntyre about murders he may have committed in the past in order to get information on which to conduct collateral inquiries. Dr. Shope responded that his mandate was to find out if the patient was delusional, and the focus of Mr. McIntyre's alleged or apparent delusions was on having committed the murders. Dr. Shope's focus was "on the question at hand". Dr. Shope was trying to find out if Mr. McIntyre's statements were or were not "reality-based".
- [207] Based on the limited information the police would give, it seemed to Dr. Shope that the event involving the death of Ms. Howe was real. Among other things, Dr. Shope considered it significant that Cpl. Beggs' confirmation that a weapon had been found in Mr. McIntyre's car married up with what Mr. McIntyre said about using a gun and then keeping it in his car.

- [208] Dr. Shope testified that throughout his dealings with Mr. McIntyre, Mr. McIntyre gave no indication of depression or delusional beliefs. He did mention hearing voices. Dr. Shope then clarified that Mr. McIntyre had in fact made comments about voices, but the voices only told him to yell. There was no indication that Mr. McIntyre heard voices telling him to harm anyone.
- [209] In cross-examination, it was put to Dr. Shope that he was comfortable with the decision to discharge Mr. McIntyre because he knew police were going to pick him up immediately upon discharge. Dr. Shope responded by explaining that he was comfortable with his discharge decision because there was no evidence of any psychopathy or psychological issue.
- [210] Dr. Shope was questioned about how he could be comfortable discharging Mr. McIntyre knowing that Mr. McIntyre had made statements about a hit list. Dr. Shope's response was that he advised the police of the hit list, so he had done what he could. He had fulfilled his duty, and it was up to the police to decide what to do from that point forward.
- [211] Dr. Shope was also questioned about patient-client confidentiality. He agreed that, as a general rule, a doctor is not supposed to share information about a patient with anyone. However, Dr. Shope added that there is a caveat to this general rule, where there is a clear risk to an identifiable person or group, or a clear risk of imminent violence. Dr. Shope agreed generally with the suggestion that if a patient talked about some harm caused to another person in the past, this would not be caught by the exception. Dr. Shope added that while this was true as a general rule, there might also be situations where a patient makes statements about both past violence and future violence, such that the statements of past violence could be relevant when assessing the veracity of a patient's stated intent to cause future harm.
- [212] Dr. Shope testified that 15 March 2022 was the last date when he had dealings with Mr. McIntyre. Dr. Shope was not at the hospital when they discharged Mr. McIntyre the following day.
- [213] At 11:58 a.m. on 16 March 2022, Ms. Bradford documented in a progress note that she phoned Cpl. Beggs at RCMP to advise that Mr. McIntyre would be discharged from the IPU that day at 1:00 p.m. Cpl. Beggs advised that the police planned to meet Mr. McIntyre as he exited the IPU.

Mr. McIntyre's Discharge from IPU for the Second Time

- [214] At 1:00 p.m. on 16 March 2022, Mr. McIntyre was discharged from the IPU for the second time. In his discharge summary, Dr. Khosroshahy noted the following:
- a) Dr. Shope had been Mr. McIntyre's most responsible physician over the past number of days, but Dr. Khosroshahy assumed that role on the date of discharge.

- b) The "clinical impression" of Dr. Shope and Dr. Khosroshahy was the same as at the time of the prior discharge. Dr. Khosroshahy wrote that, "All in all we did not see any significant signs or symptoms of any mental illness, be it affective, anxiety related or OCD related, psychotic, or otherwise".
 - c) "Throughout his stay, he was always very pleasant, polite, and cooperative with myself, Dr. Shope, and also our other colleagues. At no point did anyone feel threatened by him or his behavior or his talk".
 - d) "He usually kept to himself, watching TV or being in his room, and quite often being asleep. There was no formal thought disorder, no perceptual disturbances, and no delusional ideas. I will elaborate regarding the claimed murders later on".
 - e) "He did not generally feel sad. There was absolutely no suicidality. I will comment about the homicidal thoughts later on. He was not feeling tense, on edge, irritable, or restless. There were no panic attacks. He was only on sertraline, which I had started earlier, believing that he might suffer from depression, however, I stopped it at his discharge as I did not think he had clinical depression".
- [215] The discharge summary went on to document Dr. Khosroshahy's account of his interactions with the police, information about the alleged murders, and Dr. Khosroshahy's understanding of the status of the police investigation. I did not admit this portion of the discharge summary as a medical record as it did not appear to relate to medical treatment. I do note that at end of the final paragraph, Dr. Khosroshahy confirmed that Mr. McIntyre was discharged from the IPU at 1:00 pm on 16 March 2022, and RCMP officers were "at the door to meet him". Dr. Khosroshahy confirmed in his voir dire testimony that this is in fact what happened.

Mr. McIntyre's Arrest

- [216] Cpl. Tent attended EKRH with Cpl. Larue to arrest Mr. McIntyre. Hospital staff notified Cpl. Tent in advance that Mr. McIntyre was being discharged. When Mr. McIntyre came out of the hospital, Cpl. Tent told him that the police had an arrest warrant. Cpl. Larue then arrested Mr. McIntyre, and Cpl. Tent transported him to the Cranbrook RCMP detachment.

Legal Analysis

- [217] There are two broad categories of statements in issue in this case. The first category consists of statements made by Mr. McIntyre to police officers. The issue for determination in relation to these statements is whether the Crown has proven their voluntariness beyond a reasonable doubt. The second category consists of statements made by Mr. McIntyre to doctors and other hospital staff at EKRH. The issues for determination in relation to these statements are firstly whether the statement recipients qualify as non-conventional persons in authority, and if so, whether the Crown has proven beyond a reasonable doubt that the statements were voluntary.

(1) Admissibility of Mr. McIntyre's Police Statements

[218] The Crown seeks a ruling that all of Mr. McIntyre's statements to police officers between 7 February 2022 and 5 March 2022 inclusive are admissible under the common law confessions rule, the legal contours of which are discussed below. The statements in issue are:

- a) A series of oral statements Mr. McIntyre made to Cpl. Kletzel at the Cranbrook RCMP detachment on 7 February 2022, which I refer to collectively as oral police statement #1.
- b) The video-recorded statement that Mr. McIntyre made to Cpl. Tent in an interview room at the Cranbrook RCMP detachment on the afternoon of 7 February 2022, which I will refer to as recoded police statement #1.
- c) The series of oral statements Mr. McIntyre made to Cpl. Parker at the Cranbrook RCMP detachment on the afternoon of 1 March 2022, which I refer to collectively as oral police statement #2.
- d) The audio-recorded statement that Mr. McIntyre made to Cpl. Parker at the Cranbrook RCMP detachment, later in the afternoon on 1 March 2022, which I will refer to as recorded police statement #2.
- e) The audio-recorded statement that Mr. McIntyre made to Cpl. Betts and Cst. Flaman at the Lazy Bear Lodge on the morning of 2 March 2022. I will refer to this as recorded police statement #3.
- f) The audio-recorded statement that Mr. McIntyre made to Cpl. Betts and Cst. Flaman at the RCMP vehicle impound lot in Cranbrook on the morning of 3 March 2022, which I will refer to as recorded police statement #4.
- g) The audio-recorded statement that Mr. McIntyre made to Cst. Banich and Cst. Silitto at EKRH just past midnight on 5 March 2022. I will refer to this as recorded police statement #5.

Legal Principles

[219] Under the common law confessions rule, no statement made by an accused to a "person in authority" is admissible in a criminal trial unless the Crown proves beyond a reasonable doubt that the statement was given freely and voluntarily. In deciding whether the Crown has discharged its burden to prove admissibility of the statement, the trial judge is expected to apply the confessions rule contextually, having regard to (i) the imperative against the use of threats or promises to induce a confession, (ii) the impact of any oppressive conditions, (iii) the need for the accused to have an operating mind, and (iv) the possible use of trickery that would deprive the accused of the right to make a meaningful choice about whether or not to speak with the authorities: *R. v. Oickle*, 2000 SCC 38 at paras. 47, 68-69; *R. v. Singh*, 2007 SCC 48; *R. v. Tessier*, 2022 SCC 35.

- [220] In *Oickle*, the police were investigating a string of arson incidents. In the course of their investigation, the police conducted polygraph examinations of several individuals. The accused reluctantly agreed to attend a hotel room for a polygraph examination. The testing started at around 5:00 p.m. Within several hours, the accused admitted to starting one of the eight fires under investigation. He was then arrested and taken to the police station. Within six hours of his initial contact with the police, he had admitted to starting seven of the eight fires. He was placed in a cell at around 2:45 a.m. The next day at around 6:00 a.m., he agreed to accompany the police to the fire scenes where video recorded re-enactments were conducted.
- [221] The trial judge found that the accused's statements were voluntary, admitted them, and found the accused guilty. The Court of Appeal set aside the convictions and entered acquittals, reasoning that a combination of factors, including the failure to advise the accused that the polygraph evidence would be inadmissible in court, the offering of improper inducements, police abuse of the relationship with the accused, and concerns about whether the accused was "coherent" and sufficiently "in control of his faculties", raised a reasonable doubt about the voluntariness of the statements: *Oickle* at paras. 15-20.
- [222] In the Supreme Court of Canada, the majority allowed the Crown's appeal and restored the convictions. In the majority judgment, Justice Iacobucci began his analysis with a recognition of the importance of striking a balance between the protection of the rights and fair trial interests of the accused and the state's legitimate interest in investigating and solving crimes: *Oickle* at para. 33.
- [223] Justice Iacobucci also addressed the need for flexibility in the application of the confessions rule, stating, "Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession": *Oickle* at para. 47. The trial judge must consider "all the relevant factors", and must assess them contextually: *Oickle* at paras. 47, 54, and 71. Among other things, the trial judge must be sensitive to "the particularities" of the individual accused, including evidence of any special vulnerabilities or susceptibility to suggestion that could induce a false confession or overwhelm the will of the accused: *Oickle* at para. 42.
- [224] The majority judgment went on to outline the contours of the modern confessions rule, including (i) the imperative against the use of promises or threats to induce a confession (paras. 48-57), (ii) the effect of oppressive treatment and conditions (paras. 58-62), (iii) the "operating mind" doctrine (paras. 63-64), and (iv) the need to guard against police trickery that could "shock the community" (paras. 65-67). Thus, "[w]hether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence", a confession that is "involuntary for any of these reasons" is inadmissible: *Oickle* at para. 69. The trial judge 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 these factors: *Oickle* at para. 71.

- [225] On the facts of the case, the majority reasoned that the Court of Appeal was in error in finding the accused's statements inadmissible. While the police questioning was "persistent and often accusatorial", it did not become "hostile, aggressive, or intimidating": Oickle at paras. 1-2. The accused was "fully apprised of his rights" and was "not deprived of sleep, food, or drink". There was some evidence of inducements, but those inducements were not enough to raise a reasonable doubt as to the voluntariness of the accused's statements: Oickle at para. 72. The police did not suggest that a confession would reduce the accused's legal jeopardy: Oickle at paras. 73-77. Nor did they suggest to the accused that he could get psychiatric help only if he confessed, hence there was no "quid pro quo" in relation to this alleged inducement: Oickle at para. 78. The police did suggest there may be benefits to the accused in connection with a confession, but there was no promise -- express or implied -- that a confession would be to his benefit in the prosecution, so once again there was no quid pro quo: Oickle at para. 80. With respect to the police suggestion that they would not polygraph the accused's girlfriend if he confessed, this was not a strong enough inducement to provoke a confession, considering the timing of those comments, and the absence of a causal connection between the comments and the confession: Oickle at paras. 83-84.
- [226] Another point developed in Oickle is the relationship between the confessions rule as a product of the common law and the constitutionally guaranteed right to silence under s. 7 of the Charter. Justice Iacobucci recognized that there is considerable overlap between these two concepts, although there are important differences between them. First, the confessions rule applies to any statement by an accused to a person in authority, whereas under the conventional formulation of the right to silence, it is only engaged where the state has assumed control over the movements of an individual by placing him or her under arrest or detention. Second, the confessions rule imposes a burden on the Crown to prove admissibility of an accused's statement beyond a reasonable doubt, whereas s. 7 of the Charter places the burden on the accused to prove a violation of the right to silence. Third, there is no judicial discretion to admit a statement that does not pass muster under the confessions rule, whereas a violation of the right to silence may or may not lead to exclusion of the evidence under s. 24(2) of the Charter: Oickle at para. 30.
- [227] The relationship between the confessions rule and the constitutional right to silence was further addressed in Singh. In that case, the accused was arrested for murder in connection with a night club shooting. After being taken into custody, the accused spoke with counsel and was then interviewed by the police in a custodial setting. The accused maintained that he did not wish to give a statement, but the investigating officer persisted in questioning him. While the accused did not give a confession, in the course of persistent questioning he made a number of strategic admissions, which the trial judge ruled admissible: Singh at paras. 12-13.

- [228] On appeal, the accused conceded that the statement was voluntary, but argued that the police breached the accused's right to silence and that the courts below erred (i) in reasoning that, where a custodial statement passes muster under the common law confessions rule, there is no scope or discretion to exclude that statement under the Charter, and (ii) in failing to interpret s. 7 of the Charter to include a rule requiring the police to refrain from questioning where the accused indicates a clear intention to remain silent: Singh at para. 17. The Court of Appeal rejected those arguments and upheld the judge's decision to admit the statements. In a 5:4 decision, the Supreme Court of Canada agreed.
- [229] Even though the arguments in Singh were focused on s. 7 of the Charter, the decision also addressed the scope and purpose of the confessions rule. Writing for the majority, Justice Charron reasoned that although the confessions rule recognizes the right of an accused to remain silent, this does not give the accused a right not to be questioned by the police: Singh at para. 28.
- [230] Justice Charron further explained that the principal concern of the confessions rule is with the reliability of an accused's statements. In this way, the Crown's burden to prove the voluntariness of any statement by the accused to a person in authority is important to the prevention of miscarriages of justice: Singh at para. 29. However, the confessions rule also encompasses broader notions of voluntariness, including respect for a detained person's right to remain silent: Singh at paras. 30-31.
- [231] Justice Charron went on to endorse the proposition in Oickle that there is "considerable overlap" between the common law confessions rule and the constitutionally protected right to silence: Singh at paras. 24-25. Given the close relationship between the two, the police would be "well advised" to inform a suspect of the right to silence and that anything the suspect says can be used in evidence: Singh at para. 33.
- [232] In the result, the majority in Singh reasoned that where the accused is in custody and knows he or she is speaking with a person in authority, the confessions rule and the right to silence are "functionally equivalent": Singh at para. 39. Proof of voluntariness necessarily dispels any contention that the accused's right to silence has been violated in the taking of the statement: Singh at para. 39. Justice Charron added that "the residual protection" afforded by s. 7 of the Charter has added value in "other contexts": Singh at para. 40.
- [233] Justice Charron's suggestion that the police would be "well advised" to inform a suspect of the right to silence and to provide a warning that anything the suspect says could be used as evidence was expanded upon in Tessier. In that case, the accused was a suspect in the murder of a friend, whose body had been found in a ditch. At issue was the admissibility of statements made by the accused in connection with two separate police interviews: Tessier at paras. 1, 14, and 21.

- [234] The first interview took place when the accused attended the police station in response to a police request to provide background information about the victim. The accused was not advised of his right to silence, was not given a police caution, and was not advised of his right to counsel. The interview was recorded. The accused was clearly a suspect at the time, and some of the questions put to him were mildly accusatorial. When the interview ended, the accused was allowed to leave the police station. The accused made no admissions but did make statements that the Crown later sought to rely upon at trial: Tessier at paras. 14-20.
- [235] The second interview occurred when the accused returned to the police station later the same day at the request of the police, to provide some "additional information". The interview was once again recorded. In the course of the interview, the accused invited the police to come to his residence to retrieve a firearm. Once at the residence, the police arrested the accused, read him his rights, and gave him a police caution: Tessier at para. 21.
- [236] The trial judge ruled all of the accused's statements admissible. The Court of Appeal found legal errors in the trial judge's analysis and ordered a new trial. A further appeal to the Supreme Court of Canada was allowed and the conviction was restored.
- [237] Justice Kasirer, writing for the majority, held that while the trial judge's analysis was "incomplete", he did not make legal errors undermining the conclusion that the statements were voluntary: Tessier at para. 13. The focal point of the majority judgment was the significance of the police caution, or lack of caution, in considering the admissibility of a statement under the confessions rule.
- [238] The majority judgment picked up on Charron J.'s comment in Singh that the police would be "well advised" to caution a suspect prior to questioning. As Kasirer J. explained, "[w]hile a proper caution will not guarantee that statements given thereafter are voluntary, it stands to reason that proving the accused made a free choice to speak to the authorities will be easier for the Crown if a caution is given": Tessier at para. 5. Justice Kasirer went on to reason that the failure to give a caution was not fatal but was prima facie evidence that the suspect was unfairly deprived of the choice to speak with the police: Tessier at paras. 9 and 11.
- [239] As part of its burden to prove the voluntariness of a statement beyond a reasonable doubt, the police must show that the absence of a caution did not undermine the suspect's free choice to speak or not speak to the police, as part of the contextual examination of voluntariness: Tessier at paras. 11, 83 and 89.

- [240] Where the evidence adduced on a voluntariness voir dire shows that the accused was in custody or otherwise suspected of a crime and was not given a caution, this will give rise to a presumption that the accused lacked the ability to understand that any statements given to the police could be used in evidence: Tessier at para. 86. In such circumstances, the trial judge must "undertake a contextual inquiry to determine whether an unfairness arose that vitiates voluntariness by denying the right to silence": Tessier at para. 87.
- [241] While not required to do so, the Crown may tender evidence that shows the accused suspect was subjectively aware of the right to silence. This could include evidence that the accused was aware of being recorded, was directing the conversation, had an awareness of the subject matter of the investigation and the accused's alleged role in it, or that the accused in fact exercised the right to silence by declining to answer questions. This can be "powerful evidence that the absence of a caution did not undermine voluntariness": Tessier at para. 88.
- [242] The absence of a caution may be relevant to the "Oickle factors", or "any other considerations pertinent to voluntariness". Furthermore, circumstances indicating an "informational deficit" that was "exploited by police" will "weigh heavily towards a finding of involuntariness": Tessier at para. 89.
- [243] Nevertheless, the failure to caution a suspect is "not determinative", and the Crown may still discharge its burden based on the "totality of the circumstances". If the trial judge is satisfied that the suspect had the "ability to exercise a free choice" due to an absence of "threats or inducements, oppression, lack of an operating mind or police trickery", the statement may be admissible even in the absence of a police caution: Tessier at para. 89.
- [244] The Crown has also cited two cases that are helpful in delineating the contours of the operating mind doctrine, namely *R. v. Whittle*, [1994] 2 S.C.R. 914, 1994 CanLII 55 and *R. v. Hosack*, 2022 BCCA 226.
- [245] In *Whittle*, the police stopped the accused on the street while he was exhibiting signs of schizophrenia, and then arrested him on outstanding warrants for unpaid fines. While in custody, the accused made a series of unsolicited statements about having committed various past crimes, including a murder and several robberies. He declined to contact counsel when given the opportunity to do so. Over the course of several days thereafter, the accused made increasingly specific admissions in relation to the murder. Police were able to match these statements with an unsolved suspicious death case. Eventually, the accused indicated a willingness to give a video-recorded statement. Prior to the taking of the statement, he was again informed of his right to counsel and this time indicated a desire to exercise it. After consulting with counsel, the accused gave a video-recorded statement admitting to the murder. The lawyer testified on the voir dire that he advised against giving a statement but doubted the accused would take the advice because he appeared to be mentally ill at the time.

- [246] The trial judge found that the accused had an operating mind and that the statements were voluntary, but ruled them inadmissible based on breaches of the accused's right to counsel under s. 10(b) of the Charter. The accused was acquitted. The Court of Appeal set aside the trial judge's decision and ordered a new trial. On further appeal, the Supreme Court of Canada held unanimously that the statements were voluntary and not obtained in a manner that breached the accused's Charter rights.
- [247] The Court held that the accused had the requisite mental competence to make his decision to speak with the police voluntarily, and to make informed decisions concerning the right to silence and right to counsel. With regard to voluntariness, Justice Sopinka reasoned that the "operating mind test" requires proof that the accused possesses sufficient cognitive ability to understand what he or she is saying, and that it could be used in evidence. It is not necessary for the Crown to go further by showing that the accused was capable of making "a good or wise choice", or a choice that "is in his or her interest": Whittle at 939.
- [248] The trial judge found that the conventional "operating mind" test was satisfied, but went on to hold that the accused did not have sufficient cognitive capacity to have an "awareness of consequences" sufficient to make an informed decision about his Charter rights. The Court held that this was in error because it was not necessary for the Crown to show that the accused possessed an "awareness of consequences", either under the common law confessions rule, or under the Charter. As Sopinka J. explained, "to the extent that the inner voices prompted the appellant to speak in apparent disregard of the advice of his counsel and to his detriment, because he did not care about the consequences or felt that he could not resist the urging of the voices, they cannot be the basis for exclusion". This is because "[i]nner compulsion, due to conscience or otherwise, cannot displace the finding of an operating mind unless, in combination with conduct of a person in authority, a statement is found to be involuntary": Whittle at 946.
- [249] In Hosack, the accused lived with the deceased homicide victim when he was last seen alive. The accused was arrested in the woods, in possession of a knife with the victim's DNA on it, and a gruesome drawing indicative of a beheading. At some point thereafter, the victim's decapitated body was found in a suitcase in his residence. The police questioned the accused for 12 hours, and he eventually gave a statement under the "guise" of being his own grandfather, stating that the grandfather had ordered the accused to kill and dismember the victim: Hosack at paras. 4-11.
- [250] The trial judge held that the accused was clearly suffering from mental illness and was indeed delusional, but that his statement was nonetheless the product of an operating mind. The judge reasoned that the delusions related to matters other than his confession, which was made with a "purposive awareness" of his statements, "their effect", and their possible use as evidence against him. On this basis, the judge concluded that the accused's statement was the product of an operating mind: Hosack at paras. 30-31. The judge also considered other facets of the confessions rule, including alleged police oppression and trickery, but concluded that none of the police conduct raised a doubt as to the

voluntariness of the accused's statement: Hosack at paras. 34-35.

- [251] The Court of Appeal affirmed the admissibility ruling. The Court rejected the accused's contention that the trial judge failed to conduct a meaningful contextual analysis. Writing for the Court, Justice Dickson stated that the trial judge's reasons reflected a "broad and contextual analysis of voluntariness, as mandated in *Oickle*". This included a "keen sensitivity" to the accused's particularities and vulnerabilities, specifically the accused's mental illness and its impact on his "cognitive and volitional capacity": Hosack at para. 41.
- [252] With regard to the legal parameters of the operating mind test, Justice Dickson noted that there is "no invariable rule that inculpatory statements made by a mentally ill person are necessarily involuntary, nor does the test for an operating mind require a high degree of mental ability": Hosack at para. 44, citing Whittle at 939 and *R. v. Nagotcha*, [1980] 1 S.C.R. 714, 1980 CanLII 30 at 716.
- [253] The Crown emphasizes that in both Whittle and in Hosack, there was expert evidence speaking to the question of the accused's mental capacity. In Whittle, there was expert testimony from two forensic psychiatrists, both of whom opined that the accused suffered from schizophrenia and that a common symptom of this illness is auditory hallucination: Whittle at 925. In Hosack, the trial judge heard testimony from a psychiatrist addressing the "cognitive and volitional capacity" of a person suffering from psychosis: Hosack at para. 27. The Crown points out that no such expert opinion evidence was tendered in this case. Among other things, there is no formal diagnosis that Mr. McIntyre ever suffered from a mental illness or psychiatric condition, and neither party tendered expert evidence addressing the impact of any such illness or condition on Mr. McIntyre's cognitive or volitional capacity.
- [254] I should qualify this by noting that Dr. Yu, Dr. Shope, and Dr. Khosroshahy are all practicing psychiatrists, and that all of them did in fact give evidence about certain opinions or conclusions with respect to Mr. McIntyre's mental health and psychological condition. However, all three of these witnesses testified in their capacity as treating physicians. In other words, they were fact witnesses, not expert witnesses. They were not formally qualified as experts for the purposes of tendering expert opinion evidence. The opinions of these witnesses with respect to Mr. McIntyre's mental state were admitted merely to explain the actions of the treatment team, not for the truth of their contents.
- [255] To the extent that it was necessary for these witnesses to give testimony about various technical matters in the field of psychiatry or medicine more generally, this evidence was admissible under the reasoning found in *R. v. Panghali*, 2012 BCCA 407. In that case at para. 92, Justice Frankel explained that sometimes a witness with technical expertise may give testimony about a "fact" as opposed to an expert "opinion". Justice Frankel drew support from *R. v. K. (A.)* (1999), 125 O.A.C. 1, 1999 CanLII 3793 (Ont. C.A.), in which Charron J., as she then was, reasoned as follows:

A witness, who is an expert in a particular field, may be called simply to give evidence on the facts he or she has observed without offering an opinion based on those facts. To that extent, and if otherwise admissible, this evidence is not subject to the opinion rule. This would be the case, for example, where a treating physician is called to describe the injuries he or she observed on a patient without offering any opinion on the matter

[256] To sum all of this up, there is evidence from Mr. McIntyre's treating psychiatrists that he displayed certain symptoms consistent with a psychiatric condition and that the treatment team was at least considering the possibility that Mr. McIntyre had a psychological condition. This evidence is admissible and certainly part of the totality of the circumstances that the court must consider in assessing voluntariness. Nonetheless, it is fair to say that there is no expert opinion evidence, admitted for the truth of its contents, formally diagnosing Mr. McIntyre with any mental illness, psychiatric condition, or other cognitive deficiency. Nor is there any admissible expert opinion evidence explaining how any such condition would impact on Mr. McIntyre's ability to understand what he was saying, who he was saying it to, or its potential use as evidence against him. Although evidence of this sort may not be a legal pre-requisite to a finding that an accused lacks an operating mind within the meaning of the confessions rule, the absence of such evidence would make it more difficult for the accused to raise a reasonable doubt as to the voluntariness of the statement.

Admissibility of Oral Police Statement #1 [7 February 2022]

[257] Mr. McIntyre was not a suspect when he began speaking with Cpl. Kletzel at the Cranbrook RCMP detachment on the morning of 7 February 2022. He attended the police station of his own initiative, and at no point was he physically or psychologically detained. Cpl. Kletzel had no reason to suspect Mr. McIntyre of any crime. Mr. McIntyre took the initiative in starting the conversation, and he was largely directing the conversation. He controlled the agenda.

[258] There is some evidence that Mr. McIntyre had been in perceived medical distress the night before, but he was released from the EKRH emergency room after a full physical examination. It appears he slept in his car overnight before showing up at the RCMP detachment on the morning of 7 February 2022, but the evidence does not suggest that he was sleep-deprived to the point that it impacted his faculties. Nor is there any evidence that Mr. McIntyre was impaired by drugs or alcohol at the time of his discussion with Cpl. Kletzel.

[259] Although Mr. McIntyre stated that he had mental health concerns, he was alert and responsive and was able to communicate effectively. From the content of his statements, he was aware of his surroundings, and able to account for his own activities over the preceding day or two. Nothing Mr. McIntyre said or did in his dealings with Cpl. Kletzel suggested any deficiency in faculties. Nor is there any expert evidence that Mr. McIntyre was suffering from a mental illness or psychiatric condition at the time, much less that any

such illness or condition had any bearing on his ability to understand what he was saying or that it could be used as evidence against him. Indeed, the content and overall context of Mr. McIntyre's interaction with Cpl. Kletzel is reflective of Mr. McIntyre's understanding that anything he said could be used as evidence against him.

- [260] When Mr. McIntyre expressed a desire to speak with counsel, Cpl. Kletzel facilitated it, even though Mr. McIntyre was not detained, and was not a suspect. Mr. McIntyre spoke at length with one counsel and phoned and left a message for another.
- [261] Finally, at a certain point Cpl. Kletzel cautioned Mr. McIntyre that he did not have to say anything, and that anything he did say could be used against him in evidence. At the point when Cpl. Kletzel cautioned Mr. McIntyre, the officer had no subjective or objective grounds for believing Mr. McIntyre had actually committed a crime. The officer was aware of nothing more than Mr. McIntyre's stated wish to be arrested, and some information about a sudden death which at that time was not believed to be the result of any wrongdoing.
- [262] On these facts, I am satisfied beyond a reasonable doubt that Mr. McIntyre made oral police statement #1 freely and voluntarily. Cpl. Kletzel made no promises or threats. Mr. McIntyre's statements were clearly the product of an operating mind. There was no evidence of any oppressive conditions or police trickery. Although Cpl. Kletzel did not give Mr. McIntyre a police caution at the outset, the officer had no reason for doing so because there was no crime under investigation and Mr. McIntyre was not suspected of anything. In any event, as the discussion unfolded, Mr. McIntyre was told that he did not have to say anything and clearly understood that anything he did say could be used against him. Indeed, although he wanted to be arrested, Mr. McIntyre declined to say what, if anything, he had done, thus reflecting a clear understanding that he had a right to silence. He made his own free and voluntary choices about what he would and would not say to Cpl. Kletzel. Oral police statement #1 is admissible.

Admissibility of Recorded Police Statement #1 [7 February 2022]

- [263] Mr. McIntyre had already spoken with counsel by the time Cpl. Tent began to take recorded police statement #1. Near the outset of the discussion, Cpl. Tent informed Mr. McIntyre that he was recording the interview, and advised Mr. McIntyre he did not have to say anything and anything he did say could be used against him. Indeed, while Cpl. Tent was giving Mr. McIntyre the caution, Mr. McIntyre interjected to complete the officer's thought. Even still, Cpl. Tent completed his recitation of the police caution.

- [264] At the time of recorded police statement #1, Mr. McIntyre's physical and psychological state was largely the same as it was at the time of oral police statement #1. I will not repeat what is said above on that topic. Mr. McIntyre's physical appearance and demeanor on the video and audio-recording reinforce my conclusions with respect to his physical and psychological state at the time. Mr. McIntyre appeared alert, lucid, responsive, and fully aware of his surroundings. He communicated clearly and was responsive to questions.
- [265] Cpl. Tent gave Mr. McIntyre a coffee, and also arranged to get him a meal. When the meal arrived, it was given to Mr. McIntyre. There is no suggestion that Cpl. Tent offered these things to Mr. McIntyre in exchange for his providing a statement or answering any particular questions. There was no suggestion of a quid pro quo.
- [266] Cpl. Tent expressly informed Mr. McIntyre that nothing any other officer had said to him should be taken as a threat or promise. Cpl. Tent also said he himself had no intent to threaten Mr. McIntyre and no authority to promise him anything. At one point Mr. McIntyre parroted back the officer's advice, uttering the phrase "no promises, no threats".
- [267] The content of recorded statement #1 indicates that, as had been the case with oral statement #1, Mr. McIntyre was largely directing the conversation and in control of the agenda. Cpl. Tent generally responded or reacted to Mr. McIntyre's lead. There were a few instances where Cpl. Tent asked pointed questions, but even then the officer's tone was not aggressive or accusatorial.
- [268] Mr. McIntyre broached the topic of entering into some kind of negotiation, saying that he would tell Cpl. Tent everything he wants to know, after further consultation with his counsel. Mr. McIntyre started to discuss terms, but Cpl. Tent slowed Mr. McIntyre down and made it clear that he was in no position to promise or agree to anything.
- [269] Mr. McIntyre also made his position clear that he would not discuss any details of his dealings with Ms. Howe until he had consulted further with counsel. At one point, after engaging in some kind of verbal sparring or wordsmithing with the officer, Mr. McIntyre "respectfully decline[d] to answer" a pointed question.
- [270] Mr. McIntyre told a number of stories and discussed a number of random topics, however, this appeared to be part of an explicit strategy to stall for time until he could speak with his lawyer again. Indeed, Mr. McIntyre told Cpl. Tent directly that he was just "wasting time" until his lawyer called or the police "stuck him in a cage".
- [271] Mr. McIntyre's statement indicated a fairly good understanding of the justice system, the role of the police and the Crown, and the role of defence counsel. He referred to a prior court case that he had for a charge of impaired driving. At one point, when Cpl. Tent left the room, Mr. McIntyre went to look at the officer's notes, and then remarked to Cpl. Tent upon his return to the room that the police had more information than he thought.

- [272] Mr. McIntyre also made statements reflecting some understanding of the relationship between the justice system and the medical system. When it became apparent that Cpl. Tent was not going to arrest Mr. McIntyre without a basis for doing so, Mr. McIntyre injected the notion that he was a danger to himself and others. This led Cpl. Tent to say that with that information he could detain Mr. McIntyre under the Mental Health Act and take him to the hospital. Mr. McIntyre responded that if matters unfolded that way, the police would "lose" him to the hospital.
- [273] I am satisfied beyond a reasonable doubt that recorded police statement #1 was made freely and voluntarily. No promises or threats were made to Mr. McIntyre. Once again, I find Mr. McIntyre had an operating mind. The content of the statement reflects a full appreciation that Mr. McIntyre did not have to say anything to the police, and that anything he said could be used in evidence. Indeed, Mr. McIntyre expressly invoked his right to silence on several occasions. Nor was Mr. McIntyre subjected to any oppressive conditions or police trickery. He had consulted with counsel. He was given a police caution near the beginning of the statement, and clearly understood its significance. Mr. McIntyre did not present in the video recorded statement as particularly vulnerable, or impressionable, or easily manipulated. Indeed, the evidence establishes quite clearly that he was in a position to make his own decisions about whether or not to speak to the police, and what questions he was and was not prepared to answer. For all of these reasons, I have no difficulty concluding that the statement was given freely and voluntarily and is therefore admissible at trial.

Admissibility of Oral Police Statement #2 [1 March 2022]

- [274] Recall that upon his discharge from the IPU on 1 March 2022, Mr. McIntyre went to the police station, of his own accord. At this point, Mr. McIntyre had been in the IPU for 20 days, having been committed under the Mental Health Act for one day, and then remaining for voluntary treatment for a further 19 days. When Mr. McIntyre presented himself at the RCMP detachment, Cpl. Parker was summoned to the public information counter to speak with him. Cpl. Parker cautioned Mr. McIntyre, advising that anything he said to her could be used as evidence.
- [275] By this point in time, Mr. McIntyre had spoken with counsel at least three times, namely once at the police station on 7 February 2022, and twice more in the emergency room at EKRH on 8 February 2022. Further, near the end of the initial discussion, when Mr. McIntyre asked to speak with counsel, Cpl. Parker phoned Mr. McIntyre's counsel but was unable to make contact. She left a message for Mr. Strahl to phone Mr. McIntyre.

- [276] Cpl. Parker also made it clear to Mr. McIntyre that he was not arrested or detained and was free to leave the police station if he wished to do so. Mr. McIntyre actually expressed a wish to be taken into police custody, but Cpl. Parker explained to him that the situation was the same as it was the last time he showed up at the police station. (This was clearly a reference to the events of 7 February 2022, when Mr. McIntyre showed up at the Cranbrook RCMP detachment asking to be arrested, and the police declined to do so.)
- [277] The initial conversation ended with Cpl. Parker's suggestion that if Mr. McIntyre had nowhere to go, she might be able to assist in finding him a hotel room. Mr. McIntyre was agreeable and appreciative.
- [278] There is no evidence of any improper threats or promises arising from the exchange between Cpl. Parker and Mr. McIntyre. Although the officer offered to assist Mr. McIntyre by arranging a hotel room for him, this was not presented as an inducement to get Mr. McIntyre to speak or give a statement. There was clearly no quid pro quo. Nothing else that Cpl. Parker said or did during the exchange could be interpreted as any kind of threat or promise to induce Mr. McIntyre to speak with the police.
- [279] With regard to cognition, although Mr. McIntyre claimed to be a danger to himself and others, there is no convincing evidence that the self-professed danger he posed was a function of any mental illness or psychiatric condition. Aside from Mr. McIntyre's own statements that he was "not right in the head", there is little if any independent evidence that Mr. McIntyre had any cognitive or volitional dysfunction. The hospital records and voir dire testimony of Mr. McIntyre's nurses, doctors, and other EKRH all indicate that Mr. McIntyre was in full possession of his faculties. He was alert, communicative, and responsive. Although some of the mental status examination reports recorded that Mr. McIntyre was mildly distractible, or had mild deficits in concentration, comprehension, and reasoning, the testimony of the nurses revealed that on many occasions these remarks were attributable to their understanding of Mr. McIntyre's situation, namely their belief that he was claiming to have committed one or more murders that he did not commit. There was certainly no expert opinion evidence that Mr. McIntyre was suffering from any kind of mental illness or psychiatric condition that would impact on his ability to know what he was saying or understand that it might be used against him in court. In short, the evidence does not come close to raising a reasonable doubt on the question of whether Mr. McIntyre had an operating mind, and I have no difficulty concluding that Mr. McIntyre did in fact have an operating mind. He had the ability to understand what he was saying, and that what he said could be used as evidence.
- [280] There is no evidence of oppressive treatment or police trickery in connection with oral police statement #2. Mr. McIntyre attended the police station voluntarily. Cpl. Parker was completely transparent with him. She offered to find him a place to stay for the night, but there is no evidence that this was part of any kind of scheme or ploy to manipulate Mr. McIntyre or deprive him of his choice about whether or not to speak with the police.

- [281] I also have no difficulty concluding beyond a reasonable doubt that Mr. McIntyre had an operating mind at the time of oral police statement #2. I will not repeat all the evidence reviewed above with respect to his state of mind. He clearly had the capacity to understand what he was saying and that it could be used as evidence.
- [282] By 1 March 2022, Mr. McIntyre was clearly a suspect in the murder of Ms. Howe. Among other things, the police knew that Ms. Howe died from a bullet wound, and they had searched Mr. McIntyre's vehicle and located a gun. Thus, under the reasoning in Tessier, the question of whether Mr. McIntyre was given a police caution is relevant. Cpl. Parker did in fact advise Mr. McIntyre near the outset of their discussion that anything he said could be used as evidence against him. Even without that explicit warning, I would have no difficulty concluding that Mr. McIntyre knew anything he said to the police could be used as evidence against him. The police caution had been given to him on multiple occasions, and he had exercised his right to remain silent by declining to answer questions that he did not wish to answer. Mr. McIntyre had also spoken with counsel multiple times.
- [283] Taking into account all of these factors, I am satisfied beyond a reasonable doubt that oral police statement #2 was voluntary and is therefore admissible as evidence in the trial proper.

Admissibility of Recorded Police Statement #2 [1 March 2022]

- [284] Since the conditions at the time that Mr. McIntyre made oral police statement #1 were more or less identical to the conditions when Mr. McIntyre made oral police statement #2 some 90 minutes later, my analysis of the admissibility of the latter statement will be brief. The audio-recording certainly supports my finding that, at the time, Mr. McIntyre was in full possession of his faculties and thus had an operating mind. Cpl. Parker informed Mr. McIntyre that she was recording this particular conversation and she once again gave Mr. McIntyre a police caution. Cpl. Parker offered to arrange and pay for a hotel room for Mr. McIntyre, explaining to him that he did not have to accept the offer, and if he did accept, he would be free to come and go from the room as he chose. For his part, Mr. McIntyre confirmed with Cpl. Parker that the room would not be monitored.
- [285] In the course of the recorded interaction, Cpl. Parker did not make any threats or promises to induce Mr. McIntyre to speak with the police. Once again there was no oppression or police trickery. Mr. McIntyre clearly had an operating mind. Cpl. Parker cautioned Mr. McIntyre. Taking all of these factors into account, and considering the totality of the circumstances, I am satisfied beyond a reasonable doubt that recorded police statement #2 was made voluntarily and is admissible.

Admissibility of Recorded Police Statement #3 [2 March 2022]

- [286] This statement occurred at the doorway and inside the hotel room where Mr. McIntyre stayed the night from 1 March 2022 into 2 March 2022. Cpl. Betts recorded the conversation and Mr. McIntyre was clearly able to see the recording device, which the officer placed on the table in Mr. McIntyre's view, and near the beginning of the conversation Cpl. Betts told Mr. McIntyre that the conversation was being recorded. Mr. McIntyre stated that he had spoken with counsel and had been advised not to say anything.
- [287] Cpl. Betts expressly informed Mr. McIntyre that he was a suspect in a murder investigation, that he did not have to say anything, and that anything he said could be used against him. Later in the conversation, Cpl. Betts told Mr. McIntyre that the police had obtained and executed search warrants for his car and his residence.
- [288] The officers returned Mr. McIntyre's cell phone and tablet, and there was some discussion about Mr. McIntyre retrieving his vehicle from the impound lot.
- [289] Near the end of the conversation, Mr. McIntyre asked Cpl. Betts if the police were going to arrest him, and said "lets get the ball rolling". Cpl. Betts responded to this question by suggesting that Mr. McIntyre speak with his counsel, and then, if he wanted to speak with the police, he could go to the Cranbrook detachment to do so. Cpl. Betts gave Mr. McIntyre his business card. Cpl. Betts told Mr. McIntyre that it would be totally voluntary and up to Mr. McIntyre whether or not he chose to speak with the police.
- [290] Cpl. Betts and Cst. Flaman made no threats or promises to induce Mr. McIntyre to speak with them. There was no police oppression or trickery, and once again the police were entirely transparent in their dealings with Mr. McIntyre. Again, I have no difficulty concluding that Mr. McIntyre had an operating mind. He was given a formal police caution, and indeed had been given such cautions on multiple occasions prior to this encounter. I am satisfied beyond a reasonable doubt that recorded police statement #3 was made voluntarily and is admissible.

Admissibility of Recorded Police Statement #4 [3 March 2022]

- [291] Recall that this statement occurred at the RCMP impound lot on the morning of 3 March 2022. The statement was audio-recorded by Cpl. Betts, on a recording device that was clearly visible to Mr. McIntyre. The ensuing conversation was a mundane discussion about arrangements for Mr. McIntyre to retrieve the insurance papers from his vehicle, and his plan to return and pick up his car after renewing the insurance.
- [292] There were no threats or promises made to Mr. McIntyre during this conversation, no oppressive circumstances, and no police trickery. Mr. McIntyre continued to have an operating mind. The Crown has proven beyond a reasonable doubt that recorded police statement #4 was given voluntarily.

[293] I have taken into account that Cpl. Betts did not give Mr. McIntyre a police caution during this exchange. I am satisfied beyond a reasonable doubt that the absence of a police caution did not undermine Mr. McIntyre's free choice to speak or not speak with the police. Mr. McIntyre had been formally cautioned on multiple prior occasions. He had spoken with counsel multiple times. He clearly understood his right to remain silent and that he had the choice about whether or not to speak with the police, as reflected by his choice not to answer questions that he did not wish to answer. It is also obvious from the whole of Mr. McIntyre's dealings with the police up to this point that he understood anything he said to them could be used as evidence against him. Finally, Mr. McIntyre was aware of the nature of the police investigation and at least some of the steps the police had taken to gather evidence against him. For all of these reasons, I am satisfied beyond a reasonable doubt that the absence of a formal police caution on this particular occasion did not undermine the voluntariness of Mr. McIntyre's statement.

[294] Recorded police statement #4 is admissible.

Admissibility of Recorded Police Statement #5 [5 March 2022]

[295] Recall that recorded statement #5 took place at EKRH in the early morning hours of 5 March 2022. Cst. Banich and Cst. Silitto were in full uniform. Cst. Banich informed Mr. McIntyre that she was recording the conversation. Cst. Banich expressly cautioned Mr. McIntyre, who responded "I know, I know".

[296] In the course of the conversation, Mr. McIntyre volunteered that he did not feel well and intimated that he felt he might hurt others. He said he was "losing his marbles" and his mind would not shut off. Mr. McIntyre was clearly emotional. In the course of the conversation, he also told several long stories of no apparent significance to his current situation. Despite all this, Mr. McIntyre presented in the audio-recording as lucid, responsive, and aware of his surroundings. He made some reference to an internal dialogue in his head, but made no mention of compulsions, voices, delusions, or hallucination. Given the evidence about his mental condition both before and after this incident, I am satisfied that at this particular point in time he was fully aware of what he was saying and that it could be used against him.

[297] With regard to the substance of the discussion, Mr. McIntyre was prepared to say or at least intimate that he had considered hurting other people but would not discuss specifics or past events. When Cst. Banich suggested it would be "better if [he] let it out", Mr. McIntyre responded by saying that he wanted to use the "correct words" and he did not want to get himself into "a situation". He said he understood that the police officers were not his friends. Mr. McIntyre concluded by saying he had "information" to give, but he needed "an advocate" on his side before he would discuss it.

[298] Cst. Banich made no threats or promises to induce Mr. McIntyre to speak. There were no circumstances of oppression, nor was there any police trickery. Despite the fact that Mr. McIntyre was clearly struggling emotionally, I am satisfied beyond a reasonable doubt that he had an operating mind. Aside from Mr. McIntyre's comments about his own state of mind, there is little independent evidence that he was suffering from any mental illness, psychiatric condition, or other form of cognitive impairment. He was lucid and responsive. The operating mind threshold is not a high bar, and Mr. McIntyre was clearly capable of understanding what he was saying, who he was saying it to, and that what he said could be used as evidence. He made his own choices about what to say and what not to say. Mr. McIntyre, who was certainly a suspect at the time of this interaction, was formally cautioned by Cst. Banich, so there is no *prima facie* case for questioning whether he was unfairly deprived of the choice to speak with the police. Furthermore, and in any event, Mr. McIntyre made it clear from his own remarks, and from the fact that he would talk about certain things but not others, that he was aware that it was his choice to speak or not speak to the police, and he was also aware that anything he said could be used in evidence. I am satisfied beyond a reasonable doubt that recorded statement #5 is voluntary. It is admissible in the trial proper.

(2) Admissibility of the Hospital Statements

Admissibility of EKRH Records

[299] Before addressing the admissibility of Mr. McIntyre's statements to EKRH staff, it is necessary to clarify the terms on which the EKRH records were admitted into evidence at the *voir dire*. I heard testimony from many members of the EKRH staff, including emergency room physicians, emergency room nurses, psychiatric physicians, psychiatric nurses, and social workers. Many of these witnesses made contemporaneous notes or other records of the treatment of Mr. McIntyre. On many instances, the witnesses had no independent recollection of the particulars reflected in these records.

[300] Subject to certain limitations discussed below, I admitted the bulk of the EKRH records as evidence in the *voir dire* pursuant to the hospital records exception to the hearsay rule, as stated in the following way in *Ares v. Venner* at p. 626:

Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in court and available to be called as witnesses if the respondent had so wished.

- [301] In the case at bar, I was satisfied that the vast majority of the records or entries in those records identified by the EKRH hospital staff who testified as witnesses in the voir dire fit within the parameters of the hospital records exception to the hearsay rule. However, there are some limitations with regard to the admissibility and use of these records.
- [302] First, the fact that a particular entry fit within the parameters of a hospital record did not necessarily mean the entirety of that record was admissible. The hospital records doctrine is an exception to the hearsay rule. Even though the hearsay rule is no bar to the admission of hospital records for the truth of their contents, a particular record or entry may contain inadmissible opinion evidence, or inadmissible speculation or conjecture.
- [303] Second, the fact that a particular record or entry has been admitted for the truth of its contents is by no means dispositive of a material fact in issue. The EKRH records were admitted subject to arguments about weight. A particular entry could be wrong, or subject to clarification, or it could be inconsistent with other more reliable or compelling evidence in relation to a fact in dispute.
- [304] Third, some of the entries in the EKRH records clearly did not relate to Mr. McIntyre's medical treatment. In particular, there were several doctor's notes outlining meetings between hospital staff and police officers. These particular entries did not, in my view, qualify for admission under *Ares v. Venner*. However, some of the entries relating to meetings between the doctors and police officers were nonetheless useful in allowing the witnesses to refresh their memory as to certain meetings. Furthermore, in relation to some entries in respect of which the doctors had no independent recollection of the meetings, I admitted the entries under the doctrine of past recollection recorded, based on the criteria articulated in *R. v. Fliss*, 2002 SCC 16 at para. 63 and *R. v. Louangrath*, 2016 ONCA 550 at paras. 43-44.
- [305] Fourth and finally, the fact that hospital records were admitted in evidence in the voir dire does not make them admissible in the trial proper. The whole purpose of the voir dire is to determine whether the voluntariness rule applies to Mr. McIntyre's statements to the hospital staff, and if so, whether those statements were made voluntarily. Where the hospital records contain statements attributable to Mr. McIntyre, those statements would only be admissible if they were (i) not made to persons in authority, or alternatively (ii) proven by the Crown to have been made voluntarily.

Admissibility of the Hospital Statements

Positions of the Parties

- [306] Crown counsel's position is that none of the hospital staff were persons in authority and consequently the confessions rule does not apply to regulate the admissibility of Mr. McIntyre's hospital statements. The Crown argues, in the alternative, that if some or all of the hospital staff qualify as "non-conventional" persons in authority, Mr. McIntyre's hospital statements were in any event voluntary. Crown counsel says that Mr. McIntyre

clearly chose to speak with the hospital staff, and his mental state was such that he understood what he was saying. Finally, counsel points out that Mr. McIntyre had consulted with counsel on multiple occasions and would have been in a position to understand his situation and make his own choices about whether or not to speak to the hospital staff, and what things he did and did not want to speak to them about.

- [307] Counsel for Mr. McIntyre contends that the hospital staff were, to Mr. McIntyre's knowledge, so closely connected to the police investigation that they qualified as non-conventional persons in authority, from the outset. Counsel further contends that (i) Mr. McIntyre was improperly induced to make statements to EKRH staff, effectively working in conjunction with the police, (ii) hospital staff questioned Mr. McIntyre unnecessarily about his involvement in past offences or past conduct, when it was not necessary to do so for medical purposes, and then improperly funnelled this information to the police, (iii) Mr. McIntyre was clearly under psychiatric care, and the hospital records make reference to delusional thoughts and beliefs, raising doubts as to whether he had an operating mind, and (iv) the police used the doctors and other EKRH staff to gather evidence about Mr. McIntyre. For all of these reasons, defence counsel says the Crown has failed to prove beyond a reasonable doubt that Mr. McIntyre's hospital statements were made freely and voluntarily.

Legal Principles

- [308] The scope of the confessions rule and its application to statements made to persons other than law enforcement officers was considered in *R. v. Hodgson*, [1998] 2 S.C.R. 449, 1998 CanLII 798. In that case, the accused was confronted by the complainant, her mother and father, and her cousin. The accused made an incriminating statement. The complainant's father held a knife to the accused's back, ostensibly to keep him from leaving until the police could arrest him.
- [309] At trial, the accused denied making the statement, but raised no argument with respect to its voluntariness. On appeal, the accused argued for exclusion of the statement on the basis that the Crown had failed to prove voluntariness. The Crown's response to this argument was that the requirement to prove voluntariness applied to statements made to persons in authority, and that the complainant and her family did not qualify.
- [310] The Supreme Court of Canada upheld the conventional formulation of the confessions rule, making it clear that the rule only applies to statements made by the accused to persons in authority. This is because the recipient's "official status" could give rise to concerns about "fear of reprisal or hope of leniency" that would undermine the voluntariness of the statement. Thus, "[t]he rule is generally not concerned with conversations between private citizens that might indicate guilt, as these conversations would not be influenced or affected by the coercive power of the state": *Hodgson* at para. 24.

- [311] In the majority judgment, Justice Cory went on to explain that a "person in authority" generally refers to someone "formally engaged in the arrest, detention, examination or prosecution of the accused", although it has on occasion been applied to broader categories of individuals with "authority or control over the accused" or "the proceedings": Hodgson at para. 32, quoting in part from *R. v. Todd* (1901), 4 C.C.C. 514 (Man K.B.) at p. 526-527. From the "earliest inception" of the rule in Canada, the question as to who should be considered a person in authority depended on "the extent to which the accused believed the person could influence or control the proceedings against him or her": Hodgson at para. 32.
- [312] Justice Cory explained that the test is to be applied subjectively, but that the accused's subjective belief that the statement recipient was a person in authority also had to be objectively reasonable. The rationale for this limitation is that the confessions rule is aimed at controlling coercive state conduct, and it would overshoot the mark to apply the rule to persons who could not reasonably be regarded as acting on behalf of the state. Thus, the question is whether the accused reasonably believed that the statement recipient was a person in authority: Hodgson at para. 34.
- [313] With regard to who might qualify as a person in authority, Cory J. reasoned that there was no "catalogue of persons, beyond a peace officer or prison guard", who are "automatically" considered persons in authority "solely by virtue of their status". Other individuals -- including parents, teachers, doctors, or employers -- might qualify "if the circumstances warrant". In each such case, the court must undertake a fact-specific consideration of the accused's belief that the person had the ability to influence the proceedings, and the reasonableness of that belief: Hodgson at para. 36.
- [314] Justice Cory also addressed the shifting onus in such cases. As a starting point, the defence must be able to point to an evidential basis for the accused to believe the statement recipient was a person in authority. Where that relatively low evidentiary burden is met, the burden then shifts to the Crown to prove beyond a reasonable doubt either (i) that the statement recipient was not a person in authority, or (ii) that the statement was made voluntarily: Hodgson at para. 38.
- [315] On the facts of that case, there was no evidence that the complainant, her parents, and her cousin had spoken with the police about the matter prior to their confrontation of the accused, nor was there any evidence that the accused subjectively believed that the complainant or her family had any control over criminal proceedings against him. In these circumstances, it was not incumbent on the trial judge to direct a voluntariness voir dire on his own motion: Hodgson at para. 50.

- [316] The parties cited several cases considering whether, and in what circumstances, the confessions rule ought to be extended to what are considered to be "non-conventional" persons in authority. In chronological order, these included *R. v. Sweryda* (1987), 76 A.R. 351, 1987 ABCA 75 (CanLII); *R. v. Reid* (D.L.) (2000), 192 Nfld. & P.E.I.R. 77, 2000 CanLII 28745 (Nfld. S.C.); *R. v. Laidley* (2001), 41 C.R. (5th) 123, 2001 CanLII 28421 (Ont. S.C.J.); *R. v. Mehl*, 2017 BCSC 1614, and *R. v. Berry*, 2022 BCCA 389.
- [317] In *Sweryda*, the accused was charged with assault of his daughter. The Crown relied upon a statement the accused had made to a social worker. The social worker attended the accused's workplace, invited the accused into her vehicle, informed him of her role in investigating the alleged assault, and said it would be up to her to determine whether to allow the child to remain in the accused's home. The accused testified on the voir dire that he viewed all government employees as one and the same, that he felt the social worker had status equivalent to a peace officer, that all government employees share information, and he felt if he did not provide a statement the child might be taken away.
- [318] When the matter reached the Court of Appeal, the Court held that the social worker was a person in authority and that the accused's statement was not voluntary. Writing for the majority, Chief Justice Laycraft reasoned as follows at para. 17:
- In my view the social worker, Nadia Zubach, to whom the appellant made the statement which is the foundation of the Crown's case, was a person in authority in relation to the appellant in the classic sense. She was a person investigating an alleged criminal act with power to institute a prosecution against him for that act. In my opinion the evidence is also clear that her threats to take their child away unless she "got answers" induced the appellant to make his statement to her.
- [319] The majority went on to find that the accused was subjectively aware of the social worker's status and ability to influence the proceedings, and that she made a "direct threat" to induce the accused's statement: *Sweryda* at para. 24. In reaching these conclusions, the majority applied the "classic formulation" of the confessions rule and rejected a broader re-formulation of the test proposed in the concurring judgment of Justice Hetherington: *Sweryda* at paras. 11, 15-16.
- [320] I should note that while *Sweryda* was decided before *Hodgson*, in the latter case Cory J. cited the former as an application of the classic formulation of the confessions rule to a non-conventional person in authority: *Hodgson* at para. 35. Thus, *Sweryda* is instructive as a practical application of the proper approach.
- [321] *Laidley* is another instructive case. The accused was charged with second degree murder in connection with the death of her child. The accused brought the child to the hospital with a head injury, claiming he had fallen off the couch. At the hospital, the "SCAN team" (suspected child abuse and neglect team) was brought in to "assess" the cause of the child's injuries. At trial, the Crown sought to introduce statements made by the accused to members of the SCAN team.

- [322] The trial judge, Justice Campbell, reasoned that, even though the members of the SCAN team were not conventional persons in authority, the accused subjectively believed that they had control over possible charges or criminal proceedings, and this belief was objectively reasonable.
- [323] With regard to the subjective element of the analysis, although the accused did not testify on the voir dire, there was evidence that the accused was told that SCAN stood for "suspected child abuse and neglect". It was, in Campbell J.'s view, "hard to think of a more direct announcement that the questioners were persons in authority in relation to suspected child abuse": Laidley at paras. 22-23.
- [324] With regard to the objective element, Campbell J. found it significant that the SCAN team was "at least the third level of inquiry" into the actual assessment of the child's medical injuries. The evidence reflected that the SCAN team was "clearly investigating and not merely assessing". Justice Campbell also found it significant that the SCAN team contact list included both children's aid workers and police officers. Thus, the team's role "completely transcended any medical role or any medical aspect of the case": Laidley at paras. 16-20.
- [325] Justice Campbell went on to consider whether the accused's statements to the SCAN team were voluntary. The accused was clearly not detained, so the Charter right to counsel was not engaged and thus not violated: Laidley at para. 26. Nor was there any evidence of threats or oppression: Laidley at para. 27. However, Campbell J. was left with a doubt as to whether the statements were truly voluntary based on the failure to fully explain the role and mandate of the SCAN team to the accused, such that she had no real understanding that her statements could be used against her in court for the purposes of deciding whether or not to speak with the authorities: Laidley at paras. 28-32, 35. In reaching this conclusion, Campbell J. acknowledged that "a statement may be voluntary even if there is no warning or caution", and "[t]he existence of a warning or caution is not conclusive one way or the other and is simply one factor to consider in terms of the overall inquiry into voluntariness": Laidley at para. 33.
- [326] The crux of the reasoning on proof of voluntariness is found in the following passage, at para. 35:

Having regard to the communication difficulties experienced by Ms. Laidley, as described by the SCAN team members, having regard to their assessment of her intellectual capacity, and having regard to the absolutely unsatisfactory evidence as to what she was told about the purpose and consequences of the interview, I cannot be satisfied on this evidence that the statement was voluntary in the sense of even a minimum awareness of consequences and investigative fairness of the kind referred to in the cases analyzed above in the Sopinka Lederman and Bryant text.

- [327] Justice Campbell's reference to "awareness of consequences" in the passage just cited requires some explanation. In Whittle, the Court rejected a broad "awareness of consequences" standard of mental capacity required to establish voluntariness in favour of the narrower "operating mind" test. Justice Campbell acknowledged this, but reasoned that

even after Whittle, "awareness of consequences" is relevant to the concept of "investigative fairness": Laidley at para. 34. As Cory J. explained in Whittle at p. 932, "[a]lthough the confession rule in its traditional formulation had as its *raison d'être* the reliability of the confession, a strong undercurrent developed which also supported the rule in part on fairness in the criminal process". And, to paraphrase from Iacobucci J.'s reasoning in Oickle at para. 69, the confessions rule envelopes a "conception of voluntariness 'that focuses on the protection of the accused's rights and fairness in the criminal process'".

- [328] As I understand it, investigative fairness is not a freestanding element of the voluntariness inquiry, but rather an underlying value that a judge may consider in deciding if there is a doubt as to whether the accused was effectively deprived of the choice to speak or not speak to the authorities as a result of coercion, trickery, oppression, lack of an operating mind, or lack of information. In Laidley, due to a combination of factors including absence of legal advice, failure of the SCAN team to follow its own procedures (including failure to explain the true nature of the agency's role to the accused), and evidence that the accused had limited "intellectual capacity", Campbell J. had a reasonable doubt as to whether the accused made a voluntary choice to speak with the authorities about the matters under investigation.
- [329] In Mehl, the accused was charged with murder in connection with the death of her child. The police attended the accused's home for a wellness check, where they found the child deceased and the accused in medical distress from an apparent drug overdose. The accused was taken to the hospital and certified under the Mental Health Act, on the basis that she was suffering from a mental illness and posed a danger to herself. It was in this context that the accused made statements to hospital staff that the Crown sought to rely upon for possible cross-examination at trial.
- [330] The issue addressed in the ruling was whether there was a basis for a *voir dire* to determine the voluntariness of the statements. Justice DeWitt-Van Oosten (at that time, a judge of the Supreme Court), accepted that the hospital staff were not conventional persons in authority, but this did not mean there was no scope for the voluntariness rule. Justice DeWitt-Van Oosten cited Hodgson at para. 36 for the proposition that, "[D]epending on the circumstances, a parent, doctor, teacher, employer or others could be found to meet the criteria" necessary to be recognized as a person in authority: Mehl at para. 21. The question was whether the statement recipient was "sufficiently involved with the arrest, detention, examination or prosecution of an accused and the accused believe[d] that the person may influence the process against him or her": Mehl at para. 23, citing Hodgson at para. 49 [italics added in Mehl].
- [331] Justice DeWitt-Van Oosten explained that the trial judge's obligation to undertake a voluntariness *voir dire* "for statements that are received by someone who is not conventionally seen as a 'person in authority', is triggered by evidence that 'clearly discloses a close connection between the receiver of the statement' and the police or prosecuting authorities". Further, the "nexus" must be such that the accused could "reasonably [have

believed] the receiver was acting as an agent of the police or prosecuting authorities or as part of the prosecution team": Mehl at para. 41. The "operative question' on the 'person in authority' inquiry is 'whether the accused, based on his or her perception of the recipient's ability to influence the prosecution, believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment'": Mehl at para. 44, citing *R. v. Grandinetti*, 2005 SCC 5 at para. 38.

- [332] Justice DeWitt-Van Oosten accepted, on the authority of *R. v. Fowler* (1981), 27 C.R. (3d) 232, 1981 CanLII 4952 (Nfld. C.A.) that nurses and other medical staff caring for an accused in hospital may in certain circumstances qualify as persons in authority for the purposes of the confessions rule: Mehl at para. 50. However, on the agreed facts placed before the Court in Mehl, there was no air of reality to the defence position that the hospital staff in fact qualified as persons in authority.
- [333] The agreed facts in Mehl included admissions between the Crown and the defence that the hospital staff did not detain the accused to assist in the criminal investigation or subsequent prosecution, the police did not ask the hospital staff to detain the accused, and at no point were the hospital staff enlisted to assist the police. A doctor spoke with the police, "but only for the purpose of gathering collateral information from them and to provide an update on the discharge plan": Mehl at para. 58.
- [334] Justice DeWitt-Van Oosten found that these facts were insufficient to meet the accused's relatively low evidentiary burden in two respects. First, there was no indication that the relationship between the hospital staff was sufficiently close to yield an objectively reasonable basis for believing that the hospital staff had the capacity to influence the investigation or any contemplated criminal proceedings: Mehl at para. 58-59. Second, the agreed statement of facts expressly acknowledged that there was "no evidence" that the accused in fact subjectively believed the hospital staff "were part of the police investigation or had influence or control over the potential criminal proceedings against her": Mehl at para. 60-61. Since the accused had not met the evidential burden contemplated in *Hodgson*, there was "no principled basis for a voir dire to test the voluntariness" of the accused's statements to the hospital staff: Mehl at para. 62. The conviction in Mehl was later overturned for reasons entirely unrelated to the ruling on the admissibility of the accused's statements: *R. v. Mehl*, 2021 BCCA 264.
- [335] In *Berry*, the accused was charged with two counts of murder in relation to the killing of his children. The police attended the accused's residence to find that the children had been stabbed to death. The accused was found in the bathtub, with a black eye and injuries to his chest, torso, and throat. He claimed to have been assaulted by an intruder. He was taken to the hospital, treated for injuries to his throat, and later committed under the Mental Health Act. The accused made statements to first responders (firefighters and paramedics) at the scene and to medical staff at the hospital. While in the hospital, he also made a statement to his sister, who was a police officer. The Crown sought admission of the statements at trial to show that the accused made no inquiry about the welfare of his children, as evidence of

the accused's guilt.

- [336] The trial judge held two voir dres dealing with the admissibility of the statements. The first dealt with admissibility of the accused's statements to first responders at the scene. The trial judge found that the first responders were not persons in authority, such that the Crown was not required to prove the voluntariness of the scene statements. The second ruling dealt with admissibility of the accused's statements to hospital staff. The trial judge ruled that the hospital staff were also not persons in authority, and thus the hospital statements were admissible without proof of voluntariness.
- [337] On appeal, the accused challenged the trial judge's decision in relation to both sets of statements. The Court of Appeal judgment contains a helpful summary of the legal framework for determining the admissibility of statements made by an accused to individuals who may or may not qualify as "non-conventional persons in authority". This includes a summary of the analytical framework laid out in *Hodgson*, which is instructive but unnecessary for me to recapitulate: see *Berry* at paras. 29-34 (analytical framework), paras. 35-39 (threshold for voir dire), paras. 40-42 (admissibility determination at the voir dire).
- [338] With regard to the scene statements, the accused argued on appeal that the trial judge's ruling erroneously placed too much emphasis on the objective nature of the relationship between the first responders and the police, when the legal test articulated in *Hodgson* requires a consideration of the accused's subjective belief or understanding of the situation. The accused also argued that "confusion at the scene" may have caused or contributed to a mistaken belief on the part of the accused as to the identity and authority of the first responders: *Berry* at para. 65.
- [339] The Court of Appeal accepted the defence proposition that the "actual authority" of the first responders was "not dispositive", but went on to reason that the accused's argument failed given the lack of any evidence in the voir dire that the accused "did in fact believe he was speaking to a police officer or someone who could influence a prosecution in relation to him": *Berry* at para. 66. The Court made it clear that "[i]t was not necessary for the [accused] to testify on the voir dire, as in principle, evidence of his belief could be inferred from other evidence". However, there was no evidence adduced in the voir dire upon which the requisite subjective belief could be grounded or inferred: *Berry* at para. 67.
- [340] Turning to the hospital statements, the arguments on appeal were focused on statements made by the accused to three individuals, namely a nurse, a doctor, and the accused's sister. The trial judge considered the evidence in relation to each of these individuals, concluding that none of them qualified as persons in authority. The Court of Appeal agreed with the result, although the Court was somewhat critical of the trial judge's failure to distinguish between the threshold evidential burden on the accused, and the ultimate burden on the Crown to prove beyond a reasonable doubt that the individuals were either not persons in authority, or that the statements were voluntary.

- [341] With regard to the nurse, the trial judge had concluded that the statements in issue were made when the nurse was in the accused's room "to attend to his health care needs alone", and that there was "no indication that [the accused] thought otherwise". Hence, the accused failed to meet the "onus" of demonstrating a belief that the nurse "could influence the prosecution or proceedings against him", or that if the accused had such a belief, it was objectively reasonable: Berry at para. 78, citing trial judge's reasons at para. 80. On appeal, the accused seized upon the trial judge's use of the word "onus" to argue that the judge had misconceived the evidential burden upon him. However, the Court of Appeal determined, upon examination of the trial reasons as a whole, that "any burden" the judge placed on the accused was "evidentiary in nature, not persuasive": Berry at para. 82.
- [342] With regard to the doctor, the evidence was that the accused made statements to her in the course of a mental status exam to determine whether he should be committed under the Mental Health Act. In her voir dire testimony, the doctor accepted that the accused's statements to her could have some "legal significance" (with regard to the accused's status under the Mental Health Act), but she also testified that she never spoke directly to the police, nor did she ask the accused anything about the actual events surrounding the death of his daughters. Thus, as the Court of Appeal put it, the doctor had "no involvement with the police in relation to [the accused]": Berry at para. 88. Nor was there any evidence upon which it could be concluded that the accused believed the doctor "had the authority to influence criminal proceedings against him": Berry at para. 89. Accordingly, the trial judge reached the legally correct result in concluding that the doctor did not qualify as a non-conventional person in authority.
- [343] With regard to the accused's statements to his sister (a police officer), the trial judge found that the sister spoke to the accused at the hospital in her personal capacity and not as a police officer. This factual finding, coupled with an absence of evidence that the accused subjectively believed his sister was "acting on behalf of the police or prosecuting authorities", led the Court of Appeal to conclude that the trial judge was correct in finding that the sister did not qualify as a non-conventional person in authority: Berry at paras. 99-101.

Analysis

- [344] Applying the framework in Hodgson to the facts in this case, there are two basic issues to be decided, namely (i) whether the hospital staff (doctors, nurses, and social workers) qualify as non-conventional persons in authority for the purposes of the confessions rule, and (ii) if so, whether the accused's statements to the hospital staff were made voluntarily within the meaning of the confessions rule.
- (a) Whether the Hospital Staff Qualify as Non-Conventional Persons in Authority

- [345] This stage of the analysis involves a consideration of shifting burdens. In determining whether the hospital staff qualify as non-conventional persons in authority, the defence bears an initial evidential burden of showing some basis on which the court could conclude that (i) the accused subjectively believed the hospital staff were in a position to control or influence the proceedings against him, and (ii) that this belief was objectively reasonable: Hodgson at paras. 32, 34; Berry at para. 34. The accused is not required to testify in order to meet this evidential burden, where there is evidence adduced in the voir dire from which the requisite subjective belief can be inferred: Berry at paras. 41, 67; Laidley at para. 22.
- [346] If the accused meets the evidential burden, the burden then shifts to the Crown to prove that the hospital staff do not qualify as non-conventional persons in authority, applying the same legal test as framed above. To meet this burden, the Crown must prove beyond a reasonable doubt that the accused did not have an objectively reasonable belief that the hospital staff were persons in authority within the meaning of the jurisprudence: Hodgson at para. 38. There are several phrases used in the jurisprudence to describe the nature of the relationship and what would constitute a non-conventional person in authority. The receivers of the statements in issue must be "closely connected" with the police, or "in an agency relationship or close collaboration" with the police, or "part of the prosecution team": Mehl at paras. 29, 41. With respect to medical professionals, the court may consider whether their actions transcend the medical aspects of the case as described in Laidley at para. 18, or go beyond tending to the medical needs of the accused as contemplated in Berry at para. 80.

(a)(i) Whether the Accused has Met the Evidential Burden

- [347] This case is somewhat unique in that the evidence relied upon by Mr. McIntyre to meet the evidential burden comes from events that took place over a span of days or weeks, and Mr. McIntyre made a number of statements over that same time period. This is not a case where all of the evidence said to bear on the accused's subjective knowledge of the relationship between the police and the receivers of the statements in issue relates to a time period before the statements were given.
- [348] I would summarize the evidence that could have a bearing on the accused's subjective beliefs concerning the relationship between the hospital staff and the police as follows:
- a) On 7 February 2022, Mr. McIntyre told the police that he was a bad person and he needed to be arrested. When he was told that the police would not arrest him without grounds for doing so, Mr. McIntyre said he was mentally unwell and was a danger to himself and others. The police then apprehended Mr. McIntyre under the Mental Health Act and took him directly to the hospital.
 - b) Cpl. Kletzel accompanied Mr. McIntyre into the emergency room at EKRH. When the intake clerk was taking information from Mr. McIntyre, Cpl. Kletzel, in full uniform, was standing some 10 feet away, listening to what Mr. McIntyre was saying. Cpl. Kletzel noted on the mental health occurrence form that Mr. McIntyre refused or was reluctant to speak. Cpl.

Kletzel explained in his testimony that when being asked questions by the intake clerk, Mr. McIntyre expressed concern that the conversation was being recorded, or that the hospital staff would have to tell the police what he said.

- c) While Mr. McIntyre was under observation in the seclusion room at the EKRH emergency department, Cpl. Kletzel and Cpl. Tent were standing by, some 10 feet away from the room. It is possible and indeed likely that Mr. McIntyre could see the officers interacting with Dr. Yu and other hospital staff while Mr. McIntyre was under assessment. The likelihood that Mr. McIntyre could see the interactions between the hospital staff and police is reinforced by the point made in the last sentence of the next subparagraph.
- d) When Mr. McIntyre met with Ms. Griffin inside the seclusion room, he expressed concerns about confidentiality. Ms. Griffin explained to Mr. McIntyre that what he said would not be shared with anyone outside of his treatment team unless there was some risk of future harm to others. While Mr. McIntyre was having this discussion with Ms. Griffin, he was looking out of the seclusion room in the direction of the nearby police officers.
- e) In the late morning hours of 8 February 2020, Mr. McIntyre was in a bed (inside a stall, with curtains cordoning off each stall from the others) within the emergency room. He awoke to find two police officers, Cpl. Parker and Cpl. Tent, seizing his clothing.
- f) On the afternoon of 8 February 2022, in the course of the IPU admissions process, Ms. Diethelm reviewed the Mental Health Act involuntary admission forms with Mr. McIntyre. Ms. Diethelm noted that Mr. McIntyre was "reluctant to engage with staff" as he was afraid he was going to be charged with a crime, and his lawyer had instructed him to "make no statements".
- g) On 9 February 2022, Dr. Shope informed Mr. McIntyre that there had been a breach of the hospital's confidentiality obligations toward him when someone from the treatment team had informed the police about his statements regarding a possible second victim at a second location.
- h) On 10 February 2022, Mr. McIntyre made a comment to Ms. Diethelm that he "did not want to say anything he shouldn't say that may be used against him". Ms. Diethelm testified that comments of this sort were "typical" in her interactions with Mr. McIntyre, which she characterized as "guarded", at least in regards to his discussion of the circumstances under which he came to be admitted to the hospital.
- i) On 13 February 2022, during a meeting with Dr. Shope, the doctor told Mr. McIntyre that there had been no report of a murder in Kimberley. Mr. McIntyre reacted with an expression of apparent "perplexity". The significance of this exchange, for current purposes, is that it served to reveal or reinforce to Mr. McIntyre that his doctors were engaged in an ongoing exchange of information with the police.

- j) On 19 February 2022, Ms. Klynsoon made a note reflecting that Mr. McIntyre's only "voiced concern" at the time was that the police could pick him up at any time.
- k) On multiple occasions throughout mid-to-late February 2022, Mr. McIntyre told hospital staff that he expected to be picked up by the police upon his discharge from EKRH.
- l) On 25 February 2022, Ms. Diethelm made a progress note reflecting that Mr. McIntyre was anxious because the police would pick him up upon his discharge from the hospital. When asked how he knew this, Mr. McIntyre replied that this is what he was told him in the emergency room when he was admitted.
- m) On 28 February 2022, when Dr. Shurshilova spoke with Mr. McIntyre about his pending discharge, Mr. McIntyre said he was aware that he was going to be discharged the following day and was okay with it. He said he was "possibly going to be charged and convicted" and he "accepts everything as long as he does not get raped in prison".
- n) On 5 March 2022, when Mr. McIntyre attended the EKRH emergency room seeking to be re-admitted, Dr. Haiduk instructed staff to call the police. Less than one hour later, two uniformed officers arrived at the hospital, approached Mr. McIntyre, and asked to speak with him.
- o) In the ensuing recorded conversation, Cst. Banich related some of the things that had been reported to her, directly or indirectly, from hospital staff about Mr. McIntyre's reasons for attendance at the hospital. Among other things, Cst. Banich recounted her understanding of some of the statements Mr. McIntyre had made to hospital staff. Mr. McIntyre seemed concerned about this and questioned the accuracy of the officer's information. Mr. McIntyre remarked that someone had been "telling fibs" about what he said or what he had allegedly done. The significance of this exchange is that it would have signalled to Mr. McIntyre that things he had said to hospital staff had subsequently been relayed to police officers.
- p) Progress notes made by Ms. Diethelm reflect that, throughout the balance of his second stay at the IPU, Mr. McIntyre continued to be "guarded" with hospital staff in discussing the events leading up to his admission. However, in his meetings with Dr. Shope and Dr. Khosroshahy, Mr. McIntyre continued to discuss his alleged mental illness, his belief that he had killed people, and the list of people he intended to harm. By 13 March 2022, Mr. McIntyre was telling his doctors that he had expanded his target list to include a total of ten people whom he felt had wronged him in one way or another.

[349] With regard to the subjective element of the analysis, I am satisfied that there is at least some evidential basis to support a conclusion that, by the evening of 7 February 2022 (while Mr. McIntyre was in the seclusion room in the emergency department at EKRH), he believed that the hospital staff and the police were sharing information about him. There is also at least some evidential basis in the record to support an inference that Mr. McIntyre came to believe his doctors (and, as a consequence, the entire treatment team) could control or influence the course of the investigation or potential criminal proceedings

against him, in several ways. One way the doctors could influence the investigation or criminal proceedings was indirectly, by keeping Mr. McIntyre in the hospital, which could delay what he considered to be his inevitable arrest. Recall Mr. McIntyre's statement to Cpl. Tent on 7 February 2022 that if the police turned him over to the hospital under the Mental Health Act, then the police would "lose him" to the medical system. Another way the doctors could influence the investigation or criminal proceedings was directly, by disclosure to the police of the details of what Mr. McIntyre said to the members of his treatment team.

[350] That brings me to the objective element of the analysis. The burden on Mr. McIntyre at this stage of the analysis is to point to some evidence in the record that is capable of demonstrating that his belief that the hospital staff had the ability to influence or control the proceedings was objectively reasonable.

[351] Again, this case is unusual, in that the relationship between the hospital staff and the police evolved or developed over several weeks, during the time that Mr. McIntyre was in the hospital and continuing to make statements to hospital staff on an ongoing basis. Without identifying a precise point at which the evidential burden was met, in my view it has been. For the purposes of this stage of the analysis, it is enough to say that there is evidence in the record that is capable of satisfying the objective arm of the non-conventional person in authority test. I will discuss the evidence relating to the objective component of the test in greater detail at the second stage of the analysis.

(a)(ii) Whether the Crown Has Met its Burden of Proving that the Hospital Staff were Not Non-Conventional Persons in Authority

[352] Being satisfied that the accused has met the evidential burden on him at the first stage of the analysis, the burden then shifts to the Crown to prove beyond a reasonable doubt that the EKRH staff did not qualify as non-conventional persons in authority. To do so, the Crown must prove beyond a reasonable doubt that Mr. McIntyre did not have an objectively reasonable belief that the hospital staff were in a position to control or influence the proceedings against him.

[353] I have already discussed the evidence touching upon Mr. McIntyre's subjective belief, and I will not repeat it here. The case law makes it clear that the accused need not testify on the voir dire if there is evidence from which the requisite subjective belief can be inferred. Keeping in mind the burden that rests on the Crown at this stage of the analysis, in my view the Crown has failed to meet it. On the whole of the evidence, the Crown has failed to establish beyond a reasonable doubt that Mr. McIntyre lacked the requisite subjectively held belief. In other words, it is a reasonable possibility that Mr. McIntyre subjectively believed his treating doctors had the ability to influence the investigation or the course of the potential criminal proceedings in either of the two ways listed above in paragraph 349. However, this is not the end of the analysis, because the jurisprudence instructs that the accused's belief that the statement recipient had the ability to influence the investigation or

subsequent proceedings must also be objectively reasonable.

[354] On the objective branch of the analysis, once again the burden at this stage of the analysis is on the Crown. The Crown must prove beyond a reasonable doubt that any subjectively held belief harboured by Mr. McIntyre about the ability of his treating physicians to influence the investigation or potential criminal proceedings was not objectively reasonable.

[355] The key pieces of evidence bearing on the objective nature of the relationship between EKRH staff and the RCMP in this particular case can be summarized as follows:

- a) On 7 February 2022, Mr. McIntyre told both Cpl. Kletzel and Cpl. Tent that he needed to be arrested and locked up, but he would not say what, if anything, he had done. When the police would not arrest him, Mr. McIntyre said he was mentally ill and posed a danger to himself and others. On this basis, Cpl. Tent apprehended him under the Mental Health Act, after which Cpl. Kletzel took him directly to the emergency room at EKRH.
- b) Cpl. Kletzel stood about 10 feet away from Mr. McIntyre as he spoke with the intake clerk in the emergency room. Cpl. Kletzel noted some of the things that Mr. McIntyre said to the intake clerk on an RCMP mental health occurrence report.
- c) Cpl. Kletzel and Cpl. Tent stood outside the seclusion room while members of his treatment team were assessing Mr. McIntyre, including Ms. Griffin and Dr. Yu. One or both of the officers spoke with Dr. Yu outside the seclusion room. Cpl. Tent briefed Dr. Yu on the circumstances leading up to Mr. McIntyre's apprehension under the Mental Health Act, and what the police knew at that time about the sudden death incident in Cranbrook.
- d) While in the emergency room, Cpl. Tent asked Ms. Ackison to notify the police if Mr. McIntyre left or tried to leave the hospital. Ms. Ackison agreed to do so.
- e) On the morning of 8 February 2022, Cpl. Tent spoke with Mr. Gauer in the emergency room. Mr. Gauer agreed to advise the police if Mr. McIntyre left the hospital.
- f) Later on 8 February 2022, on the instructions of MCU officers who had assumed conduct of the Howe investigation, Cpl. Tent and Cpl. Parker returned to the emergency room to seize Mr. McIntyre's clothing. Mr. McIntyre awoke while the officers were in the process of seizing his clothes.
- g) On the morning of 9 February 2022, on the instructions of Mr. McIntyre's treating psychiatrist, Ms. Bradford phoned Sgt. Smart to enquire about whether there had been any reported sudden deaths of a woman in Creston or in Kimberley. Shortly thereafter, Ms. Bradford also contacted Cpl. Parker to make a similar inquiry.
- h) On the afternoon of 9 February 2022, on the instructions of Sgt. Smart, Cpl. Tent and Cpl. Parker attended EKRH to speak with Mr. McIntyre's treating psychiatrist. They were able to meet with Dr. Yu and Dr. Shope. The doctors and the police officers had divergent interests, and neither faction was willing or able to tell the other everything they knew about Mr.

McIntyre's situation. The doctors wanted as much information as they could get from the police as collateral to assist in determining whether Mr. McIntyre's assertions were reality-based or delusional, but at the same time the doctors wanted to protect Mr. McIntyre's patient confidentiality. Dr. Yu confirmed to the officers that Mr. McIntyre made statements about harming someone in Kimberley, and also told the officers that if they wanted more specifics about what Mr. McIntyre had said during treatment, they would have to obtain a search warrant for Mr. McIntyre's medical file. The police wanted to know what Mr. McIntyre had said to the hospital staff about the circumstances leading up to his admission, and in particular they wanted more information about Ms. Bradford's reference to a possible incident or continuing threat to someone in Kimberley. At the same time, the police did not want to divulge any more than they had to about the ongoing investigation into the sudden death in Creston.

- i) Later in the day on 9 February 2022, as a result of the aforementioned meeting with the police, Dr. Yu became concerned that there had been a breach of Mr. McIntyre's patient confidentiality, regarding the social worker's enquiries about whether the police were aware of harm befalling someone in Kimberley. After some internal discussions with hospital administrators, Dr. Yu formally advised Mr. McIntyre about the apparent breach of his confidentiality.
- j) Later still on 9 February 2022, Cpl. Tent and Cpl. Parker once again attended EKRH where they again met with Dr. Yu and Dr. Shope. At this meeting, the police advised the doctors that Mr. McIntyre was a "person of interest" in a "homicide investigation" in Creston. From the perspective of the police, this was all they were willing to disclose at the time. From the perspective of the doctors, this information was too equivocal to allow them to confirm or refute Mr. McIntyre's assertions about having killed his landlord's girlfriend. Consequently, Mr. McIntyre's doctors were still unable to determine whether or not his statements about killing his landlord's girlfriend were reality-based or delusional.
- k) On 10 February 2022, Cpl. Parker enquired with Dr. Yu about how his conversations with Mr. McIntyre were recorded. The doctor responded that while he did not record the conversations, he documented Mr. McIntyre's statements in notes retained in Mr. McIntyre's medical file.
- l) On 11 February 2022, Dr. Yu spoke on the phone with Cpl. Parker. He was unable to obtain further information about the status of the RCMP investigation. He told Cpl. Parker that if the police wanted more information about the statements Mr. McIntyre had made while in the hospital, the police would have to go through the "standard process", which I would interpret as a re-statement of Dr. Yu's earlier position that if the police wanted more information they would have to get a search warrant for Mr. McIntyre's medical file.
- m) On 13 February 2022, Dr. Shope made a note in Mr. McIntyre's medical chart asking or directing a social worker to contact the police to get more detail about whether they had recovered a gun from Mr. McIntyre's car.

- n) On 15 February 2022, Cpl. Tent re-attended EKRH to speak with Dr. Yu or Dr. Shope to check on Mr. McIntyre's status at the hospital. Dr. Shope advised that Mr. McIntyre was stable and no longer appeared to present a threat to himself or others. Dr. Shope said if the police wanted to ensure that Mr. McIntyre's medical records were available for a warrant, there was a form that would have to be completed. In response to Dr. Shope's questions about the status of the police investigation (which the doctor posed in an effort to get further collateral information to compare against Mr. McIntyre's account), Cpl. Tent advised that the police recovered "a weapon" from Mr. McIntyre's vehicle. Cpl. Tent also "acknowledged" that a body had been found in the house of Mr. McIntyre's landlord in Creston.
- o) On 18 February 2022, Dr. Khosroshahy (who had taken over as Mr. McIntyre's treating psychiatrist two days earlier) spoke on the phone with Cpl. Parker. Dr. Khosroshahy's dictated notes of the conversation reflect his view -- conveyed at the time to Cpl. Parker -- that in terms of potential safety risk to others, Mr. McIntyre was "as serious as it might get". Mr. McIntyre was claiming to have murdered two people and said he had a list of other targets. With that profile, whether Dr. Khosroshahy was convinced that Mr. McIntyre had a mental illness or not, the doctor was "not willing to discharge him", at least at that time. Dr. Khosroshahy told Cpl. Parker that, in his opinion, the best option would be for the RCMP to direct Mr. McIntyre down the forensic psychiatric route. As Dr. Khosroshahy explained in his voir dire testimony, placement in a forensic psychiatric facility could only occur if Mr. McIntyre were charged with or convicted of an offence. Cpl. Parker testified that during this conversation, Dr. Khosroshahy told her Mr. McIntyre was "not going anywhere on his watch". I view this testimony as largely consistent with the account recorded in Dr. Khosroshahy's dictated notes. This, in my view, was a critical juncture in the evolution of the relationship between Mr. McIntyre's treatment team and the police, for reasons I will explain in detail below.
- p) Between 19 February and 22 February 2022, various RCMP officers had ongoing discussions with IPU staff about the timing and logistics of the RCMP application for a production order with respect to Mr. McIntyre's medical records.
- q) On 23 February 2022, Cpl. Beggs received a telephone update from Dr. Khosroshahy about Mr. McIntyre's status. The doctor advised that Mr. McIntyre was being assessed day-to-day, was no longer taking any medications, and was sleeping a lot. At this point Dr. Khosroshahy felt that Mr. McIntyre did not have a health issue, but he needed to consult further with his colleague Dr. Shope about next steps.
- r) On the same date, Dr. Shope made a note in Mr. McIntyre's file to the effect that he was "awaiting feedback from RCMP". In his trial testimony, Dr. Shope explained that he was still seeking collateral information to assess against Mr. McIntyre's statements.
- s) From 24 February 2022 to 1 March 2022, IPU staff continued to provide the RCMP with updates with respect to Mr. McIntyre's status in the hospital and his anticipated discharge on 1 March 2022.

- t) Also on 24 February 2022, members of MCU obtained and executed a production order for Mr. McIntyre's EKRH hospital records.
- u) On the morning of 1 March 2022, Ms. Bradford phoned Cpl. Beggs to confirm that Mr. McIntyre would be discharged from EKRH at 10:00 a.m. that day. Mr. McIntyre was in fact discharged at some point prior to 10:50 a.m.
- v) In the early morning hours of 5 March 2022, shortly after Mr. McIntyre once again showed up at the emergency department of EKRH, hospital staff phoned the RCMP. Less than 90 minutes later two uniformed RCMP officers (Cst. Banich and Cst. Silitto) arrived at the emergency room, having been dispatched by the MCU with instructions to go and meet with Mr. McIntyre, to find out why he was at the hospital. Cst. Banich was specifically instructed to formally caution Mr. McIntyre, and to record the conversation.
- w) Later that morning, after Mr. McIntyre met with Cst. Banich and Cst. Silitto in the EKRH chapel, Mr. McIntyre returned to the emergency department. The attending physician, Dr. Haiduk, got an update from a uniformed officer (who, on the evidence, must have been Cst. Banich) in or near the triage area of the emergency ward, possibly in view of Mr. McIntyre.
- x) On 7 March 2022, Cpl. Beggs phoned EKRH for an update on Mr. McIntyre's status. The officer was informed by Ms. Callan, a patient care coordinator, that Mr. McIntyre was expected to be transferred to Hillside.
- y) On 12 March 2022, several days after MCU members had located the reference to Mr. McIntyre's statement about killing "David Creamly" in Kimberley in the EKRH hospital records they had obtained by way of a production order, Cpl. Tent and Sgt. Smart went to EKRH to meet with Dr. Shope. I accept the testimony of Cpl. Beggs that his primary focus was on Mr. McIntyre's status at the hospital, the risk that he might pose if he chose to leave the hospital, and the police ability to manage that risk. In that connection, Cpl. Beggs asked Dr. Shope whether he was in a position to commit Mr. McIntyre for involuntary treatment under the Mental Health Act. Dr. Shope's response was that he could not do so because Mr. McIntyre did not meet the involuntary treatment criteria. Sgt. Smart was frustrated with the fact that the hospital staff had not been more forthcoming in telling the police in a timely way about Mr. McIntyre's claim to have killed "David Creamly" in Kimberley. Although Sgt. Smart felt that Dr. Shope was "stonewalling" and "speaking in circles", the reality is that Dr. Shope was doing his best to stay within the limits of his professional responsibility as the treating physician for a patient who was in the IPU for voluntary psychiatric treatment. Dr. Shope could disclose information about ongoing risks to the safety of others, but beyond this could not say anything about the substance of what Mr. McIntyre had disclosed in treatment, nor could Dr. Shope have Mr. McIntyre committed under the Mental Health Act when he did not meet the criteria for involuntary admission.
- z) On 13 March 2022, Cpl. Beggs spoke on the phone with Ms. Bradford, requesting that IPU staff advise the police of any changes in Mr. McIntyre's status, or any plans to discharge him.

aa) On 15 March 2022, Ms. Bradford contacted Cpl. Beggs to advise that Mr. McIntyre had been declined admission to Hillside and would likely be discharged the following day. Cpl. Beggs requested an update as to Mr. McIntyre's discharge time on 16 March 2022.

bb) Just before noon on 16 March 2022, Ms. Bradford phoned Cpl. Beggs to advise that Mr. McIntyre would be discharged at 1:00 p.m. Cpl. Beggs and another RCMP officer met Mr. McIntyre at the front door of the hospital, with a warrant for his arrest.

[356] To qualify as non-conventional persons in authority, the receivers of the statements in issue must be "closely connected" with the police, or "in an agency relationship or close collaboration" with the police, or "part of the prosecution team". In the context of medical professionals, it is helpful to consider whether their actions "transcended the medical aspects of the case". The Crown must prove beyond a reasonable doubt that the receivers of the statements could not be so described or that their status did not fit within these parameters.

[357] I would summarize the key pieces of evidence with respect to the actions of Mr. McIntyre's treatment team as follows:

- a) After assessing Mr. McIntyre at the emergency room on 7 February 2022, Dr. Yu's clinical impression was that Mr. McIntyre was suffering from "psychosis NOS", or psychosis not otherwise specified. Dr. Yu decided to certify Mr. McIntyre under the Mental Health Act on the basis that he could be a danger to himself or others. The treatment plan included an intention to have social workers liaise with police to obtain "collateral" information about the circumstances leading up to Mr. McIntyre's appearance at the police station, to determine whether his assertions were reality-based or delusional.
- b) Dr. Shope conducted his initial assessment of Mr. McIntyre on 9 February 2022. His conclusion was that Mr. McIntyre did not meet all four of the necessary criteria for involuntary admission under the Mental Health Act. Although there was some reason to believe Mr. McIntyre could be suffering from some kind of mental disorder causing delusions, and that he posed a danger to himself and others, Mr. McIntyre was willing to remain in the IPU for voluntary treatment, so he could not be committed for involuntary treatment. Dr. Shope declined to issue a second certificate under s. 28 of the Mental Health Act.
- c) Dr. Yu, who at this time continued to be Mr. McIntyre's most responsible physician, also met with Mr. McIntyre on 9 February 2022. Dr. Yu testified that he and Dr. Shope reached a consensus that they would continue to treat Mr. McIntyre for psychosis, "for the time being", until the treatment team was able to obtain collateral information to confirm or refute the factual accuracy of Mr. McIntyre's statements. Dr. Yu also made a note that he specifically instructed social workers making collateral inquiries about Mr. McIntyre not to disclose information about Mr. McIntyre to the police, due to confidentiality concerns.

- d) On 12 February 2022, Dr. Shope -- who by this time had become Mr. McIntyre's treating psychiatrist -- met with Mr. McIntyre for a second time. In the course of this meeting, Mr. McIntyre made a number of specific statements or disclosures about having committed two murders. Dr. Shope's impression at the time was that much of what Mr. McIntyre was saying was still uncertain or "in the air". Dr. Shope explained in his testimony that the treatment team was still trying to tease out what was reality and what was not. They did not have much collateral information. Therefore, Dr. Shope continued to proceed on the basis that Mr. McIntyre was potentially suffering from some kind of psychosis leading to delusions. Dr. Shope's goal was to determine through collateral verification if Mr. McIntyre's statements were reality-based or delusional.
- e) On 16 February 2022, Dr. Khosroshahy took over as Mr. McIntyre's treating psychiatrist. In his initial meeting with Mr. McIntyre, Dr. Khosroshahy questioned or probed Mr. McIntyre's statement that he "believed" he had killed a woman. Dr. Khosroshahy's impression at the end of the meeting was that Mr. McIntyre was "quite sure" he had done so. After considering the prior clinical assessments of Dr. Yu and Dr. Shope, Dr. Khosroshahy himself was not yet in a position to form a diagnosis. Dr. Khosroshahy entertained the possibility that it might be most appropriate for Mr. McIntyre to be in a forensic psychiatric institution rather than the IPU at a public hospital, but for the time being he appeared to table that thought pending more information.
- f) On 18 February 2022, following two further meetings with Mr. McIntyre, Dr. Khosroshahy determined that it was "more or less impossible" to determine whether Mr. McIntyre's statements about having killed two people were true or not, in an IPU setting. By the point that Dr. Khosroshahy spoke on the phone with Cpl. Parker, at 10:59 a.m. on 18 February 2022, he had reached the conclusion that regardless of whether or not Mr. McIntyre actually had a mental illness, he should not be discharged. To paraphrase from Dr. Khosroshahy's dictated notes of the conversation, given Mr. McIntyre's risk profile, the doctor was not willing to discharge Mr. McIntyre, whether he had a mental illness or not. To put it another way, quoting from Cpl. Parker's testimony, Mr. McIntyre would "not be getting out on [Dr. Khosroshahy's] watch". Dr. Khosroshahy went on to tell Cpl. Parker that the best option would be "for the RCMP to direct [Mr. McIntyre] down the forensic psychiatric route". However, as Dr. Khosroshahy explained in his voir dire testimony, this could only occur if Mr. McIntyre was charged or convicted of a criminal offence. The net effect was that Dr. Khosroshahy had determined that, whether or not Mr. McIntyre actually qualified for inpatient psychiatric treatment, the doctor was not going to let Mr. McIntyre out "on [his] watch". Dr. Khosroshahy was hoping or expecting that the police would charge Mr. McIntyre so he could be placed in a forensic psychiatric facility.
- g) On or about 23 February 2022, Dr. Shope resumed the role of most responsible physician for Mr. McIntyre. Following further in-person meetings with Mr. McIntyre each day between 23 and 27 February 2022, Dr. Shope concluded that any risk Mr. McIntyre posed to the safety of others was not a mental health issue, but rather a policing issue. Mr. McIntyre had made

statements about having killed two people and made a list of others whom he wanted to harm, but there was no indication that he was actually suffering from any mental illness. Dr. Shope decided that Mr. McIntyre ought to be discharged and began planning for that to occur on or about 1 March 2022.

- h) On 5 March 2022, when Mr. McIntyre re-attended the emergency room at EKRH claiming to have thoughts of causing harm to others, Dr. Khosroshahy decided to re-admit Mr. McIntyre to the IPU on a voluntary basis, considering the "potentially serious consequences of what he is telling us". I would consider this to be a precautionary measure on Dr. Khosroshahy's part, taking into account Mr. McIntyre's stated desire to be admitted for psychiatric treatment, and his troubling statements about seeing people on the street whom he wanted to harm.
- i) By 6 March 2022, Dr. Khosroshahy was once again leaning toward the view that Mr. McIntyre was not suffering from any kind of mental illness. Mr. McIntyre's statements about having murdered two people were "either true or untrue", but beyond this, he displayed no overt signs of mental disturbance or psychiatric illness. At this point, Dr. Khosroshahy began to explore the possibility of referring Mr. McIntyre to Hillside, which the doctor described as a tertiary mental health facility in Kamloops. Mr. McIntyre was agreeable to the referral.
- j) On 9 March 2022, Dr. Shope once again assumed the role of Mr. McIntyre's treating psychiatrist. Dr. Shope met with Mr. McIntyre on 9 and 10 March 2022, seeking to gain insight into developments since Mr. McIntyre's prior discharge from the IPU on 1 March 2022. It appears that the Hillside referral was still under consideration.
- k) By 14 March 2022, it was becoming clear to Dr. Shope that Mr. McIntyre's issues were "not being driven by any mental illness". Dr. Shope was inclined to the view that Mr. McIntyre's attendance at the hospital was not really for treatment of a mental health condition. (I consider this particular assertion solely by way of explanation for the decision-making of Dr. Shope and other members of Mr. McIntyre's treatment team, and not for the truth of its contents).
- l) On or before 15 March 2022, the treatment team learned that Mr. McIntyre was not going to be accepted for treatment at Hillside. Plans were made to discharge Mr. McIntyre from the IPU the following day, 16 March 2022.

[358] On these facts, a key question in the objective characterization of the relationship between the hospital staff and the police is whether the actions of Mr. McIntyre's treatment team "transcended the medical aspects" of his case. As I have explained above, this case is somewhat unusual in that the relationship between the police and the hospital staff evolved or developed over time. In that context, I would reframe the issue to focus the enquiry on whether, and if so, when the actions of Mr. McIntyre's treatment team "transcended the medical aspects" of his case. One must also be mindful that this issue must be analyzed through the lens of the Crown's obligation to prove beyond a reasonable doubt that Mr. McIntyre did not have an objectively reasonable belief that the hospital staff had the ability

to influence or control the investigation or potential criminal proceedings against him.

- [359] Considering all of the evidence I have just reviewed, I am satisfied beyond a reasonable doubt that up until 10:59 a.m. on 18 February 2022, the actions of EKRH staff did not transcend the medical aspects of Mr. McIntyre's case. Up until this point in time, the doctors and other medical staff under their direction were focused entirely on Mr. McIntyre's treatment needs as a patient in the IPU.
- [360] Counsel for Mr. McIntyre argues that the hospital staff were from the outset of their dealings with Mr. McIntyre working with, on behalf or, or in an agency relationship with the police. I do not agree with that submission.
- [361] Counsel for Mr. McIntyre points to the fact that police officers and hospital staff met and exchanged information about Mr. McIntyre, in the emergency room and later in the IPU. I do not agree that the hospital staff were somehow co-opted into the police investigation simply by receiving information from the police about the circumstances in which Mr. McIntyre came to be apprehended under the Mental Health Act.
- [362] EKRH staff were dealing with an individual who was taken to the emergency room, by police, on grounds that he had a mental health condition and that he posed a danger to himself and others. The hospital staff had a duty to Mr. McIntyre, their patient, to ascertain the circumstances leading up to his appearance his at the hospital in these circumstances. Without knowing the circumstances, the doctors and other hospital staff would not be in a position to make proper medical decisions about whether to admit Mr. McIntyre, and if so, how to treat him.
- [363] Counsel for Mr. McIntyre is also critical of the fact that medical staff, acting on the direction of Mr. McIntyre's treating psychiatrists, contacted the police to obtain collateral information about Mr. McIntyre, including information about whether there were any sudden deaths that corresponded with what Mr. McIntyre was saying to them. With respect, I do not find any merit in this point. As Dr. Shope and Dr. Yu explained, it was necessary to obtain collateral information as a means of testing or assessing Mr. McIntyre's claims, to determine if they were reality-based or delusional. Mr. McIntyre presented as being preoccupied with his involvement in one or more sudden deaths, so it made sense for the treatment team to focus their inquiries on that subject.
- [364] I do not accept the premise of defence counsel's questioning of Dr. Shope, to the effect that it might have been possible for the treatment team to gather collateral information about other, potentially non-criminal aspects of Mr. McIntyre's circumstances. Dr. Shope and Dr. Yu, both medical doctors with specialization in psychiatry, were of the view that the most effective way to ascertain the nature and extent of any mental illness on Mr. McIntyre's part was to focus on the issue that appeared to be at the centre of Mr. McIntyre's concern, namely his involvement in the death of one or more of his acquaintances. The doctors directed members of the treatment team to gather collateral information about that topic. The most obvious and direct source of such collateral information in this particular case

was the RCMP. In my view, Dr. Yu and Dr. Shope's efforts to obtain collateral information from the police were well within the confines of their medical treatment.

- [365] I find as a fact that the treatment team sought to gather this information solely for the purpose of enabling a proper diagnosis and treatment of any mental illness suffered by the patient, Mr. McIntyre. It was not part of their purpose to disclose information to the police as a means of assisting in the investigation and prosecution of criminal charges against Mr. McIntyre.
- [366] Nor do I accept defence counsel's submission that Mr. McIntyre's treatment team went beyond the scope of their duties as treatment providers by providing the police with updates on Mr. McIntyre's status in the hospital, and in agreeing to provide the police with information about whether and when Mr. McIntyre might be discharged from the hospital. More or less all of the medical professionals who testified on the voir dire understood that they had an obligation to keep Mr. McIntyre's medical information confidential. However, they also understood, more or less universally, that medical professionals have a duty to disclose patient information where it is necessary to prevent serious future harm to another person. In this particular case, the EKRH staff were dealing with an individual who had been apprehended by the police and taken to the hospital under the Mental Health Act, on the basis that he was suffering from a mental health condition and posed a danger to himself and others. Indeed, the patient himself claimed to be a danger to himself and others. In these circumstances, on the record before me, I cannot accept that EKRH staff did anything wrong in advising police on an ongoing basis about Mr. McIntyre's status in the hospital, and about whether and when he might be discharged. Given the statements Mr. McIntyre was making about a target list of individuals whom he intended to harm, EKRH staff would not have been acting prudently by declining to tell the police whether and, if so, when Mr. McIntyre would be discharged.
- [367] I have considered the evidence about the breach of Mr. McIntyre's patient confidentiality identified by Dr. Yu and ultimately disclosed to Mr. McIntyre on 9 February 2022. It is not entirely clear to me that, in endeavoring to make collateral inquiries as a means of critically evaluating Mr. McIntyre's statements about having harmed two people (one in Creston and one in Kimberley), Ms. Bradford or Dr. Yu in fact breached Mr. McIntyre's patient confidentiality in a manner that was not consistent with their professional duties. Dr. Yu wanted to know whether what Mr. McIntyre was saying was based in reality or delusional. To that end, he instructed social workers to contact the police and make inquiries about the things Mr. McIntyre was saying. I have no difficulty concluding that the intent of these inquiries was to gather collateral information as a means of diagnosing and treating Mr. McIntyre's suspected mental illness. Without expert evidence demonstrating that this conduct was manifestly outside the scope and limits of patient confidentiality obligations in these circumstances, I do not consider such conduct to have transcended the medical aspects of Mr. McIntyre's case, whether considered in isolation or in conjunction with all of the other evidence about the conduct of Mr. McIntyre's treatment team. I say all of this with

the Crown's burden of proof squarely in mind. Nothing about the treatment team's collateral inquiries with the police, considered on its own or in conjunction with any other aspect of the case, leaves me with a reasonable doubt about the separate and distinct roles of the hospital staff on the one hand and the police officers investigating Mr. McIntyre on the other. The hospital staff were responsible for providing medical care to Mr. McIntyre, and the police officers were investigating Mr. McIntyre for murder. The collateral inquiries did not change that.

- [368] I have taken into account that Dr. Yu himself was of the view that the enquiry about harm befalling someone in Kimberley breached Mr. McIntyre's patient confidentiality. Dr. Yu may have felt that way at the time, but looking at the matter objectively, I find that this event did not materially alter the separate and distinct roles played by the hospital staff on the one hand and the police on the other.
- [369] I do find that, from time to time in the course of their dealings with EKRH staff, the police made efforts to obtain more information or additional information about what Mr. McIntyre said to hospital staff. However, I find that these efforts did not cause the hospital staff, acting under the direction of Mr. McIntyre's treating psychiatrists, to lose their independence or allow themselves, knowingly or unknowingly, to become agents of the police investigation. I accept the testimony of Dr. Yu and Dr. Shope that in their meetings with the police, they made it clear that the treatment providers had a duty to respect Mr. McIntyre's patient confidentiality. I accept the evidence of the doctors that they made it perfectly clear to the police that any information the police wished to obtain about statements Mr. McIntyre may have made to treatment providers (beyond the information inferentially revealed by collateral inquiries discussed above) could only be obtained through court ordered production of Mr. McIntyre's medical file.
- [370] I also find that in the course of their dealings with the doctors, the police made suggestions or requests that Mr. McIntyre be detained or certified for involuntary treatment under the Mental Health Act. However, I find that -- in the case of Dr. Yu and Dr. Shope -- the clear response of the doctors was to explain to the police that Mr. McIntyre could not be held for involuntary treatment unless he met the four criteria for committal under the Mental Health Act. Once the doctors determined that Mr. McIntyre did not meet those criteria, they were not prepared to use the powers of involuntary treatment provided for under the Mental Health Act, even if the police wanted them to do so. I find that, with the exception of the position taken by Dr. Khosroshahy as articulated in his 18 February 2022 conversation with Cpl. Parker, Mr. McIntyre's treating psychiatrists never swayed from their obligation to treat the patient -- Mr. McIntyre -- and to make treatment decisions based on a genuine assessment of his medical needs.

- [371] Thus, I am satisfied beyond a reasonable doubt that up until 10:59 a.m. on 18 February 2022, Mr. McIntyre did not have an objectively reasonable belief that the EKRH staff were closely connected with the police, or in an agency relationship or close collaboration with the police, or that they were part of the prosecution team. Up until 10:59 a.m. on 18 February 2022, nothing about Mr. McIntyre's treatment at EKRH "transcended the medical aspects" of his case.
- [372] However, in my view, the position Dr. Khosroshahy took toward Mr. McIntyre's medical treatment in the telephone call with Cpl. Parker at 10:59 a.m. on 18 February 2022 crossed the line. Recall that, by this point in time, Dr. Khosroshahy had taken over as Mr. McIntyre's treating psychiatrist. Recall as well that Dr. Khosroshahy took the view that Mr. McIntyre was 'as bad as it gets' in terms of risk to the public. And although by this point Dr. Khosroshahy had serious doubts about whether Mr. McIntyre had any mental illness at all, the doctor was "not willing to discharge him", mental illness or no mental illness. As Cpl. Parker recalled it, Mr. McIntyre would not be getting out of the hospital "on [Dr. Khosroshahy's] watch".
- [373] This evidence reflects a frank admission by Mr. McIntyre's treating psychiatrist that in view of a perceived risk to the safety of the community -- based on Mr. McIntyre's admission of having committed two murders and his stated intention to harm others -- a decision was made to keep Mr. McIntyre in the IPU, regardless of whether or not he required continuing inpatient psychiatric treatment.
- [374] Consider also Dr. Khosroshahy's view that the most appropriate way forward was for the police to take steps to have Mr. McIntyre placed in a forensic psychiatric unit and that such an arrangement could only be put into effect if Mr. McIntyre were charged with or convicted of a crime. Thus, Dr. Khosroshahy was effectively saying that Mr. McIntyre would not get out of the hospital on his watch, and at that point at least he intended to keep Mr. McIntyre in the IPU in order to facilitate police arrangements for him to be placed in a forensic facility.
- [375] Even considered against the backdrop of all of my other findings, this evidence raises a reasonable doubt in my mind about the nature of the relationship between the treating physician (and the treatment team working under him) and the police. This is, in my view, evidence tending to show that from this point forward Mr. McIntyre's treatment by EKRH staff "transcended the medical aspects" of his case.
- [376] I should add that even after 10:59 a.m. on 18 February 2022, Dr. Shope continued to maintain the independence of his decision-making regarding Mr. McIntyre's treatment needs. On or about 27 February 2022, Dr. Shope decided that there was no basis for continuing to treat Mr. McIntyre as a psychiatric inpatient, even on a voluntary basis. Dr. Shope therefore started planning for Mr. McIntyre's discharge on 1 March 2022, leaving it to the police to decide how to deal with any continuing risk that Mr. McIntyre might pose to the safety of others. Dr. Shope made this decision knowing that to the extent there was a

risk, it was a policing matter and not a matter of medical treatment.

[377] When Cpl. Tent and Sgt. Smart confronted Dr. Shope at the 12 March 2022 meeting, Dr. Shope again maintained his independence as one of Mr. McIntyre's treatment providers. Dr. Shope did his best to explain to the officers -- who were frustrated with the limitations on their ability to obtain timely information and cooperation from medical staff -- that Mr. McIntyre's treatment providers had to respect his patient confidentiality, and that Mr. McIntyre could not be held for involuntary treatment unless he met the legal criteria for certification under the Mental Health Act. Although this is compelling evidence that Dr. Shope and other members of the treatment team continued to maintain their independence, I am still left with a doubt about the objective status of the relationship between the EKRH staff and the police, based on the evidence that one of Mr. McIntyre's treating physicians -- Dr. Khosroshahy -- had made a decision on 18 February 2022 to keep Mr. McIntyre in the IPU, if necessary against his will, regardless of whether Mr. McIntyre in fact had a psychiatric condition warranting inpatient medical care.

[378] There is also the evidence that after Mr. McIntyre was readmitted to the IPU on 5 March 2022, Dr. Khosroshahy explored another option, namely referring Mr. McIntyre to Hillside. On its own, this evidence suggests that Dr. Khosroshahy himself had reconsidered his position after 18 February 2022. However, I am not satisfied that this subsequent development sufficiently blunts the effect of Dr. Khosroshahy's earlier position. I have a reasonable doubt as to whether, after the events of 18 February 2022, the actions of the treatment team under the direction of Dr. Khosroshahy were sufficiently independent of the police to conclude that the hospital staff did not qualify as non-conventional persons in authority.

[379] I do not wish to be overly critical of Dr. Khosroshahy. He was forthright in his voir dire testimony. He was dealing with what he believed to be a morally ambiguous situation. His patient was claiming to be mentally ill, to have killed two people, and to be entertaining thoughts of harming others. The police were not forthcoming with information that might confirm or refute Mr. McIntyre's statements. The patient wanted to remain in the hospital. However, Dr. Khosroshahy had bona fide concerns about whether the patient was truly in need of inpatient psychiatric care, and he decided to subordinate those concerns to countervailing public safety concerns. Dr. Khosroshahy ended up taking a position that he believed to be morally correct, but it was a position that, objectively speaking, transcended the medical aspects of his patient's case.

[380] My conclusion is twofold. First, I am satisfied beyond a reasonable doubt that prior to 10:59 a.m. on 18 February 2022, Mr. McIntyre did not have an objectively reasonable belief that the EKRH staff were "closely connected" with the police, or in "an agency relationship" or "close collaboration" with the police. Up to that point in time, the EKRH staff did not qualify as non-conventional persons in authority. Second, I have a reasonable doubt as to the nature of the relationship between the EKRH staff and the police from 10:59 a.m. on 18 February 2022 onward. I infer that Mr. McIntyre had a subjective belief that the hospital

staff were sufficiently connected with the investigation to qualify as non-conventional persons in authority, and from 10:59 a.m. on 18 February 2022 onward, there was an objectively reasonable basis for that belief.

- (b) Whether the Crown has Proven Beyond a Reasonable Doubt that Mr. McIntyre's Statements to Hospital Staff after 18 February 2022 at 10:59 a.m. Were Made Voluntarily

[381] I turn to a consideration of the voluntariness of Mr. McIntyre's statements to hospital staff from 10:59 a.m. 18 February 2022 onward. The Crown must prove beyond a reasonable doubt that the statements were voluntary, having regard to the factors articulated in Oickle, namely (i) the imperative against the use of threats or promises to induce a confession, (ii) the impact of any oppressive conditions, (iii) the need for the accused to have an operating mind, and (iv) the possible use of trickery that would deprive the accused of the right to make a meaningful choice about whether or not to speak with the authorities. This is a case-specific, contextual inquiry. There is no hard-and-fast rule or determinative legal test. It is a question of whether, on a full consideration of all the relevant factors, the Crown has met its burden.

[382] I have no difficulty concluding that Mr. McIntyre was not subject to any oppressive conditions. Throughout his time at EKRH, he was made to feel safe and comfortable. He had a fair degree of freedom in the IPU, and all of his basic needs were met. Mr. McIntyre frequently made remarks about how pleasant the staff was, and how well they were treating him.

[383] Nor is there any evidence that Mr. McIntyre was subject to any form of trickery, by either the police or EKRH staff. The police were transparent with Mr. McIntyre throughout their dealings with him. There is no convincing argument that either the police or EKRH staff did anything to trick or manipulate Mr. McIntyre into making statements while he was in EKRH.

[384] I also have no difficulty finding that throughout his time at EKRH, Mr. McIntyre had an operating mind. He was able to understand what he was saying, and that his statements could have legal consequences. He frequently told medical staff that he did not want to say more than he had to, because he was under investigation by the police, and his lawyer had advised him to make no statements. Although he was in the hospital for inpatient psychiatric treatment, the evidence as a whole reflects that he was oriented in person, place, and time. He was alert and responsive, and aware of his surroundings. He was able to communicate with EKRH staff. The only evidence of delusion had to do with Mr. McIntyre's claim to have killed two people, and in the end the treatment team was never able to reach any conclusion that these statements were the product of any psychosis or delusion. There was certainly no expert evidence to that effect.

- [385] However, I am left with a reasonable doubt about the voluntariness of Mr. McIntyre's statements to EKRH staff (from the point that the staff crossed the line into becoming non-conventional persons in authority), based on a concern that Mr. McIntyre may have been induced to make statements in order to facilitate his continued stay and treatment at the hospital. This, in turn, would have the effect of delaying his arrest by the police. The evidence that contributes to this conclusion includes the following:
- a) In the recorded statement taken by Cpl. Tent on 7 February 2022, Mr. McIntyre said that if he was apprehended and taken to the hospital under the Mental Health Act, the police would "lose him" to the medical system.
 - b) During the intake process at the EKRH emergency room on 7 February 2022, Mr. McIntyre expressed concern to Ms. Griffin about how much he could share with his treatment providers and asked if everything he said would be kept confidential. Ms. Griffin explained to Mr. McIntyre that his medical information would only be shared with his treatment team, unless he said something about causing future harm to someone. Mr. McIntyre was "vague" with Ms. Griffin about the circumstances in which he ended up in the emergency room, as a result of which Ms. Griffin said she could not help Mr. McIntyre if he did not talk to her.
 - c) During his time at EKRH, Mr. McIntyre raised concerns about patient confidentiality. Various staff members explained the patient confidentiality rules to Mr. McIntyre on multiple occasions. In sum, Mr. McIntyre was told that as a general rule his medical information would not be shared with anyone outside of his treatment team. However, he was also told that his medical team may have to disclose information about ongoing or future risk of harm to others. Mr. McIntyre was told that there was at least one instance when a member of the treatment team breached his patient confidentiality, by telling the police about Mr. McIntyre harming or killing someone in Kimberley. In the result, it is certainly possible that Mr. McIntyre had some belief or recognition that patient confidentiality was a porous concept, and that at least some of the information he gave to his treatment team could find its way to the police.
 - d) Throughout his time in the IPU, Mr. McIntyre made statements to staff about feeling safe and comfortable there, and not wanting to leave or be discharged. Mr. McIntyre also expressed the belief that once discharged from the hospital, he would be arrested by the police and would end up in jail. On several occasions he expressed concern about being "raped" in jail. On one occasion, when asked how he knew that he would be arrested upon his release from the hospital, Mr. McIntyre said this is what he was told in the emergency room.

- e) Over time, as the possibility or likelihood of discharge from the IPU was raised and discussed with Mr. McIntyre, he expressed the view that he should not be discharged. On at least one occasion, Mr. McIntyre expressed the opinion that it would not be a good idea to discharge him from the hospital because he was still unwell and posed a danger to himself and others. Also, over time, Mr. McIntyre's "target list" of people who had wronged him and whom he intended to harm grew longer and longer.
- [386] In all of these circumstances, I consider it a reasonable possibility that Mr. McIntyre was motivated to make statements to EKRH staff about the circumstances leading up to his admission to the IPU, as a means of delaying or putting off his arrest. It is a reasonable possibility that Mr. McIntyre believed his doctors had the ability to keep him in the IPU for treatment, and that so long as he was in the IPU, the police could not arrest him. In other words, by staying in the hospital, Mr. McIntyre was able to put off the legal consequences that he might have been facing. Among other things, one member of his treatment team had told him that if he did not discuss what happened, the treatment team could not help him. He was fearful or anxious about being released from the hospital and arrested. He believed that if released, his arrest would be inevitable. He was also given to believe that concerns about causing future harm to others were relevant to his status in the hospital, and also relevant to what information could be shared with the police.
- [387] I am left with a reasonable doubt as to whether Mr. McIntyre's statements to treatment providers were truly voluntary. It is a reasonable possibility that Mr. McIntyre may have felt compelled to make at least some statements to his treatment providers about the circumstances leading up to his admission, on the theory that if he did not tell them anything, they would not be able to treat him, and he might be discharged. It is also a reasonable possibility that at least some of what Mr. McIntyre said to the EKRH staff was the product of an indirect inducement, that if he said certain things that caused his treatment providers to believe he was mentally ill, he would be able to prolong his stay in the hospital, and thereby delay his arrest.
- [388] I conclude that the Crown has failed to meet its burden of proving beyond a reasonable doubt that Mr. McIntyre's statements to hospital staff from 10:59 a.m. on 18 February 2022 onward were free from inducements, and therefore truly voluntary.
- [389] One might ask why the admissibility of Mr. McIntyre's statements to hospital staff prior to the operative time -- 10:59 a.m. on 18 February 2022 -- could not also be called into question on the basis of similar concerns about lack of meaningful choice to speak, or about inducements. The answer is that up to that point in time -- that is, up until 10:59 a.m. on 18 February 2022 -- Mr. McIntyre was not speaking to persons in authority. Having proven beyond a reasonable doubt that the hospital staff did not qualify as non-conventional persons in authority prior to the operative time, the Crown does not need to prove that Mr. McIntyre's statements made prior to that point in time were the product of a voluntary choice to speak to the authorities, because Mr. McIntyre was not, prior to that time, speaking with persons in authority.

Conclusion

[390] To summarize and conclude, I find that (i) all of Mr. McIntyre's statements to the police are voluntary and thus admissible, (ii) all of the statements that Mr. McIntyre made to EKRH staff up to 10:59 a.m. on 18 February 2022 are admissible, on the basis that the hospital staff did not, prior to that time, qualify as non-conventional persons in authority, and (iii) all of the statements that Mr. McIntyre made to EKRH staff from 10:59 a.m. on 18 February 2022 onward are inadmissible, on the basis that from this point forward the hospital staff were non-conventional persons in authority, and the Crown has failed to prove beyond a reasonable doubt that the statements in issue were made voluntarily, without fear or prejudice or hope of advantage.

"The Honourable Mr. Justice Riley"

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