

# Court of Queen's Bench of Alberta

Citation: R. v. Briscoe, 2007 ABQB 48

Date: 20070129  
Docket: 050593045Q2  
Registry: Edmonton

Between:

**Her Majesty the Queen**

- and -

**Michael Erin Briscoe and Joseph Wesley Laboucan**

Accused

**Restriction on Publication:** No one may publish any information that would identify a person as having been dealt with under the *Youth Criminal Justice Act*. See the *Youth Criminal Justice Act*, s. 110(1).

No one may publish any information that may identify a child or young person as being a victim or witness in connection with an offence alleged to have been committed by a young person. See the *Youth Criminal Justice Act*, s. 111(1).

**Note:** On behalf of the Government of Alberta identifying information has been removed from this unofficial electronic version of the judgment.

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***Voir Dire* Ruling  
of the  
Honourable Mr. Justice Brian R. Burrows**

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[1] Michael Erin Briscoe and Joseph Wesley Laboucan are charged with the first degree murder, sexual assault and kidnapping of Nina Louise Courtepatte on April 3, 2005. Their trial is by judge alone. The Crown proposes to offer in evidence four statements made by Mr. Briscoe

on the day of his arrest, April 11, 2005, and the day after that. A *voir dire* to determine their admissibility has been held.

[2] The four statements are:

1. A statement made in the context of an interview conducted by Constable Kelly F. Brophy, commencing at 14:57 on April 11, 2005 and ending at 19:52 the same day. There were three breaks in that period, a five minute break at 16:12, a half hour break at 18:08 and an hour break at 18:54. A videotape and a transcript of this interview are exhibits in the *voir dire*.
2. A statement made in the context of an interview, again conducted by Constable Brophy, commencing at 08:57 on April 12, 2005 and ending at 09:21 the same day. A videotape and transcript of this interview are also exhibits in the *voir dire*.
3. A statement made in the context of an interview conducted by Constable Patrick Waldorf commencing at 10:24 on April 12, 2005 and ending at 11:10 the same day.
4. A statement made to Constable Leonard McCoshen who, in an undercover “cell sit” operation, posed as a person who had been arrested by police and was placed in the same cell as Mr. Briscoe on April 11 and 12, 2005. There is no video or audio recording of this statement. There are notes made by Constable McCoshen after the cell sit operation ended. These notes were not offered in evidence in the *voir dire*.

[3] The Crown called eight witnesses in the *voir dire*. All were members of the RCMP involved in the investigation which lead to the charges before the court. Three of these witnesses were involved in the arrest of Mr. Briscoe but had no involvement in the interviews or the undercover cell sit operation. The other witnesses were Constables Brophy, Waldorf, McCoshen, and Constable Teufel who was involved in the undercover cell sit operation as Constable McCoshen’s operator.

[4] There are two issues in relation to the first three statements listed above. The first issue is whether the Crown has proved beyond a reasonable doubt that Mr. Briscoe, in an exercise of free will, voluntarily gave those statements. The second is whether Mr. Briscoe’s *Charter* guaranteed right to counsel (*Charter*, s. 10(b)) was respected.

[5] As to the first and second statements, I am satisfied that Mr. Briscoe gave both of them voluntarily. I am also satisfied that there was no breach of Mr. Briscoe’s right to counsel in relation to these two statements. I rule that they are admissible in this trial.

[6] I find that Constable Waldorf breached Mr. Briscoe’s right to counsel at the commencement of the third statement. I understand that Crown counsel accept that if the statement was obtained through a breach of Mr. Briscoe’s right to counsel, its admission as evidence in this trial would bring the administration of justice into disrepute. Accordingly I rule

that it is not admissible. Given that ruling, it is not necessary for me to consider whether Mr. Briscoe gave the third statement voluntarily.

[7] The issue in relation to the fourth statement is whether it would violate Mr. Briscoe's *Charter* guaranteed right to a fair trial, if Constable McCoshen's testimony as to what Mr. Briscoe said during the undercover operation was admitted in evidence, given that no audio or video recording was made of the conversation between Mr. Briscoe and Constable McCoshen during the undercover operation. I find that there was no such breach and that Constable McCoshen's evidence as to what Mr. Briscoe said to him during the undercover cell sit operation is not for that reason inadmissible.

[8] The analysis that has lead me to these conclusions occupies several more pages. I will not read it in court. I will ask the clerk to mark a copy of these reasons as the next exhibit in the *voir dire* and to give each counsel a copy.

***Did Mr. Briscoe make the first statement voluntarily?***

[9] In *R. v. Oickle* (2001) 36 C.R. (5<sup>th</sup>) 129 (SCC) the Supreme Court of Canada reviewed the admissibility of statements made by accused persons to persons in authority. It mandated a less mechanical and more contextual approach than cases prior to *Oickle* often employed. Iacobucci J. said (para. 47):

The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not always) be unreliable. The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under- inclusive. A trial judge should therefore consider all relevant factors when reviewing a confession.

[10] Iacobucci J. discussed the types of promises which will raise a doubt as to the voluntariness of a confession. He concluded that discussion as follows (para. 57):

In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne. On this point I found the following passage from *R. v. Rennie* (1981), 74 Cr. App. R. 207 (C.A.) at p. 212, particularly apt:

Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.

The most important consideration in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise.

[11] Iacobucci J. also discusses the effect of police trickery on the voluntariness of a confession. In this context the concern is not only voluntariness but the integrity of the criminal justice system. He endorsed a “shock to the community” rule which was described by Lamer J. in *R. v. Rothman* [1981] 1 S.C.R. 640 in these words:

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

[12] In the context of this law, Mr. Davison submits that the Crown has not proved beyond a reasonable doubt that Mr. Briscoe gave his statement voluntarily. He suggests that three tactics used by Constable Brophy in his interview of Mr. Briscoe, operating together and in the context of the whole of the interview, overbore Mr. Briscoe’s operating will and rendered the statement involuntary. At least, he submits, the possibility they did so is sufficient to give rise to a reasonable doubt as to the voluntariness of the statement. Two of the tactics, Mr. Davison submits, amounted to offering an inducement, a *quid pro quo*, in exchange for a statement. The third involved trickery.

[13] The transcript made from the recording of the first statement occupies a total of 108 pages. For approximately the first third of the transcript Mr. Briscoe does not admit any

involvement in the events leading to Ms. Courtepatte's death. In the latter two-thirds of the transcript he acknowledges that he drove the vehicle which took a group of people out of the city and to the place where Ms. Courtepatte was assaulted and killed. He admits doing other things when the party arrived at the place where the killing occurred. He gives considerable detail as to what other members of the group did and as to what he observed. He also describes events after the group returned to Edmonton.

[14] It is clear in the first third of the interview that Mr. Briscoe is undecided as to whether or not he should give a statement. He observes that the lawyer to whom he spoke by telephone just before the interview advised him not to say anything. He is clearly fearful that by revealing what he knows he will put himself in serious, even mortal, danger at the hands of those his statement would implicate. He expresses a concern that if he does not give his version of events, he will be at risk of being framed by the versions given by other persons interviewed by the police. He also expresses a desire to protect his girlfriend, S.B., who had been arrested at the same time he was. He also wants to be released from police custody as soon as possible. At one point he describes his dilemma in these words:

. . . I don't want nothing bad to happen to her [S.B.], but, I just don't know what to say. Sometimes it's better off not saying nothing and sit in jail for two years, I don't friggin' know. But I don't want to go to jail for like, twenty-five years for something I didn't even do. And at the same time, I don't wanna just, just, for instance if I get out on the streets and I walk outta here and I wake up, like, well I won't wake up, that's, I don't want that to happen to me and I know there's nothing you can do about it, so that's basically where I'm standing. Can't say nothing, won't say nothing, just sit here, I guess.

[15] Mr. Davison first submits that Constable Brophy offered Mr. Briscoe police protection should he be in danger as a result of cooperating with the police and making a statement. This, Mr. Davison submits, was a *quid pro quo* for Mr. Briscoe's statement.

[16] The subject of protection for Mr. Briscoe was addressed several times in the interview. Here are the passages:

a) Page 13 of Part 1 of the transcript. This excerpt follows immediately after Mr. Briscoe described his dilemma in the passage quoted above in para. [14]:

Brophy: You understand, of course if, if you're a witness in one of our cases, and that your life is threatened by the other side of the case, that we have an obligation to look after you, you understand that? Okay, what does that mean to you?

Briscoe: I don't know.

- Brophy: Well, it means that we're responsible for making sure nothing happens to you.
- Briscoe: (Unintel)
- Brophy: It means that you can sit here in this room and you can tell me what happened and we'll look after you.
- Briscoe: Be locked up in here for the rest of your life, that's protection.
- Brophy: No, that's not protection. Do you understand what I just said to you? Do you understand that? Okay. Mike, Michael, start at the beginning okay of that night and tell me the story, tell me what happened and tell me the truth, okay?
- ...
- Briscoe: Okay, well, I know and you know what happens to people that even talk period and then they go inside and uh, I don't feel like being one of those people.
- Brophy: Okay.
- Briscoe: At the same time, I don't feel like being, what if I get on the streets, I don't feel like being chased around, and worry about somebody taking me out.
- Brophy: So, sounds like you're pretty worried.
- Briscoe: Put it this way, I'm more worried about some bullshit happening to me than being in here, that's pretty bad.
- Brophy: Don't you think that by being a witness to something, that makes you at even more risk? Being outside the umbrella of protection of the police? Do you know what I mean? You're a witness to something. That means you could talk to the police. That's enough for people, sometimes. You say you're worried that if you talk to police, that uh, somebody's gonna come after you in jail or somebody's gonna come after you on the street and I'm telling you that if you're a witness for the police, we have an obligation to look after you, okay? If the police aren't looking after you when you're on the street, who's looking after you?
- Briscoe: Nobody looks after me.

Brophy: Right, nobody. You just told me a few minutes ago there was somebody beating on your door in the middle of the night and you didn't know who it was. You probably did know who it was. How many times is that knock gonna come at the door? Kinda hard to sleep when you're thinking about somebody coming through your front door all the time. I know I don't wanna live like that. There's no reason for you to have to live like that.

b) Page 23 of Part 1 of the transcript:

Brophy: . . . You, you're telling me that you're, you're afraid to go to jail, you're afraid to go back on the street, you're afraid basically of looking over your shoulder. Is that about, is that about right? Well, personally, I would probably take my chances with somebody who has a badge and a, you know, licence to carry a gun as opposed to all the crazy people that are out there wandering around that kill people indiscriminately, such as this person that you mentioned that claims to have cut up a bunch of people.

c) Page 28 of Part 1 of the transcript:

Brophy: . . . I think that you need to know that we'll do whatever it takes to ensure your safety and your girlfriend's safety, do you understand that? Okay, do you understand that? Do you think anybody on the street outside of this office will give you that promise and follow through on it?

Briscoe: No

Brophy: Do you think they're even capable of doing it?

Briscoe: No

Brophy: Exactly. Now, you tell me one good reason why you shouldn't just sit back and tell me exactly what happened. I can't think of one.

d) Page 33 of Part 2 of the transcript. This passage appears after Mr. Briscoe has given a significant amount of information.

Brophy: . . . I think we're making pretty good progress, here, don't you?

Briscoe: Yeah, not bad.

Brophy: Um-hmm.

Briscoe: Now that my brain is starting to work a little bit. But all I know is like, some of these people are some pretty big people.

Brophy: Yeah.

Briscoe: And if I'm inside.

Brophy: Let's concentrate on, [M.W.], let's concentrate on this, right now, okay? And if there's safety issues, I promised you that we're, we're responsible for your safety, right? Okay, there's no issue there, okay?

Briscoe: Okay.

e) Page 2 of Part 3 of the transcript:

Briscoe: . . . You can ask any, any people that I've known from before and they'll tell you I'm not no fucking murderer. Or anything like that, I may be a little bit loose in the head but.

Brophy: Well Michael I want to believe you and I know that you've told me a lot of the truth here today. I don't know if you've given it all to me . . .

Briscoe: The best . . .

Brophy: . . . to be quite honest.

Briscoe: . . . the best that I can right now cause I can't think of anything else. I'm more shocked that I even said anything, actually.

Brophy: Why is that?

Briscoe: 'Cause I just didn't want I just don't wanna, I don't want to have to live in there being labelled a rat. But you said that you could help protect me and my girlfriend. And whoever else needs to be protected. That's from what I got in there. And I don't want nobody hurt in my family or my kids or anything like that.

Brophy: Well I made it very clear to you that it'll be our responsibility to look out for you if you're going to be at risk because of our investigation. And we have to look after you. Right? That's the bottom line so.

Briscoe: Oh I'll be at risk all right. Inside, inside period. I don't care where.

f) Page 8 of Part 3 of the transcript:

Briscoe: . . . I do not want to be the victim of all this bullshit cause.

Brophy: Well you're not the victim, the victim is sitting right there on the table. [referring to photograph of the deceased]

Briscoe: Well I don't . . .

Brophy: She's dead.

Briscoe: Well I don't want to be the next victim. I was talking to help me and her out. That's what you told me and that's what I did.

Brophy: Well that's a fine . . .

Briscoe: That doesn't mean.

Brophy: . . . line Michael.

Briscoe: That doesn't mean, doesn't mean just add, take her right out of the equation she was there too.

g) Page 16 of Part 3 of the transcript. The interview initially ended just before 7:00 pm. About an hour later it resumed. Mr. Briscoe had indicated that he wanted to speak to Constable Brophy again.

Brophy: Ok, what's on your mind?

Briscoe: Well, my concern is like, what you said about helping me out or whatever and I kind of feel like that's not gonna happen now.

Brophy: Well, to clarify to you, about what we talked about was that if the police are gonna to be dealing with you and we find that you are in a position of ah, immediate danger, or it's gonna be a danger to your family, it's incumbent on the police to look after you. Ok, that's what we talked about.

Briscoe: Yeah.

Brophy: Ok, it's ah witness protection, whatever you want to call it, that's, that's what we're talking about. If because of what we're doing here, is going to put you in grave danger we have an obligation to look after you. Ok, that's common knowledge Ok.

Briscoe: It's gonna put me in danger.

[17] Mr. Davison also submits that Mr. Brophy induced Mr. Briscoe to give his statement by holding out the possibility that by doing so he might secure his release from custody. He refers to the following passage at page 30 of Part 1 of the transcript:

Briscoe: What's the chances of me walking outta here, today?

Brophy: You know, I, I can't tell you that, Michael, you gotta, you've gotta talk to me, okay? You've gotta talk to me. All I can tell you is that I'm here to listen to what happened and I need you to tell me, okay?

Mr. Davison observes that the full import of this passage cannot be appreciated from simply reading the transcript. He submits that the tone and inflection with which Constable Brophy says "you've gotta talk to me" suggests a relationship between Mr. Briscoe giving a statement and his chances of being released.

[18] Finally Mr. Davison submits that Constable Brophy's tactics included falsely suggesting to Mr. Briscoe that others who were present when the crime was committed had provided statements to police. He focusses on the following passage at page 32 of Part 1 of the transcript. The passage occurs shortly after a short break in the interview after which Constable Brophy took a slightly more aggressive tact in his questioning of Mr. Briscoe.

Brophy: . . . We were, I think we were, right, you were telling me about what you heard, which is not the truth, Michael, at all, okay, and I don't have a lot more time here to waste, okay? Snowman, I know every person that was there, including you, okay, so let's cut with the crap, right now, alright? I don't have time to play games with you.

Briscoe: (Unintel)

Brophy: Okay, you're either in the crime 100%, you're on the periphery of it and you're gonna be dealt with on those matters or you're the one who organized this mob into killing this young girl, okay, so let's stop screwing around and get to the meat of, of the matter, here, okay. Snowman, Joe Laboucan, okay, Joe, tattoos, he's about 5'6" maybe 240. He's kinda fat, put on about 60 pounds in the last

6 months. I know him very well, okay? Alright? He's been talked to.

Briscoe: Okay.

Brophy: Your girlfriend is being talked to, right next door, here, right now, and let me tell you something, she's talking. You are not. You're in this room with me, here right now and I've been treating you with respect that I would give any person on the street and you are lying to me like a sack of crap and it's

Briscoe: I am, I never lied to you.

Brophy: Don't, uh, don't, look, I can tell when you're lying, cause your lips are moving, okay, so just be quiet. I got some stuff I want to share with you, here.

Briscoe: Okay, fine

Brophy: Okay, how's your golf handicap?

Briscoe: Golf?

Brophy: Um-hmm. Yeah. Seems that you guys went for a little midnight golf game, maybe.

Briscoe: Golf game.

Brophy: Buffy, you know Buffy's real name? I do. She's been talked to. You know Pyro? I know Pyro, too. I know his real name, 'cause guess what? He's been talked to. Okay? Snowman's been talked to. Joe's been talked to, exhaustively, alright? [S.B.], well, you know, [S.B.]'s young, impressionable and you know what, she likes the police, she's not as, you know, against us or something. I don't know why you're not telling me what happened, here, I mean, for God's sake, man,

Briscoe: Well, basically, like I told you, I don't want to be the one that fuckin', pardon the language

Brophy: I don't want to hear any more of that, you know what, you've sat there and told me "I don't wanna be this", "I don't wanna be that", "I don't wanna rat", "I don't wanna do that", you know what? Look at that. This girl was brutally beaten to death, okay, she's a

teenager, her mom is burying her poor broken body this week, okay? You know what, you were involved, okay. That's not something to be proud of, here. You can sit there in that chair and look me in the eye and don't tell me you can't look me in the eye. Look me in the eye when you lie to me, at least give me that respect, okay? If you got forced into this and that's how it went down, you got exactly two seconds to start telling me about it, man. Because we're way, way beyond traffic tickets, here. Do you understand what I'm saying to you?

Briscoe: Yeah.

Brophy: Now, do you also understand what I told you before?

Briscoe: Um-hmm.

Brophy: If you are not the one who organized this and, and brought this off and there's other people that are responsible for that, you need to tell me about it, now. Right now. Let's have it.

Mr. Briscoe then gave his statement.

[19] On cross-examination in the *voir dire*, Constable Brophy confirmed that when he told Mr. Briscoe that "Pyro" (M.W.) had been talked to, it was a lie. Mr. M.W. was not arrested until the next day. Constable Brophy acknowledged he did not know whether Mr. Laboucan had been talked to at that point, though he told Mr. Briscoe he had been. S.B. had not made a statement implicating Mr. Briscoe. Constable Brophy acknowledged that he intended Mr. Briscoe to think that she had.

### *Analysis*

[20] Were Constable Brophy's statements regarding police protection for Mr. Briscoe should he be in danger as a result of giving a statement a *quid pro quo*? It is clear that one horn of the dilemma that Mr. Briscoe faced in deciding whether or not to give a statement was that he thought doing so would put him in danger from those whom his statement would implicate. It appears likely that Constable Brophy's assurance that the police have the obligation to protect him from such danger figured into his decision to make a statement despite his fear. In that sense it was an inducement.

[21] It is also clear that Constable Brophy never suggested that Mr. Briscoe's access to police protection depended on his giving a statement. It depended on Mr. Briscoe being in danger. Danger might result from his giving a statement, and if it did, police protection would be provided. In that sense Constable Brophy's statements about the police protection was not a *quid pro quo*.

[22] Did Constable Brophy hold out, as an inducement to Mr. Briscoe, that he would be released from custody if he gave a statement? Clearly he did not. He declined to answer Mr. Briscoe's question concerning release. I accept that he implied that he might be able to answer after he knew what Mr. Briscoe had to say. In my view this falls far short of a *quid pro quo*.

[23] The "trick" in which Constable Brophy engaged by suggesting that the police had talked to persons suspected to have been involved in the crime cannot be characterized as police conduct that would shock the community. It does not compromise the integrity of the criminal justice system.

[24] In summary then, of the three aspects of Constable Brophy's conduct during the interview which Mr. Davison submits, considered together, raise a reasonable doubt as to the voluntariness of Mr. Briscoe's first statement, only the first, the statements concerning police protection, is of even possible concern. Whether or not those statements are properly characterized as an inducement or a *quid pro quo*, I have no doubt whatsoever that they did not overbear Mr. Briscoe's will.

[25] It is clear that up to the point that Constable Brophy indicates that the police have talked to other persons who were present when Ms. Courtepatte was killed, Mr. Briscoe had not finally decided whether or not to give a statement. It is also clear that once he understood that the police knew the names of several other persons who had been present when Ms. Courtepatte was killed and were talking to them, his greatest concern was that the police would derive their understanding of his involvement from others. It was therefore important to his own position that he provide a statement. He immediately admitted being present at the scene of the killing and witnessing several important aspects of it. It is evident that the decision he made to give a statement was not the product of any inducement regarding police protection, if there was an inducement. It was the product of the exercise of his own fully operational free will. He independently and freely made a decision as to what course of action was in his best interests in the circumstances. I find his first statement was voluntary.

***Did Mr. Briscoe make the second statement voluntarily?***

[26] Mr. Briscoe's second statement, as noted, was made to Constable Brophy on the morning of April 12, 2005 after Mr. Briscoe had spent the night in custody. Constable Brophy testified that Mr. Briscoe had requested a further interview. Constable Brophy decided to take a hard approach to the interview, by comparison to the approach he took on April 11. He felt that Mr. Briscoe had not told him everything in the first statement and he hoped a hard approach would result in him revealing what he had not yet disclosed.

[27] The videotape recording of the interview does not start at the very beginning of the interview. Neither does the transcript, which I understand was prepared from an audio recording. It is apparent that something had been said prior to the commencement of the recording. Constable Brophy's evidence is that the missing part must be very brief - a minute or less in

duration and that it would have consisted of an aggressive statement by him to the effect that Mr. Briscoe's statement the day before was incomplete and unsatisfactory. He expects that almost all of the missing portion was he himself talking. His words were in the same vein as the words spoken after the recording commenced. Mr. Briscoe did not testify on the *voir dire*.

[28] The transcript starts as follows:

Brophy: We all make our fate here, right?

Briscoe: Yeah, well that . . .

Brophy: You're gonna have to be . . .

Briscoe: . . . I agree with that, but.

Brophy: . . . a hundred per. There's no buts. Okay? There's no buts. You gotta but a hundred percent up front with me know, cause I'm, I'm just about done with this. I, like when we're done talkin' here, I'm not talkin' to you anymore. Okay? So you wanna talk to me right now. Let's go. Let's have it. Let's have what you never told me last night. The stuff you left out, get started. Let's have it.

Briscoe: Well, you're not gonna even tell me where start from, so I can at least try to figure out what the hell we were?

Brophy: You know where to start from. You know what we're talkin' about.

[29] Mr. Davison submits that the Crown cannot prove beyond a reasonable doubt that Mr. Briscoe gave this statement voluntarily when it cannot prove exactly what was said in the portion that is missing.

[30] I am satisfied that the Crown has proved beyond a reasonable doubt that the second statement was voluntary. I accept Constable Brophy's evidence that the missing portion is very brief and was of the same character as what was recorded when the recording commenced. While Constable Brophy took an aggressive approach and displayed anger, his conduct was not oppressive. There was further discussion of the police protection point, but in my view, as in the case of the first statement, it did not overbear Mr. Briscoe's operating will. As in the case of the first statement, Mr. Briscoe's second statement was entirely voluntary.

***Was Mr. Briscoe's right to counsel violated in the context of the first and second statements?***

[31] Constable Brophy advised Mr. Briscoe of his right to call a lawyer shortly after he was arrested. The advice was that Mr. Briscoe had the right to call a lawyer at any time. Mr. Briscoe said he wanted to call a lawyer. Constable Brophy escorted him to a telephone room. The room had telephone directories and information about locating a lawyer. Mr. Briscoe selected a lawyer's telephone number from the telephone directory. Constable Brophy dialed that phone number so he could be sure that it was a lawyer's number. The lawyer's office was closed. Mr. Briscoe selected a second number from the list of legal aid lawyers in the room. Constable Brophy dialed. The lawyer was not in but his office provided a cell phone number. Constable Brophy dialed that number. The lawyer answered. Constable Brophy advised the lawyer what was going on. He then left while Mr. Briscoe spoke to the lawyer. About three minutes later, Mr. Briscoe knocked on the door to indicate he was finished talking to the lawyer. Constable Brophy asked him if he was satisfied with the advice he had received. He said he was. He volunteered that the advice was "to say nothing". He made no further request to speak to a lawyer. The first statement began about two hours later.

[32] Mr. Davison submits that at one point in the first interview, before Mr. Briscoe began to reveal information about activities on the night of the murder, he requested further access to a lawyer. Here is the passage: (Transcript Part 1, page 14)

Briscoe: . . . If I did something, believe me, I wouldn't be sitting here, I'd, I'd be gone. But, I don't know what the hell's going on, I don't want to get framed for anything or I don't want nothing to happen. So let's say for pretense sake, if a person did say something, right, what would happen? Like, if, if I did know enough to help you to find the person that did that or whatever

Brophy: You know, I gotta hear what you gotta say first, man, that's the way it works and you know that. You're not a stupid guy.

Briscoe: And I'm not as smart as you think, either cause you know, like, it's not like this happens to me every day. I only know is one thing, your lawyer has to be there and you have to, papers have to be signed and all this kinda crap and da da da da da. So basically, I don't know that much and I just told, basically told you what I know. I'm arrested I don't know what the fuck, what to say. I don't see how it has anything to do with me anyway, just because of, you came to my door, doesn't mean, like I told you, right?

. . .

Brophy: I only have a limited time to talk to you, here, Michael, okay, and you're wasting my time, I can tell you. You're really wasting my

time. If you've got something to tell me, then you better sit back on that chair and start, okay? Go ahead.

Briscoe: If I had a lawyer here, would it help?

Brophy: You're lawyer's not gonna be here. You've talked to your lawyer. Okay.

Briscoe: And he said, "Don't say anything".

[33] Mr. Davison focusses on the last speech by Constable Brophy in this excerpt. He submits it should be interpreted as either Constable Brophy advising that no lawyer would be willing to be with Mr. Briscoe while he was interviewed by police, or that he had no further right to speak to a lawyer at that point. In either case, Mr. Davison submits, Constable Brophy's statement amounts to a denial of Mr. Briscoe's right to contact a lawyer.

[34] I disagree. It is necessary to assess Mr. Briscoe's words in this excerpt as well as Constable Brophy's. It is clear that when Mr. Briscoe mentions a lawyer at the beginning of the excerpt, it is in the course of attempting to suggest to Constable Brophy that it might be possible to arrange some sort of a deal whereby Mr. Briscoe would make a statement in return for some unspecified benefit. He observes that a lawyer would be required to assist in putting such a deal together.

[35] At the end of the passage he asks if it would help if he had a lawyer present. In the context it is reasonably clear that he is still attempting to determine whether a deal is possible. His question, "If I had a lawyer here, would it help?" means, "Are you interested in making a deal with me?" It is not a request for an opportunity to contact a lawyer. Constable Brophy's response puts an end to that possibility.

[36] In my view, this exchange does not evidence a denial of Mr. Briscoe's right to counsel.

[37] At the end of the first statement, Mr. Briscoe asked to be allowed to call his lawyer. He wanted to call a lawyer with whom he had had dealings in the past. He was again taken to the phone room. He attempted to contact the lawyer but was not successful.

[38] He made no further request to contact his lawyer before the second statement the next morning. He did not say anything about wanting to speak to his lawyer during the second interview until it was over. As he was leaving the interview room he said that he wanted to call his lawyer. That request is relevant to the assessment of whether his right to counsel was violated in the third interview. It has no significance to the second interview.

[39] I find that Mr. Briscoe's right to counsel was not violated in either the first or second interview.

***Was Mr. Briscoe's right to counsel denied in the context of the third statement?***

[40] The third statement was in the context of an interview conducted by Constable Waldorf commencing about an hour after the second statement ended. As mentioned at the end of the second statement, Mr. Briscoe asked to call his lawyer.

Briscoe: . . . I want to make a phone call to my lawyer, I never got a chance to do that.

Brophy: Yeah, this morning you can call your lawyer again. You called your lawyer yesterday.

Briscoe: I didn't have, my lawyer's not that person. . . .

[41] During the hour between the end of the second statement and the start of the third, Mr. Briscoe was not given the chance to call his lawyer. He did indicate that he did not wish to speak to Constable Brophy further. He wanted to talk to another police officer.

[42] The third statement began as follows:

Waldorf: You remember me from yesterday, right? I'm Pat.

Briscoe: I'm scared shitless, man.

Waldorf: You are?

Briscoe: Yes.

Waldorf: I understand. I understand totally what you're saying. I also understand you were talkin' to another guy, and you don't wanna talk to him anymore.

Briscoe: He doesn't, he's not. I don't know what.

Waldorf: What's the, what's the problem there? What's?

Briscoe: He's, he's being so fuckin', and I can't think straight.

Waldorf: Okay.

Briscoe: And he said he was gonna keep me and my friend safe right, if I, if I helped out or whatever, and.

- Waldorf: Okay. Well, I don't know anything about that. But listen now, and I know, I understand you're talkin' about you wanna call a lawyer, okay? My understanding from being around here yesterday, you, you spoke to somebody already, right?
- Briscoe: Right.
- Waldorf: Okay.
- Briscoe: Thirty seconds, but that wasn't my lawyer.
- Waldorf: Okay. It was a lawyer, I understand though eh, it was a lawyer, right?
- Briscoe: Yeah.
- Waldorf: Good enough. Okay. Listen. I just wanna cover off a few things here with you, okay?
- Briscoe: Okay.

[43] The subject of Mr. Briscoe speaking to a lawyer was not mentioned again during the third statement.

[44] By contrast to the exchange set out above in paragraph [32], it is clear in the excerpt just set out that Mr. Briscoe wanted an opportunity to speak to a lawyer. For the first time he indicated dissatisfaction with the contact he had had with a lawyer the previous day. Constable Waldorf said his conversation with a lawyer the previous day was "good enough". Though he did not expressly state that Mr. Briscoe would not be allowed to contact a lawyer, he went on to question him and in fact, did not honour Mr. Briscoe's clear request.

[45] In my view this was a violation of Mr. Briscoe's right to counsel.

***Does the lack of a recording of statements to undercover officer breach Mr. Briscoe's right to a fair trial?***

[46] The fourth statement was made to an undercover police officer who posed as another prisoner and was placed in the same cell as Mr. Briscoe from the evening of April 11 to the morning of April 12. The officer, Constable McCoshen, testified as to certain statements Mr. Briscoe made to him during the night. There was no recording of their conversation. Constable McCoshen made notes of the discussion after the undercover operation ended. Though those notes were not offered in evidence, they have been disclosed to Mr. Briscoe's counsel.

[47] There is no issue as to whether the statement was voluntary. It was not given to a person who Mr. Briscoe understood to be in a position of authority. Mr. Davison's challenge to the admissibility of the statement is that to permit it to be put in evidence would violate Mr. Briscoe's *Charter* right to a fair trial: *Charter*, s. 11(d). Mr. Briscoe's trial would not be fair, Mr. Davison submits, both because of the fallibility of the Constable's memory as to what Mr. Briscoe actually said, and because of the unavailability of reliable evidence as to the full context of the statements which, if available, might promote greater precision in determining Mr. Briscoe's meaning and the significance to be attached to what he said. In these circumstances, Mr. Davison's submits, Mr. Briscoe's ability to defend himself would be prejudiced.

[48] Mr. Davison submits that it would have been possible and not difficult for the police to have obtained a warrant permitting them to intercept and record the conversation between Mr. Briscoe and Constable McCoshen in the cell. If this step had been taken there would be no doubt as to what was said. There would be no prejudice to his ability to defend himself.

[49] Mr. Davison cites no authority for the proposition that the type of concern he raises can amount to a violation of an accused person's *Charter*, s. 11(d) rights.

[50] In my view Mr. Briscoe's right to a fair trial is not violated, compromised or threatened in these circumstances. I see no distinction between Constable McCoshen's evidence regarding what Mr. Briscoe said in the cells and any other witness' evidence as to what they saw or heard. The determination of whether or not the trier of fact accepts the witness' evidence as establishing that what he testifies he saw or heard actually happened, and whether enough of the context is established to justify accepting that the event seen or heard has the import suggested by the party presenting the evidence, is an assessment triers of fact must frequently make. That determination is generally called the assignment of weight to evidence. The process of assigning weight to evidence is an important feature of a fair trial. That the form in which the evidence comes requires more care in the assignment of weight than might be necessary if the evidence came in a different form, does not cause the trial to be unfair.

[51] I dismiss Mr. Davison's challenge made on the basis of *Charter*, s. 11(d). There is no breach of Mr. Briscoe's rights under that section. Constable McCoshen's evidence as to what Mr. Briscoe said to him when they were in the cell is not rendered inadmissible by reason of a *Charter* s. 11(d) breach.

[52] Ms. Schutte, in replying to Mr. Davison's submissions on this point, observed that Constable McCoshen's evidence as to what Mr. Briscoe said is hearsay admissible under the "admission against interest" exception to the hearsay rule. She also briefly addressed the question of whether this hearsay would meet the tests of necessity and reliability to be addressed in the principled approach to hearsay. Mr. Davison responded briefly to her submissions in this regard. This was not, however, the basis of Mr. Davison's challenge to the admission of this evidence. I am not comfortable making any determination of the hearsay issue at this point when it was not the basis of Mr. Davison's challenge. I do not wish to be taken as having made any determination in that regard.

***Conclusion***

[53] For these reasons I rule:

- 1) Statements 1 and 2 are admissible
- 2) Statement 3 is inadmissible
- 3) Statement 4 is not inadmissible because of any breach of Mr. Briscoe's *Charter* s.11(d) rights. There is no such breach.

Heard on the 18<sup>th</sup> day of January 2007.

**Dated** at the City of Edmonton, Alberta this 26<sup>th</sup> day of January 2007.

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**Brian R. Burrows**  
**J.C.Q.B.A.**

**Appearances:**

Anne Schutte and Jack Watson  
Agents for the Attorney General of Alberta

Charles B. Davison  
for the Accused Michael Erin Briscoe

Laurie Wood  
for the Accused Joseph Wesley Laboucan