A RECIPE FOR WRONGFUL CONFESSIONS: A CASE STUDY EXAMINING THE "REID TECHNIQUE" AND THE INTERROGATION OF INDIGENOUS SUSPECTS

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The Innocence Project in the United States has produced research that more than 1 out of 4 persons who have been wrongfully convicted (as confirmed by DNA evidence) were convicted because of a false confession. There are similar estimates in Canada that approximately 20% of all DNA based exonerations involve false confessions. This paper seeks to explore the potentially damaging effects of police interrogation techniques when used on Indigenous suspects in the criminal law context. Very little has been published on this important topic, but with the overrepresentation of Indigenous offenders it is a subject that needs further study. The cultural factors that may cause an Indigenous accused to "confess" to something they did not do are very much linked to language and communication styles. Suspects who are vulnerable as a result of their background need special accommodations in interrogation, but this understanding has been largely absent from Canadian jurisprudence as there are very few references in the caselaw to these considerations.

This paper will begin with a brief discussion of the common law "Confessions Rule" as well as the history of Canadian jurisprudence involving interrogation and the Reid Technique which is taught to Canadian police candidates today. This paper will then examine the

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1. Dr. Frances E. Chapman is an Associate Professor at the Bora Laskin Faculty of Law, Lakehead University in Thunder Bay, Ontario, Canada. Much thanks to my student researcher Daniel Cox for reading a draft of this paper, and many thanks to my research assistant Claire McCann for her editing and content research. At the outset that I wish to respectfully acknowledge that Lakehead University is located on the traditional lands of the Fort William First Nation, Signatory to the Robinson Superior Treaty of 1850. I also wish to acknowledge that I am cognizant of the pan-Indigenous stereotypes that are perpetuated by the fallacy of treating all Indigenous Peoples as a part of one community. I acknowledge that this is not the case, and I am simply using the term "Indigenous Peoples" as a starting place for the discussion of interrogation of a certain subset of our population. By no means do I wish to categorize all Indigenous Peoples in the same way, but I only wish to use the most respectful lens possible. Please see more information on pan-Indigeneity and academic work in Hadley Friedland, *Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws*, 11 INDIGENOUS L. J. 1 (2012).

Confessions Rule and interrogations methods and the seminal case of *R v Oickle*. Approaching this topic from a new perspective, this paper will then examine an actual interrogation of an Indigenous suspect that came to the attention of the author through an expert retainer. The paper will then break down all nine steps of the Reid Technique by examining what the suspect said at each stage of the interrogation using the actual words of an Indigenous suspect. The author seeks to begin the discussion that the Reid Technique of interrogation needs to be removed as the preferred method for our police forces with all interrogation subjects, but especially for Indigenous suspects. This article will also discuss research from Australia which focuses on the dangers of interrogation of Indigenous subjects and suggestions will be made for this proposed shift in the Canadian criminal justice system. There is inherent risk of eliciting false confessions as a result of culturally unaware interrogations which can allow vulnerable populations to fall victim to questioning which exploits their unexamined vulnerabilities.

1. Introduction

> *It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.*[2]

> *The cases of torture, actual or threatened, or of unabashed promises are clear; perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them*.[3]

> *[T]he criminal courts have perpetuated the myth that everyone is equal under the law, and have failed to develop strategies for overcoming the differences in language, culture and wealth which in reality place Indigenous defendants at such extreme disadvantage*. . . .[4]

The Innocence Project in the United States (U.S.) has produced research that more than one out of four persons who have been wrongfully convicted (as confirmed by DNA evidence) were convicted because of a false confession.[5] There are similar estimates in Canada that approximately 20% of all DNA based exonerations involve false confessions.[6] These numbers likely fall short of capturing the full numbers of false confessions as it is difficult to determine conclusively

2. Miranda v. Arizona, 384 U.S. 436, 457 (1966).

3. R. v. Fitton, [1956] S.C.R. 958, 962 (Can.).

4. HEATHER MCRAE ET AL., INDIGENOUS LEGAL ISSUES: COMMENTARY AND MATERIALS 363 (2d ed. 1997).

5. *See False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT, https://www.innocenceproject.org/false-confessions-recording-interrogations/ (last visited Jan. 27, 2020).

6. Timothy E. Moore & C. Lindsay Fitzsimmons, *Justice Imperiled: False Confessions and the Reid Technique* 57 CRIM. L. Q. 509, 519.

that a confessor is not guilty.[7] Interrogations are inherently stressful, and the potential for abuse involved in overcoming the will of another in interrogations is well-documented. Since the 1966 case of *Miranda v. Arizona*, the U.S. Supreme Court has recognized that "[e]ven without employing brutality, [or] the 'third degree' . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[8] The techniques used by police in the course of interrogations, and the methods used by officers when questioning a suspect, are the focal point for an analysis of false confessions. Police officers try to persuade a suspect to confess because the denial of the crime is considered an undesirable outcome and obtaining a confession that is self-incriminating and "voluntary" is deemed successful.[9] Moreover, the number of confessions an officer obtains is linked to his or her interviewing competence.[10] This pressure put on officers to obtain confessions from suspects sometimes leads officers to resort to coercive interrogation tactics, which have the potential to lead to false confessions.[11] Besides these well-documented problems with interrogations of all suspects, research has often failed to consider the further negative impacts of certain interrogation techniques used on Canada's most vulnerable populations and the increased potential for false confession.

It goes without saying how damaging a false confession may be as it snowballs throughout the criminal justice system. Research has shown that having a confession (false or otherwise) causes police to investigate less, Crown Attorneys are more likely to charge the maximum number of offenses, prosecutors are less willing to offer or accept a plea bargain, bail is more difficult to obtain, a confession decreases the likelihood of an acquittal, and defense lawyers are less likely to advise their clients to

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7. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 5 (2009) [hereinafter Kassin et al., *Police-Induced*].

8. Miranda v. Arizona, 384 U.S. 436, 455 (1966).

9. *See* Alan Hirsch, *Going to the Source: The "New" Reid Method and False Confessions*, 11 OHIO ST. J. CRIM. L. 803, 815.

10. Stephen Moston, *From Denial to Admission in Police Questioning of Suspects*, *in* PSYCHOLOGY, LAW, AND CRIMINAL JUSTICE 91, 93 (Graham Davies et al. eds., Walter de Gruyter 1996).

11. *Id.* at 93.

plead not guilty.[12] The jury overwhelmingly convicts where there is a confession and will "convict on the basis of confession alone, even when no significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it."[13] Sentencing is also likely to be equally harsh especially if the accused is unwilling to show remorse when they later recant and expose the false confession. It is also important to remember that in the 125 cases of proven false confession analyzed by Drizen and Leo, "more than four-fifths (81%) of the innocent defendants who chose to take their case to trial were wrongfully convicted 'beyond a reasonable doubt' even though their confession was ultimately demonstrated to be false."[14]

One of the main catalysts for a false confession may stem from the "Reid Technique" method of interrogation, which is one of the most widely used police techniques in the world. There are grave concerns with a police method when a cornerstone is that the interrogation "*is conducted only when the investigator is reasonably certain of the suspect's guilt*."[15] There is an inherent bias from the outset that the subject of the interrogation is already guilty. The techniques that are taught to our state interrogators are flawed and the science on which they base these interrogations is "actually contradicted by empirical evidence."[16] With the addition of cultural factors, the result is to potentially set-up the subject to falsely confess.

This paper seeks to explore the potentially damaging effects of police interrogation techniques when used on Indigenous suspects in the criminal law context. Very little has been published on this important topic, but with the overrepresentation of Indigenous offenders it is a subject that needs further study. The cultural factors that may cause an Indigenous accused to "confess" to something they did not do are very much linked to language and communication styles.[17] Suspects who are

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12. *See generally* Frances E. Chapman, *Coerced Internalized False Confessions and Police Interrogations: The Power of Coercion*, 37 L. & PSYCHOL. REV. 159 (2013).

13. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 922–23 (2004).

14. *Id.* at 961.

15. *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 5 (5th ed. 2013) (emphasis in the original).

16. Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?* 4 OHIO ST. J. CRIM. L. 121, 130 (2006).

17. *See infra* Section 4(i)(d).

vulnerable as a result of their background need special accommodations in interrogation, but this understanding has been largely absent from Canadian jurisprudence as there are very few references in the caselaw to these considerations.

This paper will begin with a brief discussion of the common law "Confessions Rule" as well as the history of Canadian jurisprudence involving interrogation and, in particular, the Reid Technique taught to Canadian police candidates today. This paper will then examine the Confessions Rule and interrogations methods and the seminal case of *R v. Oickle*. Approaching this topic from a new perspective, this paper will then examine an actual interrogation of an Indigenous suspect that came to the attention of the author through an expert retainer. The entirety of the interrogation recordings and all of the transcripts in this case were analyzed and were examined as a representative example of the reality for one Indigenous suspect in the criminal justice system.[18] The names in this case study have been changed to protect the identity of all parties even though this material was presented in open court and is the subject of a reported decision. The name of the accused has been changed to "Mr. George," and the names of the Detectives involved have not been used to protect their identities and are referred to collectively as "the Detective." The co-suspect is referred to as such, and the individual who was assaulted is referred to as the victim. Using these interrogations as a model, the paper will then break down all nine steps of the Reid Technique by examining what the suspect said at each stage of the interrogation using the actual words of "Mr. George" who found himself subject to an interrogation. Using this one case, the author seeks to begin the discussion that the Reid Technique of interrogation needs to be removed as the preferred method for our police forces with all interrogation subjects, but especially for Indigenous suspects. Following this discussion, this article will also look to research from Australia, which focuses on the dangers of interrogation of Indigenous subjects, and suggestions will be made for this proposed shift in the Canadian criminal justice system. The case of "*R v. George*," will act as a limited example of the inherent risk of eliciting false confessions as a result of culturally unaware interrogations which can allow vulnerable

18. Of course, this case is only one example and is not meant to represent all Indigenous peoples in any type of overarching conclusions. The case is simply an example for further discussion and research.

populations to fall victim to questioning which exploits their unexamined vulnerabilities.

2. Confessions

i. The Confessions Rule and Interrogation in Canada – *R v. Oickle*

It is important to know that the Reid Technique of interrogation is very much alive and well in Canada (even though it has been discredited in countries around the world) and interrogations are conducted using the technique every day.[19] These types of police tactics come to the forefront in the pivotal 2000 Supreme Court of Canada case of *R v. Oickle.*[20] Mr. Oickle was charged with a series of arsons, and the interrogation techniques used by the police were called into question by the lower courts. Yet, the Supreme Court found that the techniques were legitimate and that a confession would only be found to be coerced "through threats or promises, an atmosphere of oppression, or any other tactics that could raise a reasonable doubt as to the voluntariness of the confessions."[21] Although Mr. Oickle's questioning was "persistent and often accusatorial" it was never deemed "hostile, aggressive or intimidating."[22] Even though police had exaggerated the reliability of a polygraph test he underwent, the Court found this was a legitimate police tactic as he was told he could leave at any time, and he was repeatedly offered food and drink and allowed to use the bathroom on request.[23] There were suggestions that, during the interrogation, Mr. Oickle did not wholly understand the warning that he could remain silent nor the warning that he had "nothing to hope from any promise or favor and nothing to fear

19. *See generally* Chapman, *supra* note 12. The British adopted PEACE method of interrogation is far more beneficial. *See id.* at 189.

20. *See* R. v. Oickle, 2000 SCC 38, [2000] 2 S.C.R. 3 (Can.). *See generally* Kent Roach, *Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions*, 52 CRIM. L. Q. 210 (2006).

21. *Oickle*, [2000] 2 S.C.R. 3, ¶ 1.

22. *See id.*

23. *Id.* ¶ 2.

from any threat whether or not you do say anything. Anything you do say may be used as evidence."[24]

The lower Nova Scotia Court of Appeal found the cumulative effect of the "improper inducements" to be "overwhelming" and, in combination, produced doubt about the voluntariness of the statements and the confession was disregarded.[25] However, the Supreme Court disagreed with this assessment, allowed the confession, and convicted Mr. Oickle. After examining the common law on confessions and the *Charter* rights of the accused, the Court noted the "twin goals" of interrogation in "protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes."[26] While the Supreme Court did note that the police minimized the "moral significance of the crimes," they did not do this in a way that would minimize the legal consequences, nor did the police offer psychiatric help in a *quid pro quo* basis.[27] The police did suggest "it would be better" to confess, but the highest court found no threats were implied to either Mr. Oickle or his girlfriend Ms. Kilcup; thus, there was no atmosphere of oppression which would make the confession involuntary.[28] Even misstating the use and admission of a polygraph test was ultimately found to have led to no "emotional disintegration" and that either alone or in combination these factors do not "raise a reasonable doubt about the voluntariness of the respondent's confessions."[29]

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24. *Id.* ¶ 9.
25. R. v. Oickle, [1998] N.S.J. No. 19, ¶ 104 (Can. N.S. C.A.).
26. *Oickle*, [2000] 2 S.C.R. 3, ¶ 33.
27. *Id.* ¶¶ 77–78.
28. *See id.* ¶¶ 79–87.
29. *Id.* ¶¶ 99, 104. Although a full evidentiary analysis is beyond the scope and focus of this paper, it is worth noting that Madame Justice Arbour's dissent in *Oickle* brought up an interesting evidentiary point. She notes that not only should the statement be excluded because they were obtained as a result of fear of prejudice or hope of advantage from those in authority, but also from an evidentiary standpoint the accused runs the risk of an unfair trial in trying to exclude a failed polygraph test because he cannot, "repudiate his out-of-court confession without effectively being forced to adduce highly prejudicial evidence that the Crown could not tender, and that will appear to bolster, rather than impeach, the reliability of his confession." *Id.* ¶ 142. She goes on to say that this would result in the accused incriminating himself with otherwise inadmissible evidence that, "cannot help but strengthen what is often, as here, the sole evidence against him." *Id.* Thus, Justice Arbour would keep the confession and the failed

Regardless of the evidentiary difficulties, the "Confessions Rule" was cemented by the majority of the Supreme Court in *Oickle*, dictating that the Crown must prove beyond a reasonable doubt that the statement was voluntary and thus not obtained by "fear of prejudice or hope of advantage" by threats or advantages made.[30] Those statements that were not the product of an "operating mind" and those secured through oppression would not be permitted nor would those statements gained through police trickery which would "shock the community."[31] These elements have become known as the modern Confessions Rule. However, it is important to note that the Supreme Court acknowledged there is documentation on "hundreds of cases where confessions have been proven false by DNA evidence, subsequent confessions by the true perpetrator, and other such independent sources of evidence."[32] The Court also noted the "unsavoury chapters" in the history of police interrogation, and the Court urged sensitivity "to the particularities of the individual suspect."[33] Justice Iacobucci, writing for the majority, quotes Welsh S. White as saying that:

> False confessions are particularly likely when the police interrogate particular types of suspects, including suspects who are especially vulnerable as a result of their background, special characteristics, or situation, suspects who have compliant personalities, and, in rare instances, suspects whose personalities make them prone to accept and believe police suggestions made during the course of the interrogation.[34]

However, as noted by Dale Ives, the Supreme Court fails to discuss any "personal characteristics and incident-specific concerns" that might lead to a false confession and thus "fails to provide any real guidance on

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polygraph completely separate but would exclude the confession and acquit Mr. Oickle on all counts. *Id.* ¶ 147.

30. *See id.* ¶¶ 48–62.

31. *See id.* ¶¶ 58-67.

32. *Id.* ¶ 35.

33. *Id.* ¶¶ 34, 42.

34. *Id.* ¶ 42 (quoting Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions* 32 HARV. CIV. RTS. - CIV. LIBERTIES L. REV. 105, 120 (1997)).

judges and counsel on this important issue."[35] Was the majority of the Supreme Court including cultural differences in this calculation? Justice Iacobucci pairs this statement from White with Justice Rand's finding in the 1956 case of *R v. Fitton*, where he noted that it is important in the case of confessions to examine the:

> Strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.[36]

Although these statements are *obiter*, there is a need to re-examine what the Supreme Court meant by recognizing the special circumstances and what constitutes a "vulnerable" population for reasons beyond emotional or psychological strength. What about those minority populations which may exhibit cultural vulnerabilities and susceptibilities to these interrogations? White notes that those who may have "special vulnerabilities" might be more at risk.[37] In the early literature on this topic this often referred to mental impairment or emotion problems, but this question needs to be broader. Are there others who have special vulnerability to wrongfully confessing? Justice Iacobucci states in no uncertain terms in *Oickle* that a:

> [C]onfession that is not voluntary will often (though not always) be unreliable. The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession.[38]

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35. Dale E. Ives, *Preventing False Confessions: Is Oickle Up to the Task*, 44 SAN DIEGO L. REV. 477, 483 (2007).

36. R. v. Fitton, [1956] S.C.R. 958, 962 (Can.).

37. White, *supra* note 34, at 131.

38. *Oickle*, [2000] 2 S.C.R. 3, ¶ 47. This passage is cited in *R. v. Spencer*, but the court ultimately decided in *Spencer* that "according to the trial judge, he was aggressive and a 'mature and savvy participant,' and that he unsuccessfully attempted many times to

Justice Iacobucci seems to unequivocally recognize that there are more vulnerabilities, but these unnamed factors remain without further guidance.[39] The question becomes how this modern Confessions Rule squares with the role of the police interrogations and false confession.

II. False Confessions Generally

The largest study of proven false confessions was published in 2004 showing that 93% were men, 63% were under twenty-five, and 81% of the confessions happened in murder cases.[40] This makes false confessions among the leading cause of wrongful convictions in the U.S. and in Canada.[41] These numbers are particularly concerning given that most false confessions are not widely publicized and not known to researchers or the media.[42] Steven Drizin and Richard Leo did one of the most important empirical studies on this phenomenon in 2005 and analyzed 125 proven interrogation-induced false confessions in which "indisputably innocent individuals confessed to crimes they did not commit."[43] Indeed, the general public still believes in what some have

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secure 'deals' with the police. While none of these factors are determinative, it was not an error for the trial judge to consider them in his contextual analysis." R. v. Spencer, [2007] 1 S.C.R. 500, ¶ 21 (Can.).

39. *See* R. v. Pearce, 2016 MBQB 14, 324 Man. R. 2d 176, ¶ 60 (Can.). The Supreme Court in *Oickle* urged us to pay specific attention to the particular vulnerabilities of a suspect when it comes to the potential of a false confession, yet in reality this has been recognized in very few cases. *Oickle*, [2000] 2 S.C.R. 3, ¶ 42. The 2016 case of *R. v. Pearce* involved the interrogation of an accused person with a mental disorder, experts testified that Mr. Pearce was particularly susceptible to making a false confession. *Pearce*, 324 Man. R. 2d 176, ¶ 20. Even though the court cited *Oickle* and the passage on background susceptibilities in particular, the Manitoba court disallowed an expert to testify to the vulnerability as his testimony would "encroach upon the ultimate issue" but did recognize that because of Mr. Pearce's "unique personality traits" this was a "rare case" where the court should be "particularly sensitive to the particularities of the individual suspect whose personality makes him prone to police suggestions." *Id.* ¶¶ 59, 60. Again, the vulnerabilities of the accused were only partially allowed while not permitting expert opinion even the presence of medically recognized psychiatric conditions. *Id.* ¶ 60. The question becomes how this modern Confessions Rule squares with the role of the police interrogation.

40. Kassin et al., *Police-Induced*, *supra* note 7, at 5.

41. Drizin & Leo, *supra* note 13, at 906.

42. *Id.* at 921.

43. *Id.* at 891.

called the "myth of psychological interrogation," which states that an "innocent person will not falsely confess to a serious crime unless she is physically tortured or mentally ill."[44] This myth is easily debunked based on decades of psychological and sociological literature.[45] In fact, police themselves report confessions by innocent suspects. In a survey of 631 officers in the U.S., police self-reported a nearly 5% confession rate by the innocent.[46]

It is important to note there is a difference between an "admission" and a "confession." Michelle Fuerst et al. have noted historically a confession was simply a guilty plea which was considered the "best and surest" evidence.[47] This attitude on the quality of confession evidence has changed very little since the statement in *Rex v. Lambe* in 1791 that "a free and voluntary confession made by a person accused of an offence is receivable in evidence against him, . . . as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true."[48] However, the definition was expanded and "now includes any written or oral communication made by the accused stating or inferring that he or she committed the crime. A confession may be either a complete admission of all of the elements of the crime or an admission of one or more material facts tending to prove the guilt of the accused."[49] In some circumstances, it may be inferred that a suspect

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44. *Id.* at 910.

45. *Id.*

46. Saul Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & HUM. BEHAV. 381, 396 (2007).

47. Michelle Fuerst, Sidney N. Lederman & Alan W. Bryant, THE LAW OF EVIDENCE (Toronto, 5th ed. 2018) citing 2 William Staunford, LES PLEES DEL CORON, at c. 51 (P.R. Glazebrook ed., London, Prof. Books 1971) (1557).

48. Bigaouette v. R., [1926] S.C.R. 112, 46 C.C.C. 311, 320 (Can.) (citing Rex v. Lambe, 168 Eng. Rep. 379, (1791) 2 Leach 552, 554-55 (Eng.)).

49. *Fuerst, supra* note 47, § 8.1. It is also notable that a confession is an exception to the hearsay rule and can be admitted as evidence as the truth of its contents. A confession is defined by Black's Dictionary as "[a] criminal suspect's oral or written acknowledgement of guilt, often including details about the crime." *Confession*, BLACK'S LAW DICTIONARY (11th ed. 2019). An admission is defined by Black's as "[a] statement in which someone admits that something is true or that he or she has done something wrong." *Admission*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See* David Milward, *Opposing Mr. Big in Principle*, 46 U. BRIT. COLUM. L. REV. 81, 85. Milward sums up the hearsay exception as related to admissions saying, admissions are "out-of-court

made admissions during her interrogation, but it may be arguable whether she confessed. One needs an admission to make a confession, but an admission is not necessarily a confession. Statements that "lack a coherent or detailed narrative account of the crime are mere admissions, not confessions."[50] The literature on false confessions discussed throughout this paper also refers to false admissions and the distinction is not always drawn.[51] The two terms will be used interchangeably throughout and the research about false confessions applies equally to false admissions.[52]

The term "interrogation" rather than "interview" is also used throughout this paper. Academic literature distinguishes interviews as those with witnesses and victims, and interrogations as the questioning of a criminal suspect through confrontation.[53] Interviewing is based on open-ended questions and is used to explore "truth gathering," while interrogation is used to elicit statements that incriminate the subject and lead to a criminal conviction.[54] Interrogations are conducted on those presumed to be guilty (as will be discussed below), and are "structured to promote isolation, anxiety, fear, powerlessness, and hopelessness . . . [through] psychological techniques, primary among them, isolation, accusation, attacks on the suspect's alibi, cutting off of denials, confrontation with true or false incriminating evidence, the use of

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statements made by a party and against his or her interests – may be used by the opposing side against the party that made the statement. The party making the admission does not need to have knowledge that the statement is against his or her interest. It suffices that the opposing side seeks to use it in trial for the statement to qualify as an admission. Admissions are a recognized exception to the general rule against hearsay." *Id.*

50. *See* Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 45 (2004).

51. Gisli H. Gudjonsson, *False Confessions and False Guilty Pleas: Similarities and Differences*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS at 33 (G. Daniel Lassiter & Christian A. Meissner eds., 2010).

52. For examples of using the terms interchangeably, see the recent article by Robert J. Norris & Allison D. Redlich, *Seeking Justice, Compromising Truth? Criminal Admissions and the Prisoner's Dilemma*, 77 ALB. L. REV. 1005, 1015–16 (2014).

53. *See* Gisli H. Gudjonsson, *The Psychology of Interrogation and Confessions*, *in* INVESTIGATIVE INTERVIEWING: RIGHTS RESEARCH AND REGULATION 123, 123 (Tom Williamson ed., 2003).

54. Drizin & Leo, *supra* note 13, at 911.

'themes' . . . and inducements."[55] For an individual who may be of another cultural background than those conducting the interrogation, these ramifications may be increasingly dangerous and lead to false information and false confessions.

Police are trained to elicit confessions, and this function is considered an integral part of police enforcement.[56] It has long been a principle of law, as discussed, that a confession is not admissible unless the Crown shows the statement was voluntary without fear or hope of advantage.[57] This healthy fear of confessions comes from the notion that confessions made in the face of threats may be untrue or untrustworthy. However, the weight attached to any confession before the court cannot be overstated. As John Wigmore pointed out as far back as 1899, the:

> [C]onfession of a crime is usually as much against a man's permanent interests as anything well can be; and . . . no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance.[58]

Wigmore goes on to say that the "danger of a false statement induced by an important advantage – is of a slender character,"[59] and this danger is just as real today. The delicate balance between the rights of police to elicit statements and the rights of the individual not to be coerced into a confession remains a constant struggle.

Moreover, what constitutes a threat or inducement is unclear. In the 1967 English case of *Commissioners of Customs and Excise v. Harz,* the Court also recognized that although it "is true that many of the so-called inducements have been so vague that no reasonable man would have been influenced by them, but one must remember that not all accused are reasonable men or women: they may be very ignorant and terrified by the

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55. *Id.* at 911–12.

56. Ronald Joseph Delisle & Don Stuart, LEARNING CANADIAN CRIMINAL PROCEDURE at 352 (Carswell, 6th ed., 2000).

57. *Id.* at 356 (citing Ibrahim v. R., [1914] AC 599, 83 LJPC 185 (Eng.).

58. John H. Wigmore, *Confessions: A Brief History and a Criticism*, 33 AM. L. REV. 376, 391–92 (1899).

59. *Id.* at 393.

predicament in which they find themselves."[60] Thus, there has been a long-standing recognition that the potential for false confessions exist even if the inducements or threats seem inconsequential to those looking at the situation from the outside. Situations in which prisoners were subjected to physical violence and promises of full immunity may be gone, but they may have been replaced by a far subtler system of implied threats and promises.

Some maintain false confessions are exclusively the product of individuals who are mentally incompetent, but this is not supported in evidence.[61] However, studies have found that a subset of those interrogated, including the mentally challenged, the young, those who are highly suggestible or easily confused, those who lack confidence in memory, and have low levels of self-esteem, are more susceptible to making a false confession when interrogated by police.[62] Therefore, much of the work around false confessions has centered around safeguards for the protection of these vulnerable people. For example, Redlich & Meissner cite Great Britain's standards for interrogations including special standards for interviews with vulnerable people including determining if the suspect is fit for an interview in terms of legal competencies and physical, mental, and social vulnerabilities[63] as an effective safeguard.[64]

Richard Ofshe studied interrogation techniques and concluded that many methods require a suspect to be "persuaded" to confess, and he identifies several keys to persuasion including: (1) convincing the suspect of the hopelessness of the situation and the certainty of their conviction through "invention of evidence" and "gross distortion" of key

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60. Delisle & Stuart, *supra* note 56, at 365 (citing Comm'rs of Customs and Excise v. Harz, [1967] 1 AC 760, [1967] 1 Eng. Rep. 177, 184 (Eng.)).

61. Hollida Wakefield & Ralph Underwager, *Coerced or Nonvoluntary Confessions*, 16 BEHAV. SCI. & L. 423, 425 (1998).

62. Moston, *supra* note 10, at 92; Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 249, 251 (2008) [hereinafter Kassin, *Causes*]; Kassin et al., *Police-Induced*, *supra* note 7, at 22; Allison D. Redlich & Christian Meissner, *Techniques and Controversies in the Interrogation of Suspects: The Artful Practice Versus the Scientific Study*, *in* PSYCHOLOGICAL SCIENCE IN THE COURTROOM 124, 133 (Jennifer L. Skeem et al., eds. 2009).

63. Redlich & Meissner, *supra* note 62, at 142.

64. Kassin et al., *Police-Induced*, *supra* note 7, at 22.

facts; (2) manipulating the individual's emotional state including feelings of "guilt and distress;" and (3) pressuring the accused to consider the advantage of an immediate confession and the potential for less severe punishment if there is sufficient remorse.[65] The authors of the Reid Technique do make brief reference to the possibility of false confessions but note there are four factors that appear with some regularity in false confessions cases: "the suspect is a juvenile; and/or the suspect suffers some mental or psychological impairment; and/or the interrogation took place over an inordinate amount of time; and/or the interrogators engaged in illegal tactics and techniques."[66] They note these difficulties arise when the investigators fall outside of "proper interrogation procedures" including "engaging in behavior that the courts have ruled to be objectionable, such as threatening harm or inevitable consequences; making a promise of leniency in return for the confession; denying a subject their rights; or, conducting an excessively long interrogation."[67] Thus, instead of recognizing the potential for false confessions in the technique, the authors blame officers who operate outside of the manual. However, as will be discussed below, the potential for false confessions is present even when using the techniques as directed.

iii. The Reid Technique

Although there is a copious amount of academic commentary questioning the Reid Technique, it is important to examine the basis of the method.[68] John Reid, a police officer with the Chicago Police Department, developed the "Reid Technique" in the 1930-40s with his colleague Fred Inbau, a Professor at the Northwestern Law School. It has been noted that up until the present day the Reid Technique "is the most

65. Richard J. Ofshe, *Coerced Confessions: The Logic of Seemingly Irrational Action*, 6 CULTIC STUD. J. 1, 2 (1989).

66. FRED E. INBAU ET AL., ESSENTIALS OF THE REID TECHNIQUE: CRIMINAL INTERROGATION AND CONFESSIONS 194–95 (2015) [hereinafter REID TECHNIQUE] (This is the truncated version of the full Reid Technique).

67. *Id.* at 195.

68. Moore & Fitzsimmons, *supra* note 6, at 510 n.5 (compiling an informative list of just some of the articles and monographs that have criticized the Reid Technique including: Deborah Davis & William T. O'Donohue, *The Road to Perdition: Extreme Influence Tactics in the Interrogation Room*, *in* HANDBOOK OF FORENSIC PSYCHOLOGY 900 (William T. O'Donohue & Eric R. Levensky, eds., 2003)).

influential and widely used police interrogation procedure in North America."[69] The first book on the Reid Technique was the 1962 publication *Criminal Interrogation and Confessions.*[70] Originally, the Reid Technique was seen as a positive move beyond the historically physically abusive tactics used by the police.[71]

The Reid Technique website claims that over 500,000 law enforcement, military, and security professionals have taken the training since 1974.[72] The Reid Technique is used in Canada, with new editions as recently as 2015.[73] However, there has been an outpouring of criticism of the technique in academic circles. The authors of the Reid Technique state "persuasion occurs in fairly predictable stages" and "[g]uilty suspects who eventually confess often start out offering verbal statements intended to dissuade the investigator's confidence of their guilt, then they psychologically withdraw in an effort to outlast the investigator, and then go through a stage of mentally debating the possible benefits of telling the truth."[74] Not all nine steps must be used, but they include:

i. Direct, Positive Confrontation;

ii. Theme Development;

iii. Handling Denials;

iv. Overcoming Objections;

v. Procurement and Retention of the Suspect's Attention;

vi. Handling the Suspects Passive Mood;

vii. Presenting an Alternative Question;

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69. Moore & Fitzsimmons, *supra* note 6, at 510.

70. Brent Snook et al., *Reforming Investigative Interviewing in Canada*, 52 CAN. J. CRIMINOLOGY & CRIM. JUST. 215, 217 (2010).

71. *Id.* at 224.

72. *Training Programs*, JOHN E. REID & ASSOC., INC., http://www.reid.com/training_programs/r_training.html (last visited May 29, 2019).

73. *See* REID TECHNIQUE, *supra* note 66.

74. INBAU ET AL., *supra* note 15, at 187–88.

viii. Having the Suspect Relate Details of the Offense; and

ix. Converting an Oral Confession into a Written Confession.[75]

Researchers have suggested that the Reid Technique's basic principles are so unscientific that the confessions elicited from this technique should be wholly inadmissible in court.[76] The potential for false confessions using the Reid Technique has been shown to be increased in the academic literature, and in mock juror studies,[77] yet juries often still convict the accused regardless of the criticisms of the technique.[78] When proven false confessors go to trial the jury conviction rates in the U.S. are still between 73-81%.[79]

Research may suggest the Reid Technique is not necessarily problematic in and of itself, but jurists have been able to identify troubling elements of the technique. Included in this list are suspects who are young, scared and who were withheld food, water, and not allowed bathroom breaks. The Reid Technique is based in terms of broad overarching themes that are claimed to be universal when there is significant question as to whether they can be applied to all people, of all ages, and from all cultural backgrounds. The technique is based on statements like the "[guilty] suspect will" or the "innocent suspect will."[80]

For example, broad statements are made like the assertion that the guilty suspect will justify their actions. The Technique identifies that the "guilty suspect has justified the crime in some manner, whereas the innocent person has not. In justifying the crime, the guilty suspect experiences much less of a troubled conscience when he later lies about

75. *Id.* at 188–89.

76. Brian Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L. J. 529, 529 (2010).

77. Redlich & Meissner, *supra* note 62, at 139.

78. Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 L. & HUM. BEHAV. 27, 27 (1997).

79. Kassin et al., *Police-Induced*, *supra* note 7, at 24.

80. INBAU ET AL., *supra* note 15, at 203. The authors note that these labels are just for interrogation purposes and a "final determination of a suspect's status is the province of the judge or jury at a criminal trial." *Id.* at 191. Nonetheless, these are the terms selected by the authors to categorize suspects. *Id.*

committing it."[81] Generalities about the guilty suspect's conscience do not consider individual and cultural traits. If a behavioral baseline is properly determined by the investigators, it would be clear that culturally these factors should not be used against the accused. However, there is scant information provided by the Reid Technique on culture and the interrogation of suspects, and what commentary is provided is often offensive. The authors note "[t]hroughout the interrogation of an unintelligent, uneducated offender with a low cultural background, the investigator must maintain a positive attitude, without ever relenting in the display of a position of certainty regarding the suspect's guilt, unless there are clear behavioral indications reflecting truthfulness."[82] Equating a "low" cultural background with intelligence and education is appalling and, quite frankly, inaccurate. Coupled with the comment that "many persons who are unintelligent, uneducated, and come from a low cultural background engage in criminal behavior" only serves to further discredit the technique.[83]

In Canada, some have alleged that inadequate education on interviewing is provided to police officers and the main method of interrogation used is under significant criticism.[84] Unfortunately, poor interviewing has been linked to wrongful confessions.[85] The training programs offered to police on the Reid Technique method "do not appear to be grounded in any scientific research, are based largely on testimonials and anecdotes, and have evaded the independent peer review process."[86] There is also no evidence that the nine step technique leads to more confessions, or more valid confessions, and the assumptions on which it is based are not supported by research.[87] Although a full discussion of the method is beyond the scope of this paper, there has been much discussion of the PEACE method of interrogation adopted in the U.K., and it is important to note that alternatives to the Reid Technique do exist.[88]

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81. *Id.* at 203.
82. *Id.* at 333.
83. *Id.*
84. Snook et al., *supra* note 70, at 216.
85. *Id.* at 217.
86. *Id.* at 218.
87. *Id.* at 219.
88. *Id.* at 216.

Great Britain has prohibited police officers from using psychologically manipulative techniques during suspect interrogations.[89] It has been suggested that these deceptive techniques be removed for all who are facing interrogation.[90] Kassin *et al.* also make several recommendations regarding potential safeguards against false confessions which can be implemented by police including conversion of the interrogation process from confrontational to investigative, addressing specific risk factors including length of the interrogation, making it mandatory that a lawyer or interested adult be present during the interview, and that officers and other personnel receive specific training concerning interviews with vulnerable people.[91] Videotaping the interrogations has certainly helped in the ability to see when a false confession may occur.[92] However, the research establishes that despite the Confessions Rule, and perhaps because of the Reid Technique, false confessions are still occurring.

iv. The Function of Interrogation Techniques

Stephen Moston states that interrogation techniques focus on how to overcome denials and elicit confessions from suspects.[93] One of the leading experts in this area, Saul Kassin, describes modern police interrogation as a psychological process involving three components, including: isolation as a means to increase the suspect's anxiety and desire to escape; confrontation whereby the interrogator accuses the suspect of the crime using real or fictitious evidence to support the accusation; and minimization where the investigator conveys sympathy and provides a moral justification for the crime to lead the suspect to expect leniency upon confession.[94]

Kassin *et al.*[95] and Redlich & Meissner[96] state that the tactics of isolation, confrontation, and minimization are currently used in police

89. Redlich & Meissner, *supra* note 62, at 142.
90. *See* Chapman, *supra* note 12, at 165.
91. Kassin et al., *Police-Induced*, *supra* note 7, at 27–30.
92. Wakefield & Underwager, *supra* note 61, at 434; Kassin et al., *Police-Induced*, *supra* note 7, at 27; Redlich & Meissner, *supra* note 62, at 131.
93. Moston, *supra* note 10, at 93.
94. Kassin, *Causes*, *supra* note 62, at 250.
95. Kassin et al., *Police-Induced*, *supra* note 7, at 12.
96. Redlich & Meissner, *supra* note 62, at 127.

interrogations to obtain confessions. Kassin et al also discuss the technique of maximization where the interrogators convey to the accused a solid belief that the suspect is guilty and that any attempt to deny guilt will fail.[97] The authors also claim interrogations are designed to be stress-inducing in order to obtain confessions from suspects.[98] Other techniques include invading the suspect's personal space, keeping light switches, thermostats, and other control devices out of the suspect's reach, and using a one-way mirror to allow other officers to look for signs of fatigue, weakness, anxiety, and withdrawal as well as reading the suspect's body language.[99]

Studies have shown that police often start interrogations with a presumption of guilt and denials are seen as "attempted deceptions, thereby reducing the credibility of the suspect."[100] This leads to a paradox for the accused: "if they protest their innocence the interviewer merely takes this as a confirmation of guilt. If they say nothing, perhaps using their right to silence, this too is taken as confirmation of guilt."[101] Redlich & Meissner also identify "investigator bias,"[102] whereby officers focus on one suspect because they are convinced he or she is guilty, which also plays a significant role in false confessions. The additional difficulty associated with reading body language and non-verbal cues also has the potential to lead to false confessions.[103] Studies have shown the "detection of deception through observations of non-verbal cues is an almost entirely unreliable process."[104] Many scholars argue that a confession is a prosecutor's most powerful weapon of guilt[105] and that a confession is highly persuasive.[106] There is often a great deal of pressure on police after a high-profile crime such as murder. It has been found in

97. Kassin et al., *Police-Induced*, *supra* note 7, at 12.

98. *Id.* at 6.

99. Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221, 222 (1997) [hereinafter Kassin, *Psychology*].

100. Moston, *supra* note 10, at 92.

101. *Id.* at 92–93.

102. Redlich & Meissner, *supra* note 62, at 130.

103. Kassin, *Psychology*, *supra* note 99, at 222; Redlich & Meissner, *supra* note 62, at 5.

104. Moston, *supra* note 10, at 94.

105. Kassin, *Psychology*, *supra* note 99, at 221; Kassin et al., *Police-Induced*, *supra* note 7, at 9.

106. Wakefield & Underwager, *supra* note 61, at 423; Kassin, *Causes*, *supra* note 62, at 249.

several wrongful conviction cases that the "'interrogators' urgency to obtain a confession led to wrongful convictions."[107]

There is a fundamental flaw when comparing the Confessions Rule (as discussed above) side-by-side with the Reid Technique. The Confessions Rule dictates that the Crown must prove beyond a reasonable doubt that the statement was voluntary and thus not obtained by threats or advantage, that the statements were the product of an operating mind and those secured through oppression would not be permitted if they would shock the community. Yet, these are all essential techniques used by the police in the Reid Technique. The availability of deceptive police practices including trickery and manipulation to threaten the suspect was to be limited in order to eliminate police practices that crossed the line. Instead, we see these practices very much a part of the Reid Technique. To examine how this works in practice, the case example of "*R v. George*" will be used to illustrate how each prohibited factor in the Confessions Rule is used to make vulnerable suspects "confess."

3. INTERROGATION OF INDIGENOUS PEOPLES AND R V. GEORGE

The case example used in this paper involved the potentially wrongful "confession" of a twenty-one-year-old Aboriginal man who was accused of aggravated assault and eventually with attempted murder. In December of 2012, the victim was viciously beaten, and once he was unconscious, he was set on fire. The victim did regain consciousness after a considerable time in the hospital, but he remains (as far as is known) disabled. The house in question during this time was in complete disarray, and there were at least three parties in the house at the time. One party was severely injured and in critical condition (who is the subject of the interrogation), "Mr. George" who is a suspect in various crimes, and one other party who accused Mr. George of the crime (the co-suspect). The injured party was found in the basement smeared with

107. *See* David Dixon, REGULATING POLICE INTERROGATION, IN INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH, REGULATION 318, 323 (T. Williamson ed., 2006).

blood, beaten, and approximately 18% of his body was burned.[108] Mr. George was later arrested for aggravated assault of the victim.[109]

Mr. George was interrogated by police first on January 9, 2013, and then again on January 14, 2013.[110] All six hours of the videotape, including Mr. George's "confession," was analyzed by the author, as was the video of the interrogation of the co-suspect. This matter was resolved just before expert testimony, and Mr. George was released after a significant amount of time served. However, this case is an example of the dangers of the Reid Technique with a young Indigenous subject who may be "confessing" to things that he potentially did not do. A critique of the Reid Technique, as used in this case example, will explore the problems inherent in the technique.

The entire basis of the Reid Technique is to catch the accused in a lie, misstep, or inconsistency. This again is contrary to many Indigenous cultures because in many cultures, "[a]nything which might cause another person to lose face, to feel inadequate, foolish or stupid, would be a blow to that self-esteem and an impediment to their development as a human being."[111] The strategy of this type of interrogation fails to recognize cultural differences, which should be investigated to understand why so many Indigenous peoples are imprisoned. Ross notes that the phrasing used in interrogations might cause an Indigenous person to agree:

> [W]hether or not it happens to be what that person really thinks. Great care must be taken never to ask leading questions to which people can answer "yes" or "no". Instead, questions must be neutral, requiring that all the information come from the person being interviewed. There are numerous instances where file summaries indicated that an accused had confessed, but the actual statement amounts instead to an officer giving his version of the event, asking the accused, "Is that right?" and receiving an affirmative answer in reply. When later asked why he

108. R. v. George, reported case, ¶ 9-13 (Name of case and parties have been changed to protect the identities of those involved. Case and transcripts on file with author.).

109. R. v. George, reported case, ¶ 11.

110. *See infra* Section 4(I)(a) (citing to R v. George transcripts).

111. RUPERT ROSS, DANCING WITH A GHOST: EXPLORING ABORIGINAL REALITY 27–28 (1992).

> confessed to something he did not do, the reply is, "Because that's what the cop wanted me to say."[112]

Again, many in the justice system would not see this as a traditional coerced confession because there was no violence, no threat, no promise, and no benefit. Just the same, "the commandment requiring that you not show up another person by pointing out that he's wrong is strong enough."[113] The use of these statements as an indicia of guilt becomes completely fallacious when applied to certain suspects.

4. THE NINE STEPS OF THE REID TECHNIQUE AND R V. GEORGE

The Reid Technique, as discussed above, developed in the 1930s into the Nine Steps of Interrogation.[114] The aim of the technique is to break down the resistance of an individual in order to make them confess. The authors of the technique describe in their introduction that they are not promoting the "third degree," but they do approve of "psychological tactics and techniques that may involve deception; they are not only helpful but frequently indispensable in order to secure incriminating information from the guilty or to obtain investigative leads from otherwise uncooperative witnesses or informants."[115] The authors readily admit that these psychological tactics could be categorized as "unethical" in the course of ordinary "social behavior."[116] However, the authors state this is justified out of "necessity" and "investigators must deal with criminal suspects on a somewhat lower moral plane than that upon which ethical, law-abiding citizens are expected to conduct their everyday affairs."[117] Thus, the instruction seems to be the use of coercive and deceptive tactics on those already deemed "guilty."

Baseline evaluations of the suspect and their behaviors are made at step one with a transition to step two and an "interrogation theme." Step three handles denials of guilt, and step four overcomes the suspect's

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112. *Id.* at 30.
113. *Id.*
114. INBAU ET AL., *supra* note 15, at 187.
115. *Id.* at xi.
116. *Id.*
117. *Id.* at xiv.

denial with reasons why he would commit the crime.[118] Step five retains the attention of the suspect using sincerity and eye contact, while step six recognizes the suspect's passive mood.[119] Step seven gives the suspect a choice of an acceptable explanation for the crime, step eight has the suspect relate details of the crime, and step nine is the confession itself.[120] Theoretically, each step should, ideally, build on the last in a process leading towards a confession.

The circumstances of this case are very informative to a discussion of the Reid Technique and confessions in a way that is not often seen in the academic literature. It was the position of the accused that the statements were false confessions, they were unreliable and obtained in breach of his *Charter* rights.[121] Mr. George was charged with attempted murder and aggravated assault, and he underwent two different interrogations over a period of more than six hours. To elucidate some of the concerning elements of the Reid Technique, examples will be used from the interrogation transcripts and also from the transcript of the cross-examination of the Detective in the *voir dire* on the admissibility of the confessions.

I. Step 1 - Direct, Positively Presented Confrontation of the Suspect

The Reid Technique identifies that the first step in an interrogation is the confrontation of the suspect in order to view his or her verbal and nonverbal responses. The investigator is to note that "[r]egardless of the suspect's initial response to the direct positive confrontation, the investigator will proceed to offer a reason as to why it is important for the suspect to tell the truth."[122] Although the Detectives in this case said they were not consciously using the Reid Technique in the interrogation, in cross-examination the Detective in the *George* case says that he is familiar with "paralinguistic communication," which is term used

118. *Id.* at 190
119. *Id.*
120. *Id.*
121. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, s 8 (U.K.).
122. *Id.* at 188.

extensively in the Reid Technique.[123] This seems to be a common theme in the case law.[124] The second interrogation uses many steps of the Reid Technique, and the officer starts with a bold confrontation to set the tone of the rest of the interrogation.

a. R v. George – The Confrontation of the Suspect and Implied Threats

The second interrogation of Mr. George begins with exactly the type of statement dictated by the Reid Technique. In fact, in cross examination the Detective is asked by defence counsel if in "some cases such as this one you want to open with confrontation correct?" to which he answers "yes."[125] The Detective starts the process by saying:

> [Y]ou told me a little bit but you know you said that you couldn't remember you passed out and you were drinking lots . . . but you did tell me like you say ah [the co-suspect] is the one that stabbed [the victim] and subsequently [the co-suspect] was arrested you know you're aware of that right?[126]

As noted in the cross-examination of the Detective, the police had already questioned a co-accused who had assigned blame to Mr. George. As such, the Detective commences the second interrogation by saying the other suspect:

> [C]ame in here and you know what he sat in the very same seat you sat in right there okay and he was given the same opportunity you're gonna

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123. Cross Examination of Detective on Apr. 6, 2013 at 38, R. v. George [hereinafter Cross of Detective, April 6].

124. An example is a 2014 case of *R. v. Johnny*, [2014] B.C.J. No. 891 (Can. B.C. S.C.), which involved a 19-year-old Indigenous male who had made a statement to police in British Columbia. *Id.* ¶ 64. When the officer was cross-examined on the technique, the officer said that if the technique had ever been used it was "before his time." *Id.* ¶ 20. The officer then went on to describe the interrogation using elements that sound very much like the Reid Technique but the officer maintained that "his unit does not currently employ a system, per se, but they know they have to have an interrogation with a set structure." *Id.*

125. Cross of Detective, April 6, *supra* note 123, at 120.

126. *Id.* at 100; Transcript of Interrogation on Jan. 14, 2013 at 3, R. v. George [hereinafter *January 14 Transcript*].

> be given right now to tell a side of the story. And I'm letting you tell your side of the story 'cause as I mentioned . . . you're charged with aggravated assault do you know what aggravated assault is?[127]

The scene is set by making this implied threat that the co-suspect has already told authorities that Mr. George is the guilty party, but the Detective still states the co-suspect is charged with aggravated assault and not murder (or attempted murder). The Detective later admits it is an implied threat that he would have the power to lay additional charges including murder, saying "I guess . . . it would be considered a threat yes. If that's the implication that they are getting."[128] It is noteworthy that the suspect was not re-warned or advised of his right to re-consult with counsel. This confrontation starts the nearly four-hour interrogation regarding not just the aggravated assault but also the separate attempted murder.

Another implied threat is made when the Detective asks the suspect's age. When Mr. George responds he is twenty-one, the Detective says, "twenty one second degree murder is a lot of time in prison right (sighs) . . . twenty one's ah early time when you're just starting out in life to be going to prison for a long time."[129] The Detective admits on cross-examination that there could be the implication that if the suspect does not talk he would face a life sentence, but he does not agree this was a "threat."[130] The statement made by the officer is to accentuate how much time he would face for murder, not aggravated assault which again confuses the suspect and would potentially trigger a re-consult with counsel.

Implied threats (to an extent) may be been used in interrogation. The Detective could be seen as making an implied threat when he refers to the co-suspect controlling the accused and then says, "I wonder what he's thinking right now in the [jail] knows you didn't come back probably knows you're here."[131] When the accused says he is "probably thinking nothing (chuckles)" the Detective responds, "I doubt it."[132] The

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127. Cross of Detective, April 6, *supra* note 123, at 101; *January 14 Transcript, supra* note 126, at 4.
128. Cross of Detective, April 6, *supra* note 123, at 124.
129. *Id.* at 142; *January 14 Transcript, supra* note 126, at 12.
130. Cross of Detective, April 6, *supra* note 123, at 142.
131. *January 14 Transcript, supra* note 126, at 36.
132. *January 14 Transcript, supra* note 126, at 36.

accused is clearly quite concerned about what is going to happen at the jail if the co-suspect finds out that he has talked to the authorities because of the possible association of the co-suspect with a gang. It is established in the transcripts that the accused fears these gangs. The Detective asks him about this at the end of the first interrogation asking why he did not come forward immediately saying, "so I know that you made no effort to come and talk to the police am I thinking that maybe you were concerned that somebody was after you."[133] The Detective seems to be indicating that he is aware that some gangs might be interested in harming the accused.

It seems as if the police were trying to exploit this concern in reminding Mr. George that he is going back to the local jail after the second interrogation. The Detective said the accused has to look after himself because "what do you think [co-suspect]'s telling guys in the [the jail] cause he already told me so you don't think he's telling the same thing so you go back there tomorrow cause you're in custody for aggravated assault."[134] The Detective continues saying, "what are those guys gonna think cause again he tells and then that you're responsible for what happened to [the victim] and you show up there with aggravated assault charges everybody in there's smart enough to know make the connection."[135] Clearly, there is fear on the part of the accused that he is going back to the same jail as the co-suspect and he says, "um I think ah are things gonna happen to me at the [the jail]."[136]

After the accused has eventually made admissions, the Detective's tone is much different, and he reassures the accused that only he and the monitoring officer know what was said in the interrogation and:

> [N]obody will know what went on … other than the fact that now you have more serious charges now um word gets around and um with regards to who you assaulted I don't know if he has friends or anything like that in the [the jail] … if you're worried about repercussions because of you telling me the story ah nobody should know for a long

133. Transcript of Interrogation on Jan. 9, 2013 at 61, R. v. George [hereinafter *January 9 Transcript*].

134. *January 14 Transcript*, *supra* note 126, at 37.

135. *Id.*

136. *Id.* at 9.

> time a long long time that being said [the co-suspect] told his story right and he's in there so right.[137]

The accused indicates "um yah," and the Detective says there is a possibility the victim has friends in the jail and advises "keep your head in the soil man right just like you do anytime in there."[138] The Detective reassures the accused that he has friends in the jail and says "and if you're really that concerned then there's always you can always request [protective custody]."[139] These exchanges could be interpreted as threats until there were admissions made, and then promises of security followed. The result is maximization of the offense until the admissions are gained, and then there is a minimization of the consequences to the accused, just as the technique dictates.

b. R v. George - Denial of Counsel and Denial of Opportunity to Re-Consult

Perhaps the most concerning part of the interrogation, related to improper interrogation techniques, is that the accused asked to talk to his lawyer and was refused. At the beginning of the second interrogation the accused is told he is charged with aggravated assault and two breaches of probation, but he is interrogated on the basis that if the assault victim died in hospital it would be a murder.[140] Upon being informed of this, the accused said, "I just want to talk to my lawyer."[141] The Detective's response was "well you spoke to your lawyer" and then "I saw you I didn't see you talking to him but I know you did cause he went in one room and you were in the other and you were conversing with him I saw him in person."[142]

Again, a few minutes later, the accused describes the scene at the house that night then says, "I don't want to talk about it." The response from the Detective is "you already did so why not."[143] The accused then continues talking. The accused then asks to go back to his cell a few

137. *Id.* at 75
138. *Id.*
139. *Id.* at 76
140. *Id.* at 3–4.
141. *Id.* at 5.
142. *Id.*
143. *Id.* at 15.

minutes later.[144] The Detective does not accommodate this request and instead says, "kay that's fine because you've just shown me exactly what I know . . . that you had part in beating [the victim] to death nearly to death part I know that [co-suspect] had part of it too but I know you had part now and that's all that did all this time just confirmed it to me and you know why."[145] The accused denies this statement but continues talking. Defense counsel asks in cross-examination whether the Detective thought that Mr. George requesting to leave the room "is consistent with his being guilty of murder."[146] The Detective affirms this and says "I guess he might take it like that and for the aggravated assault."[147] However, the Detective characterizes this as a return to the theme and says he means that if Mr. George does not speak, other suspects are "controlling his life."[148] Defense counsel attempts to show this is a way to obstruct the accused's right to remain silent, but the Detective denies this.[149]

There seems to be little evidence the accused was given the opportunity to re-consult with counsel in response to an attempted murder/murder charge. It is well into the interrogation when the Detective says, "this investigation isn't done there may be more charges to be laid."[150] Several minutes later the Detective again says "there may be future charges but he controls you and you let him (pause) and you continue to let him."[151] There seems to be times when a duty to re-consult may have been appropriate. The Detective notes in cross-examination that a suspect cannot be told they will be charged with something else unless they start talking, but that seems to be exactly what happened.[152] The Detective notes one cannot fabricate a charge to threaten someone with but agrees with the statement that "threatening or suggesting to them if they don't talk they'll be charged with something else" to which he says "I can do that. Yeah."[153]

144. *Id.* at 39.
145. *Id.* at 27.
146. Cross of Detective, April 6, *supra* note 123, at 21.
147. *Id.*
148. *Id.* at 22–23.
149. *Id.* at 23.
150. *January 14 Transcript*, *supra* note 126, at 26.
151. *Id.* at 37.
152. Cross of Detective, April 6, *supra* note 123, at 67.
153. *Id.* at 69.

The Detective is questioned about re-consulting counsel, but the officer states this is not an appropriate situation to re-consult counsel because the victim was still alive.[154] The Detective also points to the fact the accused had met with his lawyer on the aggravated assault. However, it is noted in the cross-examination the Detective says "I think you lit that apartment fire tryna' cover that up and I think you killed [the victim]."[155] Even though the Detective states on cross-examination, "I didn't believe he committed that murder" he puts this statement to Mr. George and does not believe he has the duty to re-consult with his lawyer because it would "diminish the psychological effect of putting that allegation to him" and it would "escalate his level of tension."[156] Even though the suspect gave a denial (in response to the Detective's statement "I think you killed [the victim]," the accused responds "I didn't") the Detective did not consider it a "strong denial."[157] Again, while using questionable tactics under the Reid Technique, the accused's right to counsel is being denied.

c. R v. George - The Suspect's Mental Capacity and the Confrontation

On cross-examination at trial, the Detective is asked if the suspect was someone who would present as a "sophisticated participant in the criminal justice system."[158] Very interestingly, it is the testimony of the Detective that "I wouldn't even consider that that would enter my mind whether he's savvy to the criminal justice system or not."[159] When pushed whether he would consider the suspect's level of intelligence the Detective said "I didn't ask him what his level of intelligence . . . and education. I didn't consider it . . . I didn't consider whether Mr. [George]

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154. *Id.* at 103–07.

155. *Id.* at 108.

156. *Id.* at 108–09.

157. *Id.* at 113. A full discussion of this point is beyond the scope of my expert decision. Other authors have discussed this point. *See generally* Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 LEARNING & MEMORY 361 (2005); Linda A. Henkel & Kimberly J. Coffman, *Memory Distortions in Coerced False Confessions: A Source of Monitoring Framework Analysis*, 18 APPLIED COGNITIVE PSYCHOL. 567 (2004).

158. Cross of Detective, April 6, *supra* note 123, at 175

159. *Id*.

graduated high school or graduated with a PhD."[160] The Detective goes on to say he would not consider these factors unless a suspect was "obviously mentally challenged or handicapped."[161] It is striking that baseline factors, identified in the Reid Technique and in interrogation generally, cannot be established if the Detective does not understand the intellectual abilities of the suspect. Baselines are essential and without them the officer may use language that the suspect fails to understand throughout the interrogation.

There is evidence the accused does not understand some of the legal/police enforcement terms used throughout the interrogations. An example is the use of the word "jeopardy."[162] At the first interrogation, the Detective is very unclear in his definition of this term. He starts by saying the police wanted to talk to the accused but they had been unable to locate him, and states, "just for your own jeopardy you know what jeopardy means?"[163] When the accused clearly says "no" the Detective explains, "ah for you own um uh legal safety how bout that." When the accused says, "all right," the Detective asks, "you understand that term more like" and the accused says, "Yeah kind of."[164] From the video, it is not clear the suspect fully understands this exchange.

Again, the Detective uses unclear language when he says, "so you don't implicate yourself in something that you know incorrectly … the lawyer you spoke to yesterday was told that you were a suspect in a homicide okay now" to which the accused says "oh."[165] The Detective says, "we did that again for your jeopardy okay we haven't been able to speak to ya" to which the accused says "yeah."[166] The Detective continues saying "maybe you can clarify a few things for us . . . that might change a little bit but uh you should now uh that uh you know if you do say something that uh is evidence it can be used against you you understand that" and the accused says "yeah."[167] Again, it is not clear that the accused understood this exchange, and indeed, it is unclear if anyone

160. *Id.* at 175–76.
161. *Id.* at 176.
162. *January 9 Transcript*, *supra* note 133, at 3.
163. *Id*.
164. *Id*.
165. *Id.* at 4.
166. *Id.*
167. *Id*.

could understand this exchange. The Detective notes much later in the interrogation that "you see why I mentioned that jeopardy thing way back when when we started this interview" to which the accused says "yeah." The Detective says, "your legal jeopardy" and the accused says "yeah."[168] Again, this term is not explained to the accused and neither are the implications. This exchange highlights the officer's unclear and confusing language more than illuminating discrepancies with the suspect's capacity, but the consequences remain the same for the suspect.

d. R v. George - The Suspect's Understanding of the Language

In *George*, it is clear the Detective did nothing to ascertain if the suspect was comfortable in speaking English, nor did he turn his mind to the subject. The Detective was asked on cross-examination whether Mr. George had difficulty with English or understanding what had been said the Detective replied, "I don't believe so no."[169] However, in analyzing the tapes and transcripts of the interrogation, it is my opinion that Mr. George may have agreed verbally to statements (as shown in the transcript) to concepts or suggestions that he did not agree with evidenced by this intonation and physical reactions on tape. At times it also seemed as if he laughed, not when he thought they were funny, but when he was uncomfortable. This was not formally taken into account by the interrogators.[170] Mr. George's first language is likely not English, but at no time is this recognized, accommodated, or even mentioned during the interrogations.[171] This is to the detriment of the accused as he may not understand the sometimes-complex legal language that is being used. The word "contentious" is used in the interrogation to describe the relationship between the accused and the victim.[172] The accused asks, "what does that mean," and the Detective answers, "you guys didn't get along sometimes," which downplays the seriousness of that term.[173] Also,

168. *Id.* at 41.
169. Cross of Detective, April 6, *supra* note 123, at 117.
170. *January 9 Transcript*, *supra* note 133, at 46.
171. This is an assumption made by the author given the comments in the transcript which may be in another language.
172. *January 9 Transcript*, *supra* note 133, at 50.
173. *Id*.

the word "corroboration" is used several times in the second interrogation, and it is uncertain if the accused understood this term.[174] In the discussion about the accused's jeopardy, the Detective also uses the word "implicate," which again is not explained.[175] It is unclear whether the accused understood or fully appreciated what the Detective was describing about his demeanor on the tape and his subsequent answers in the transcript.

The Detective also says the accused should "look out for number one," when the accused responds "what" the Detective says, "look out for number one." Clearly not understanding, the accused says, "look out for number one who's that."[176] The accused does not understand who number one is, and the only explanation given is, "you're number one look out for him nobody else."[177] This is addressed by counsel on cross-examination and the Detective says again this is an attempt to build on the theme of "take control for yourself."[178] During cross-examination at the trial, counsel again asks the Detective if he recalls not establishing a baseline about Mr. George's sophistication (as is dictated in the Reid Technique), and the Detective responded again he did not have concerns with Mr. George's intellectual capabilities. The officer says he did not recognize an "extreme lack of intelligence or anything like that."[179] When confronted about whether the suspect understands this phrase of "looking out for number one" the Detective capitulates saying, "I guess he doesn't."[180] The Detective also uses the phrase "liquid courage" at the beginning of the interrogation, and later the accused attempts to repeat this back saying that people get tough when they are drunk, "like drunken couragement [sic] whatever."[181] At times he simply seems to adopt the language of the Detective, perhaps without full understanding. Again, there is no acknowledgment that these phrases might confuse someone unfamiliar with these very anglicized sayings, and there is no

174. *January 14 Transcript*, *supra* note 126, at 14, 55.

175. *January 9 Transcript*, *supra* note 133, at 4.

176. *January 14 Transcript*, *supra* note 126, at 31–32.

177. *Id.* at 32.

178. Cross Examination of Detective on Apr. 7, 2013 at 1–3, R. v. George [hereinafter Cross of Detective, April 7]; *January 14 Transcript*, *supra* note 126, at 31–32.

179. Cross of Detective, April 7, *supra* note 178, at 15–16.

180. *Id.* at 16–17.

181. *January 9 Transcript*, *supra* note 133, at 49.

consideration on the part of the Detective about what this might do to the veracity of the interrogation.

The Detective also uses the word "derogatory" without explanation in the first interrogation.[182] There seems to be little accommodation for the understanding of the accused, and no attempt (that is discussed) to secure a translator or support person for the accused. Perhaps most disturbingly, there is a point in the interrogation where something is said in Oji-Cree or another First Nations language by Mr. George that is inaudible on the tape, to the transcriber, and to the Detective. The Detective forcefully asks what he said multiple times and says, "I wanna know what did you say did you say something in Ojibiway was that Ojibiway or Ojicree or something like that or what."[183] When seen on the video this response is very curt and accusatory. Shortly after this statement, there are admissions made by Mr. George. When this is put to the Detective on cross-examination, the Detective says he was "just tryna' see what he was sayin'" but the exchange presents very differently on video.[184] This confrontation when the accused uses his first language, an Indigenous language, is to stop him and harangue him for that usage which is unacceptable under any theory of interrogation.

The suspect has now been confronted through step one of the technique and baselines have been established (or not established), and the Reid Technique dictates the use of a transition statement should be used which offers "a reason why it is important for the suspect to tell the truth. This transition statement introduces the interrogation theme."[185] At this point it is clear through the transcripts that the Detectives are trying to introduce to the accused a "theme" of why the suspect is guilty.

ii. Step 2 - Introduction of an Interrogation Theme

The Reid Technique suggests the suspect should be "offered a possible moral excuse of having committed the offence."[186] This often means blaming another, but can also include sympathizing with the suspect, minimizing the seriousness of the crime, using flattery,

182. *Id.* at 24.
183. *January 14 Transcript*, *supra* note 126, at 47.
184. *Id.* at 47; Cross of Detective, April 6, *supra* note 123, at 37.
185. INBAU ET AL., *supra* note 15, at 188.
186. *Id.*

exaggerating the seriousness of the crime, or the one that is used here which is to "sympathize with [the] suspect by condemning others."[187] It is noted in the Reid Technique that if the suspect listens "attentively" or "deliberates" about the theme, it is "strongly suggestive of guilt" while a suspect who "expresses resentment" may have a "reaction indicative of innocence."[188] Again, only suspects who are thought to be guilty are questioned using this technique, so the accused is presumed guilty of falling victim to this created theme.

a. R v. George - The Theme of "Control" By Others

Although the Detective initially established a theme that Mr. George was very intoxicated, this theme is quickly abandoned. The Detective stated that he decided to appeal to the suspect's "better nature."[189] The Detective notes he was using the theme that "somebody else was controlling" the accused.[190] In the Crown Brief the Detectives specifically refer to a "control your life" theme. It is clear that the Detectives are establishing a theme, and they refer to it as such.[191] The transcripts of the second interrogation reveal the Detective refers to "control" "take control" and they "control you" approximately forty-seven times in the second interrogation.[192] The Detective says that he was trying to evoke "remorse" in the accused by suggesting that the accused was not someone who would do this sort of thing.[193] During the breaks in the interrogation the Detective (with the assistance of another Detective who is watching behind glass) discusses the theme. The Detective testifies on cross-examination that the theme of others "deciding his fate" is one that is going to be developed and agrees that "yes, it's suggested to him."[194] Using the theme that others are controlling the suspect, the Detectives hope to have the subject say he is not being controlled and

187. *Id.* at 210-32.
188. *Id.* at 188.
189. Cross of Detective, April 6, *supra* note 123, at 21.
190. *Id.* at 50.
191. *Id.* at 48.
192. By my unscientific count in the transcripts.
193. Cross of Detective, April 6, *supra* note 123, at 51.
194. Cross of Detective, April 6, *supra* note 123, at 166. This is again confirmed at Cross of Detective, April 7, *supra* note 178, at 1-2 and 6 again the theme comes back and is confirmed by the Detective.

that he takes responsibility for the crime. This does not happen in this portion of the technique with this particular suspect as Mr. George continues to deny his involvement.

iii. Step 3 - Handling Denials

In the third step of the Reid Technique, the primary goal is to "discourage the suspect from engaging in unnecessary denials that distract from the investigator's theme and subsequent efforts to persuade the suspect to tell the truth."[195] Thus, the investigator should adhere to the theme developed in step two, and eliminate any denials the suspect may have about their involvement. This step in the deployment of the Reid Technique calls for discouraging denials of guilt by returning to the moral theme started in step two as "an innocent person will not allow such denials to be cut off; furthermore, he will attempt more or less to 'take over' the situation rather than submit passively to continued interrogation. On the other hand, a guilty person will usually cease to voice a denial, or else the denials will become weaker, and he will submit to the investigator's return to a theme."[196] Thus, the "correct" response to officers dictates that all accused persons will behave in the same manner.

The authors of the technique acknowledge that this is the time when there is a risk that an innocent person is "prevented from telling the truth because of the investigator's efforts to stop denials. It must be made clear the suspect was not physically restrained from offering denials, but rather procedures were used to socially discourage the suspect from offering denials."[197] Again, conclusions are drawn about the "innocent" suspect and the "guilty" subject and their behaviors. The authors note, "an innocent suspect will not be concerned with social protocol and will vehemently state his case; it is the guilty suspect who allows his denial to be put off because he knows it is a lie."[198] Thus, it is impossible for an innocent person to have more passive attributes under this theory. Investigators are trained to confront the accused person (step one),

195. INBAU ET AL., *supra* note 15, at 256.
196. *Id.* at 188.
197. *Id.* at 256.
198. *Id.* at 257.

develop themes (step two), and then the investigator should communicate guilt and focus on an "explanation for its commission" (step three).[199]

The fundamental premise of this step is for the suspect to "take over" the interrogation. The authors of the technique state "innocent" suspects will use unequivocal statements like "[y]ou're wrong; I did not do it!"[200] Innocent suspects will "forcefully" interject denials into the conversation.[201] Investigators are still urged to discourage these denials, but note the innocent suspect will "become angry and unyielding and often will attempt to take control of the interrogation" in order to clarify they did not commit the crime.[202] It seems from this step of the Reid Technique the accused is expected to rage against the accusations from police and refuse to hear anything but confirmations of their innocence.

The authors of the Reid Technique note suspects from "certain cultural backgrounds or lower mental capacities" may be "slow in the development" of denials at this stage. This description is offensive given the equation of culture and low mental capacities. This expected takeover of the interrogation and forceful interjection of innocence may not be culturally intuitive in the interrogation of an Indigenous accused. Investigators are trained that innocent suspects will look investigators "straight in the eye" and "may lean forward in the chair in an assertive or even aggressive posture" saying, "[y]ou're wrong. You've got to be crazy if you think I did something like that!"[203] Investigators are trained that a "denial that is said softly or passively, also lacks the strength and conviction typically heard from an innocent person."[204] Taking over the interrogation would be the primary way of asserting innocence in this technique, but this behavior may be culturally foreign to the accused. As discussed further below, culturally, many Indigenous Peoples would find this type of anticipated behaviour extremely distasteful to carry out. To expect this young Aboriginal man to enter a "verbal battle" with trained investigators in order to prove his innocence is untenable. Furthermore, to infer guilt from his lack of verbal confrontation is even more disconcerting.

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199. *Id.* at 257–58.
200. *Id.* at 262–63 (Exclamation in the original).
201. *Id.* at 263.
202. *Id.*
203. *Id.* at 263–64 (Exclamation in the original).
204. *Id.* at 265.

b. R v. George – Multiple Denials of Guilt by the Suspect

Consistently during all interrogations, Mr. George denies his guilt to the attempted murder, which is the focus of the interrogation starting with the second interrogation. As noted in the cross-examination of the Detective there are multiple denials.[205] To counter these denials, the Detective makes statements like, "you told me a story that was full of shit cause I've been in that house I know exactly what went on."[206] The Detective admits he is talking about both the assault and the attempted murder in the interrogation and there may have been an implication in the suspect's mind that he might be charged with murder, even though the Detective denies this other charge was relevant.[207] Any denials are handled firmly by the Detective. At various times later in the second interrogation he makes statements like, "you can't keep handing me that same line of crap that story's shit it's shit" and "your story's shit and you want to keep handing me that so why don't you tell me the truth."[208] This denial leads to the next step of overcoming objections that the suspect may forward.

c. Forensic Evidence

The Detective also handles the denials by implying the importance of forensic evidence, particularly in the first interrogation. The Detective asks the accused if he watches the television program "CSI" ("Crime Scene Investigation"). The Detective says, "you watch CSI ever seen CSI . . . the TV show CSI." When the accused admits he watches "CSI Miami" the Detective says:

> [N]ow those are fiction and and quite quite a bit fake but we have a unit that's similar to that it collects evidence okay . . . and they just spent a week and a half in your house going over it with a literally a fine tooth

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205. Cross of Detective, April 6, *supra* note 123, at 144; *January 14 Transcript*, *supra* note 126, at 5. Starting at page 5 of the interrogation Mr. George says, "I didn't" "I didn't" (at 12), "it wasn't me" (at 13), "I didn't" (at 20), "No I didn't" (at 20), "I didn't do it" (at 45).

206. Cross of Detective, April 6, *supra* note 123, at 153; *January 14 Transcript*, *supra* note 126, at 19.

207. Cross of Detective, April 6, *supra* note 123, at 157–59.

208. Cross of Detective, April 7, *supra* note 178, at 48.

> comb . . . and that is going to be all organized and then sent away to a a lab that looks into this stuff . . . And they come up with all sorts of evidence . . . Now that evidence is gonna tell me a story too what's the story it's gonna tell me . . . Is it gonna tell me you . . . nearly killed [the victim] . . . or is it gonna tell me that [the co-suspect] . . . nearly killed [the victim].[209]

This statement seems to be an implication of infallible forensic evidence which would potentially prove the guilt of Mr. George in a homicide. The Detective comes back to this point a while later in the first interrogation saying "we got a whole bunch of evidence we gotta go through statements . . . got all sorts of reports we got forensic evidence that's gotta be examined and evidence pulled from."[210] He also talks about the forensic evidence in the second interrogation saying, "there's still investigation that has to be done there's still forensic work that has to be done."[211]

Forensic evidence is also referred to in the second interrogation and subsequent cross-examination of the Detective in order to convince the suspect there is considerable forensic evidence. The Detective says, "we still have a tone [sic] of stuff that has to go to a forensic lab where they get DNA and they can pull out blood and DNA from clothing even when it's washed."[212] The Detective goes on to say Mr. George's clothing had been discovered and "so that's gonna have somebody's blood on it maybe [the victim]'s . . . now why would it have [the victim]'s DNA on it."[213] The Detective admits on cross-examination he was implying there was more evidence, but that he had no real belief that there was any of the victim's blood on Mr. George's clothing.[214] Again, this introduction of false (or questionable) evidence, although permitted under *Oickle*, serves to confuse the suspect and runs the risk of eliciting false confessions once again.

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209. *January 9 Transcript*, *supra* note 133, at 42–43.

210. *Id.* at 53.

211. *January 14 Transcript*, *supra* note 126, at 37.

212. Cross of Detective, April 6, *supra* note 123, at 137; *January 14 Transcript*, *supra* note 126, at 10.

213. Cross of Detective, April 6, *supra* note 123, at 137–39; *January 14 Transcript*, *supra* note 126, at 11.

214. Cross of Detective, April 6, *supra* note 123, at 139–40; *January 14 Transcript*, *supra* note 126, at 11.

IV. Step 4 - Overcoming Objections

In this stage the suspect will offer reasons why "he would not or could not commit the crime."[215] Once the investigator hears the objection they should "attempt to reverse the significance of the suspect's objection and return to the interrogation theme."[216] These objections could be "economic, religious, or moral reasons for not committing the crime."[217] The Detective admits allegations are made to the suspect to "overcome their initial resistance."[218] The technique dictates objections are heard, "almost exclusively" from those who are guilty[219] and where there are multiple objections "the suspect is probably guilty."[220] Thus, officers are encouraged to use the suspect's own words as providing an "excuse and not a denial" and this should be incorporated into the theme.[221] The technique likens this to a salesperson and a customer in that the officer should reverse the objection and return to the theme.

a. R v. George – Maximization & Morality

The officer admits in cross-examination to a technique of maximization by accentuating the nature of the brutal offense suggesting that the suspect was intoxicated or not themselves.[222] The Detective agreed he would tell the accused that he could "understand why people might do bad things" in an attempt to suggest to the suspect that he is a "moral person who simply made an understandable mistake."[223] The Detective emphasizes that it is a cue to the detainee that they should "prove to me that you're not a bad person."[224] Morality and family are also used to influence the suspect in this case. From the first interrogation, the accused is asked about his pregnant girlfriend and the

215. INBAU ET AL., *supra* note 15, at 188.
216. *Id.* at 278.
217. *Id.* at 189.
218. Cross of Detective, April 6, *supra* note 123, at 147.
219. INBAU ET AL., *supra* note 15, at 275–76.
220. *Id.* at 281.
221. *Id.* at 276.
222. Cross of Detective, April 7, *supra* note 178, at 24–25.
223. Cross of Detective, April 6, *supra* note 123, at 25.
224. *Id.* at 27.

Detective mentions Mr. George is soon going to be a father.[225] The Detective also mentions his family members and says they are worried about him.[226] This theme is picked up in the second interrogation when the Detective says, "I don't know if you're a religious person or a superstitious person and if you are either of those well then you got to contend with those repercussions."[227] Morality is used to prompt the suspect to talk.

The Detective also brings back inaccurate recollections of the previous interrogation. The Detective recalls a statement by the accused from the first interrogation, "I think fuck I wish I didn't drink that day," which is taken and used by the Detective to be an expression of regret for what may have been done.[228] This statement is brought back into the second interrogation by the Detective who says you "wish you could take it back (pause) I think you said to me when we first talked I wish that day didn't happen something along those lines you remember that saying that," to which the accused says "no."[229] This statement from the first interrogation is also taken to be used as the theme in the interrogation, but it is based on a statement that is used incorrectly by the Detective. He uses this to build on saying, "it's bothered you and I think you wish that you could go back in time and stop it somewhere along those lines but you know what you can't go back in time."[230] This is put to the Detective on cross-examination and defense counsel asks "you set yourself up as morally authoritative in terms of whether or not you're a good or bad person right?" to which the Detective responds "right."[231]

The Detective is quiet and deliberate throughout the entirety of the interrogation, but he gets increasingly aggressive around the third hour of interrogation and repeatedly leans toward the suspect.[232] At this time the accused expresses regret because he did not stop drinking or fighting. [233] On cross-examination, the Detective says he is not "overly aggressive or

225. *January 9 Transcript*, *supra* note 133, at 5.
226. *Id.* at 2.
227. *January 14 Transcript*, *supra* note 126, at 51.
228. *January 9 Transcript*, *supra* note 133, at 72.
229. *January 14 Transcript*, *supra* note 126, at 9.
230. *Id.* at 42.
231. Cross of Detective, April 6, *supra* note 123, at 30–31.
232. *January 14 Transcript*, *supra* note 126, at 48.
233. *Id.*

anything like that."[234] The Detective seems to be handling the objections that Mr. George has offered and the Detective instead returns to the themes previously established in order to maintain his guilt. Under the Reid Technique, the officer must now retain the suspect's attention.

V. Step 5 - Procurement and Retention of the Suspect's Attention

As established in step three, this fifth step of the interrogation necessitates the investigator being sincere, getting closer to the suspect, and maintaining eye contact so the suspect does not "psychologically withdraw" from the interrogation.[235] The officer is told, through the Reid Technique, that "innocent suspects who have been accused of committing a crime will not psychologically withdraw."[236] The interrogator is warned that a suspect could ignore what the Detective is saying and they will "sit back and allow the investigator to continue with his monologue."[237] If this happens the investigator is encouraged to bring their chair closer to the suspect and maintain eye contract through directing "his own body to a position where he moves into the suspect's line of vision."[238]

a. Reid Technique - Nonverbal Behaviour

The Reid Technique relies heavily upon "nonverbal behavior." The technique dictates that nonverbal behaviour is behavior that is "subtly influenced through our culture or environment. Examples of these include eye contact, proxemics, and some hand gestures such as the OK symbol, the salute, a raised fist, or a wave."[239] However, the technique notes "nonverbal behaviors are most subject to outside factors such as personality, culture, or health problems and may provide misleading clues, especially if read in isolation from the verbal content of the speaker's message."[240] Despite this warning, the Reid Technique reliance

234. Cross of Detective, April 6, *supra* note 123, at 66.
235. INBAU ET AL., *supra* note 15, at 275–76.
236. *Id.* at 281.
237. *Id.* at 282.
238. *Id.* at 285.
239. *Id.* at 121.
240. *Id.* at 122.

on the "evaluation of paralinguistic behavior" is problematic given the further statements that "paralinguistic cues during an interrogation may be the best source of detecting deception for a criminal investigator."[241] The technique expounds on the length of time until the subject responds ("Response Latency"), responding before the question is completed ("Early Responses"), responding with a lengthy answer ("Response Length"), the way in which the subject responds ("Response Delivery"), the fluidity of the response ("Continuity of the Response"), and any attempts to delete a former statement ("Erasure Behavior").[242] Again, researchers discredit the technique and have concluded "nonverbal and verbal cures to deception are typically faint and unreliable."[243]

Academic literature shows "[t]here is no compelling evidence that police (or anybody else) can detect deception with a high degree of accuracy."[244] Some scientific studies of those trained in the Reid Technique show those who were untrained in the method did better in detecting truth telling,[245] and other studies of trained investigators showed no more accuracy than if they flipped a coin.[246] What is common in all of the studies referenced by researchers P. Granhag and A. Vrij is "[t]o trust the information that these manuals provide in terms of cues to deception might result in misinterpretations of the verbal and nonverbal behaviours that a suspect shows. Such misinterpretations might, in turn, fuel suspect-driven investigations that might ultimately result in miscarriages of justice."[247] When officers believe they are highly skilled at detecting lies, there is a huge potential for abuse and for the interrogation to be particularly accusatorial because of the belief that

241. *Id.* at 117.

242. *Id.* at 117–20.

243. Aldert Vrij & Pär Anders Granhag, *Eliciting Cues to Deception and Truth: What Matters are the Questions Asked*, 1 J. OF APPLIED RES. IN MEMORY & COGNITION 110, 110 (2012).

244. Moore & Fitzsimmons, *supra* note 6, at 511.

245. *Id.* at 511 (citing Saul M. Kassin & Christina T. Fong, "*I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 L. & HUM. BEHAV. 499, 499 (1999)).

246. Moore & Fitzsimmons, *supra* note 6, at 511–12 (citing Christian A. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 L. & HUM. BEHAV. 469, 478 (2002)).

247. Pär Anders Granhad & Aldert Vrij, *Deception Detection*, *in* PSYCHOLOGY & LAW: AN EMPIRICAL PERSPECTIVE 43, 50 (Neil Brewer & Kipling D. Williams eds., 2005).

suspect is already "guilty." Nonverbal behaviour, such as posture, are also an important part of the Reid Technique. Interrogators are taught the posture of a subject reveals his emotional involvement, confidence and level of interest.[248]

There is one brief note in the Reid Technique about "Cultural Differences."[249] The authors of this technique notice there may be a difference with learned behavior, which may have "cultural roots."[250] They use the example of eye contact but note only a difference between Eastern cultures and Western cultures. They note "[i]ndividuals raised in Eastern culture[s] are taught that it is disrespectful to establish direct eye contact with a person in authority. Western culture, conversely, teaches that direct eye contact represents candor, sincerity, and truthfulness."[251] No mention is made of Indigenous suspects. The authors also note that "[i]n Western culture, [a] mutual gaze (maintained eye contact) represents openness, candor, and trust."[252] They note that truthful suspects have no difficulty maintaining eye contact with the interviewer, needing "no preparation because their answers are truthful."[253] This again does not mention Indigenous or other peoples, and has the implication that this type of eye contact is necessary to indicate truthfulness. The authors note that a suspect who was previously looking at the ceiling and to the side who suddenly looks to the floor is "signaling resignation" and is in a "'feeling' mode and is experiencing significant emotions."[254]

b. Research on Silence, Eye-Contact, and Culture

Research has shown that an Indigenous person's use of silence can easily be misinterpreted. In many western societies, silence indicates that a speaker is thinking of a deceptive answer or cannot think what to say.[255]

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248. INBAU ET AL., *supra* note 15, at 122.

249. *Id.* at 150–51.

250. *Id.* at 150.

251. *Id.* Indigenous, Inuit, Metis, nor Aboriginal peoples are mentioned in the Reid Technique.

252. REID TECHNIQUE, *supra* note 66, at 83.

253. *Id.*

254. *Id.* at 164.

255. Diana Eades, *Judicial Understandings of Aboriginality and Language Use in Criminal Cases*, *in* STRINGS OF CONNECTEDNESS: ESSAYS IN HONOUR OF IAN KEEN 26, 36 (Peter Toner ed., 2015) [hereinafter Eades, *Judicial*].

Conversely, in some Aboriginal communities, silence can be a "positive and normal part of conversation. In Aboriginal, English silence is an acceptable way to begin an answer to a question."[256] In fact, silence is often a positive attribute indicating a party's "desire to think, or simply to enjoy the presence of others in a non-verbal way."[257] The implications in the interrogation setting can make this inaction look like "evasion, ignorance, confusion, insolence, or even guilt . . . especially when they are not aware of cultural difference in the use and interpretation of silence."[258] It has also been noted that silence is used by many Indigenous people when particularly important matters are being discussed, and long silences are often quite comfortable for many Indigenous persons.[259] In a study done in Australia, it was found that most western individuals do not feel comfortable with silences longer than one second but in a study of Aboriginal individuals in the courtroom in Australia, Diana Eades found that the longest silence in her courtroom study by an Indigenous person was twenty-three seconds.[260]

Since the *Royal Commission on the Donald Marshall, Jr. Prosecution*, it is clear that guilt should not be ascribed to Indigenous people because of culturally-coded assumptions of appropriate interpersonal responses.[261] Cathy Prowse recognized during the time of the 1988 Commission that Aboriginal Peoples "respond to anxiety provoking situations, such as testifying in court, giving evidence in their own defence, or giving statements to police, by becoming quieter and quieter."[262] The only warning given in the entirety of the Reid Technique is that the investigator "must be aware of possible cultural influences on

256. Nicole Watson, *Policing of Indigenous People in Australia: Justice is Still Elusive*, 6 INDIGENOUS L. BULL. 10 (2007).

257. Diana Eades, *Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications*, 20 CURRENT ISSUES IN CRIM. JUST. 209, 219 (2008) [hereinafter Eades, *Telling*].

258. *Id.*

259. Diana Eades, *I Don't Think It's an Answer to the Question: Silencing Aboriginal Witnesses in Court*, 29 LANGUAGE IN SOC'Y 161, 167 (2000) [hereinafter Eades, *Answer*].

260. *Id.*

261. T.A. Hickman, *Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations* (Halifax, N.S., 1988).

262. Cathy Prowse, *"Native Ethics and Rules of Behaviour" in the Criminal Justice Domain: A Career in Retrospect*, INT'L J. OF HUMAN. & SOC. SCI. 251, 252 (2011).

a subject's behavior" and that a "behavioral baseline" of the subject is essential for assessment.[263]

Eye-contact can also be seen as disrespectful or a "threat to individual autonomy" in many Indigenous belief systems leading police to the conclusion they are "detached, not attending to what's being said, or appearing as disinterested."[264] The authors of the technique note "[i]f a subject exhibits poor eye contact while providing background information, the lack of eye contact when discussing the issue under investigation should certainly not be considered a symptom of deception."[265] However, later in the publication, the authors note that "[e]ye contact is one of the most reliable social signals of attention."[266] The authors also note, after consideration is made to cultural or religious customs, "[g]enerally speaking, a suspect who does not make direct eye contact is probably withholding information."[267] Following this, a caution to investigators is made that, "[u]nder no circumstances should an investigator challenge the suspect to look him 'straight in the eye.'"[268] However, the authors note under "Guidelines for Using Eye Contact to Assess a Suspect's Veracity" that a "lying suspect" will have eyes that are "foggy, puzzled, probing, pleading (as though seeking pity), evasive or shifty, cold, hard, strained, or sneaky" and truthful people's eyes will be "clear, bright, alert, warm, direct, easy, soft, and unprobing."[269]

c. R v. George – Non-Verbal Communication and Body Language

The Detective makes multiple comments about the accused's (allegedly) long pauses, inappropriate body language, and improper eye contact. The Detective says, "I've sat here for three hours now and for probably a good hour and a half of that so half of it it's been quiet and I've sat here and I've looked at you look . . . and you're trying to think of how you can minimize your involvement in this but you can't because

263. INBAU ET AL., *supra* note 15, at 150.
264. Prowse, *supra* note 262, at 252.
265. INBAU ET AL., *supra* note 15, at 151.
266. *Id.* at 284.
267. *Id.* at 135.
268. *Id.*
269. REID TECHNIQUE, *supra* note 66, at 84.

you're involved in all of it."[270] The Detective seems to be making assumptions of guilt based on body language and communication. As discussed, an Indigenous person's use of silence can be misinterpreted. The accused's silence paired with the lack of cultural sensitivity present throughout the interrogation, misinterpretation of body language seems inevitable. After asking what comment Mr. George said in his traditional language (as discussed above), the Detective notes for the second time that the accused is "looking down."[271] The first mention is very early in the second interrogation when he says, "I'm gonna tell you something else too *look at me*."[272] This is further addressed later on in the interrogation when the Detective says, "why is it that every time I ask that question you gotta do that you look down."[273] A few minutes later the Detective says, "I've looked at you look in your lap your hands in your lap your fingers whatever the case is and I don't know what you're thinking but I know you're thinking I can almost see the wheels turned and that's the same behaviour you're doing each time I ask you for something."[274] When this is put to the Detective on cross-examination he explains he was just inquiring why the suspect did that because "he was trying to come up with something he could tell me or, or try and avoid speaking to me. One or the other."[275] It is clear from the video of the first and second interrogation, Mr. George is someone who looks down frequently. Recording this behavior would have been prudent in establishing a baseline for Mr. George at the outset of the interrogation. Instead, eye contact was used as an avenue to further criticize and exploit his purported weaknesses during questioning.

Again, the Reid Techniques gives much power to eye contact and posture that may be culturally relevant in this case. The Detective notes during cross-examination that eye contact can be a culturally dependent factor.[276] However, the Detective, despite his comment on the cultural dependency of eye contact, says just a few questions later that he is able to know when a suspect is lying and "I know that they're being deceptive

270. *January 14 Transcript*, *supra* note 126, at 53.
271. *Id.* at 48.
272. *Id.* at 5. Emphasis added.
273. *Id.* at 48.
274. *Id.* at 53.
275. Cross of Detective, April 7, *supra* note 178, at 38–39.
276. Cross of Detective, April 6, *supra* note 123, at 42.

with me."[277] Although it is clear in the literature that body language is not an exact science, the Detective, in this case, speaks of the techniques as being more definitive. The Detective says that if someone does make eye contact and then does not that is a sign as body language is something that he does "intuitively" and it "signals me."[278] The Detective notes a way of escalating tension is forcing that eye contact.[279] He admits in cross-examination he told the suspect to look at him because "I want him to look at me when I'm advising him of what I'm thinkin'."[280]

There has been research into why many Aboriginal Peoples are not as orally communicative as some believe they should be in the justice system (which again should be met with understanding rather than seen a "problem"). One precept is that of "the ethic of *non-interference* is derived from a cultural postulate that to interfere in the interactions of others is actually to attempt to exert dominance over that other individual."[281] Clearly there exists a power differential between an accused person and the officer who is interrogating him. It has been noted that some Indigenous Peoples "will generally opt for silence until that relationship is established."[282] Aboriginal Peoples in the criminal justice system have been seen as "un-" characteristics such as "uncommunicative, unresponsive, unable, unwilling, and uncooperative" which leads to "negative conclusions" within the justice system.[283] This misinterpretation and distrust of the accused's answers seems to stem from the Western Reid-based paradigm of needing eye contact and non-verbal communication which may be foreign to the accused.

It has been long documented in Canadian communication theory that "cultural differences influence the way one communicates . . . [t]herefore, the behaviours related to truthful or deceptive statements would vary according to the ethnic origin of the speaker."[284] Michel Sabourin of the University of Montreal notes "statements made by the members of one ethnic group are susceptible to being evaluated as

277. *Id.* at 42.
278. *Id.* at 43.
279. *Id.* at 44.
280. *Id.* at 116; *January 14 Transcript*, *supra* note 126, at 5.
281. Prowse, *supra* note 262, at 251.
282. *Id.* at 252.
283. *Id.*
284. Michel Sabourin, *The Assessment of Credibility: An Analysis of Truth and Deception in a Multiethnic Environment*, 48 CAN. PSYCHOL. 24, 26 (2007).

deceptive by the members of another group" because of things like slow speech rate, posture, absence of eye contact etc.[285] Researchers have also identified that the purpose of some Indigenous communication is "telling people what you know they want to hear instead of disagreeing with them."[286] A right to silence is seen as foreign in many Indigenous cultures, and to the contrary:

> [T]here appears to be an opposite commandment, one that requires full disclosure, full acknowledgement of wrongs. It is apparently seen as an essential first step towards rehabilitation and the reintegration into the community. It may be that this ethic contributes substantially to the high frequency of guilty pleas by Native accused. At the very least, it contributes to a high rate of full confessions during police questioning, and these confessions are often what lead defence counsel to the conclusion that a plea of 'Not Guilty' would be fruitless.[287]

The recommendation of the Commission was that where suspects are "juveniles or mentally unstable, investigating officers make special efforts to ensure they are treated fairly. Supportive persons from the witness/suspect viewpoint should be present during interviews."[288] It can be argued Mr. George was in need of supports (given his age, education, language skills, and culture) and should have had a support person from the community, especially if his first language was not English. Eades makes the point it is unfair to label the different uses of communication by Indigenous peoples as a problem in communication. It is a different way of communication which must be respected because, particularly within the criminal justice system, it can lead to miscommunication.[289]

As evidenced below, this can be devastating to the case of an Indigenous accused. Add to this paradigm the research that those in minority groups might also have cultural differences which may make them appear "guilty." Research on African American suspects has alluded to the circular reasoning that the threats "Black suspects probably experience in interrogations . . . might cause Black suspects to engage in specific nonverbal behaviors that are, ironically, the same as those

285. *Id.* at 28.
286. ROSS, *supra* note 111, at 29–30.
287. *Id.* at 16.
288. Hickman, *supra* note 255, at 17.
289. *See* Eades, *Judicial*, *supra* note 255, at 43.

displayed by suspects who are lying or guilty."[290] Sadly, these same realities may be faced by Indigenous Canadian suspects. If race is a factor in the classification of a vulnerable population in confessions, this needs to be explored to safeguard against the use of race and/or culture to wrongfully convict.

VI. Step 6 - Handling the Suspect's Passive Mood

In this step the interrogator is supposed to note the passive mood of the suspect who is weighing telling the truth. This includes tears, collapsed posture, and eyes drawn to the floor. The technique dictates the subject "if guilty, will have become reticent and quiet."[291] The investigator is urged to continue to ask the suspect to tell the truth while the Detective, "repeats and reiterates reasons for the commission of the offense," and it may be appropriate to state "if the suspect were his own brother (or father, sister, etc.), the investigator would still advise telling the truth"[292] and the Detective should tell the truth for his "mental relief, or moral well-being, as well as 'for the sake of everybody concerned.'"[293] The interrogator must look for signs of "resignation" in the accused to move on to the seventh step.[294]

a. R v. George - The Length of the Interrogation *and the Effort to Address the Suspect's Physical Needs*

The interrogation on January 9th, 2013 starts at 9:56 am and runs to 11:41 am, almost two hours, and the interrogation on January 14th, 2013 starts at 9:21pm and goes to 1:16am the next morning which makes the interrogation almost four hours long. This is a long interrogation which finishes after 1:00 am. When asked what happened during the intervening six hours between the arrest and the interrogation, the Detective has no explanation except there "may have been other things I

290. Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects are at Risk for Confessing Falsely*, 17 PSYCHOL., PUB. POL'Y, & L. 562, 565 (2011).

291. INBAU ET AL., *supra* note 15, at 287.

292. *Id.* at 289.

293. *Id.*

294. *See id.*

was doin' that didn't require noting. Maybe havin' lunch that matter I'm not too sure yeah."[295] One can make the assumption that this delay may have been strategic in facilitating a late-night interrogation of the suspect.

The interrogation, in this case, is very long with only one water break in each session. During the first interrogation, the accused asks for water and he is given two small disposable cups that he drinks immediately.[296] The accused is not offered food or water for the entirety of the 1 hour 51-minute interrogation. During the second interrogation he is never offered food, water or to use the bathroom in the 4-hour interrogation, but he eventually asks for a bottle of water and receives one.[297] The Detective leaves the room for three minutes from 10:05 pm to 10:08 pm and for four minutes at 1:00 am to 1:04 am. Other than these short breaks the Detective is actively interrogating the accused for the entirety of the four hours. When cross-examined on the length of the interrogation, the Detective noted this interrogation was probably the longest he had ever conducted.[298] The Detective notes in cross-examination that he did give the suspect water but that he did not "notice 'till right at the end during this, watching this when I exited the room that he was yawning that he looked at but when I was there I don't recall him yawning or complaining of being tired or anything like that."[299] The Detective confirmed that prior to the interrogation Mr. George was held in a room with a concrete bunk with no bedclothes and he believed he was given juice boxes and granola bars during the six-hour wait from arrest until interrogation.[300] Interestingly, the Detective did not ask if the suspect actually had this food and water during that time and said, "no I don't think I would inquire to it" even though it "wouldn't hurt" to do so.[301] Defense counsel also asks about temperature during the cross-examination and notes that he saw that Mr. George had his arms inside his t-shirt in the interrogation room. The Detective said that he did not note the temperature.

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295. Cross of Detective, April 6, *supra* note 123, at 85.
296. *January 9 Transcript*, *supra* note 133, at 46.
297. *January 14 Transcript*, *supra* note 126, at 27.
298. Cross of Detective, April 6, *supra* note 123, at 63.
299. *Id.* at 64.
300. *Id.* at 90.
301. *Id.* at 91.

VII. Step 7 - Presenting an Alternative Question

This next step is designed to trick the suspect into admitting a choice which is "acceptable" or "understandable," but which incriminates the accused. The Reid Technique describes this as a "waitress" encouraging customers to purchase dessert. This step is to make the accused make a very small admission so that they have an opportunity to start telling the whole truth.[302] The investigator is to give two explanations for the crime and allow the suspect to have a "face-saving" ability to tell the truth. Although suspects are not required to choose either of the options, the Detective theoretically should suggest something like "[d]id you blow that money on booze, drugs, and women and party with it, or did you need it to help out your family?"[303] Mr. George makes the small admission that he was fighting with some of the people in the house that night. The Detective seizes on this admission that he was in the house and then Mr. George proceeds to talk about more details of the offense.

VIII. Step 8 - Having the Suspect Relate Details of the Offense

In this step of the Reid Technique the investigator is to have the suspect orally relate details of the alleged offence. After about three hours and ten minutes of interrogation with very few breaks, Mr. George begins to make "admissions." The language used during admissions is important. From the first interrogation Mr. George uses the phrase "I guess" extensively. When asked who stabbed the victim, the Detective says "I'm asking you who's telling the truth man" and the accused responds "I don't know I guess" then explains, "ah I ah guess that like I guess thing is like stuck in my head cause I used to say that a lot when I was a kid (inaudible).[304]

a. R v. George - The Language of False Confessions

This lack of definitive language happens throughout the interrogation but particularly when the accused makes admissions after hours of interrogation. The accused says "I know ah I know [the co-suspect] was

302. INBAU ET AL., *supra* note 15, at 293.
303. *Id.* at 293–94.
304. *January 14 Transcript*, *supra* note 126, at 59.

there to help me back me up or something but I don't know who who all was fighting I guess."[305] There are numerous examples of this including when the accused said "it was just me and [the victim] I guess he took his shirt off and started fighting."[306] When asked why the fighting was going on the accused said "um I guess ah one of us was like trying to be tough."[307] When asked where the parties were located, the accused responded "I don't know I don't think anybody was in the basement I think they were trying to help."[308]

Researchers have done work on these exact phrases. Dr. Saul Kassin has testified that some types of confessions follow a pattern in that:

> [Y]ou have a person who is vulnerable to manipulation, presents them with apparently unimpeachable objective evidence, that person now has to try to reconcile on the one hand, I have no memory, with on the other hand but they tell me and I believe it that there is objective evidence that I did this. So they now have to reconcile this evidence with their lack of memory . . . . Often in these cases they then go through a process of imagination whether they try to imagine how they would have committed this act for which they have no direct memory. That imaginational process ultimately results in their making a false confession which always sounds exactly the same, I guess I did. I must have done it. I must have done it and blocked it out. You get those kinds of statements in very tentatively fragmentary language.[309]

Kassin notes this pattern is found in many confirmed false confessions and the common "ingredient" is the addition of evidence that "puts them over the edge" which "disorients their view of reality and they [begin] to question their own memory."[310] Kassin notes that it is a hallmark of some false confessions for the person being interrogated to finally say "I must have done it." He notes that this is not a "statement based in memory. It's not I did it. Oh, yeah, now I remember I did it. It's I guess I must

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305. *Id.* at 54.
306. *Id.* at 56.
307. *Id.*
308. *Id.* at 57.
309. Transcript of Record at 17, South Carolina v. Cope, Docket Nos. 2002-GS-46-3232-3234, 2003-GS-46-1843-1844, 2004-GS-46-2614-2618, and 2004-GS-46-196-199 (S.C. 16th Cir. Ct. 2004), available at http://billywaynecope.com/uploads/Saul_Kassin.pdf, (testimony of Dr. Saul M. Kassin).
310. Transcript of Record, *supra* note 309, at 173.

have done it. That is to say, I don't know for sure but I infer it must have happened."[311] The language Mr. George uses mirrors the type of language identified by Kassin in false confessions.

IX. Step 9 - Converting the Oral Confession into a Written Confession

In the case of *George*, the statement was video recorded so there is no issue at this step of the technique. Using these Reid Technique steps, the Detective's ultimate goal is to secure a "confession." However, it is necessary to analyze the use of such a statement with an Indigenous suspect and what it actually means to the administration of justice.

5. The Australian Experience with the Interrogation of Indigenous Suspects

Some reports from the Australian government on the interrogation of Indigenous Peoples shed light on this important topic. The Australian Institute of Criminology released a report in 2011 that identified "Aborigines and Torres Strait Islanders" and those with "non-English speaking backgrounds" as those who require special protection during interviews.[312] The Tasmania Law Reform Institute released another report in May 2011 that stated, "[w]hen an Aborigine or Torres Strait Islander is arrested the Aboriginal Legal Service should be notified via the on-call Field Officer in accordance with Tasmania Police requirements."[313] This recommendation was in response to the over-incarceration and deaths in custody of Indigenous persons and recognizing there are categories of individuals (including Indigenous

311. Transcript of Record, *supra* note 309, at 199 (testimony of Billy Wayne Cope).

312. Lorana Bartels, 'Police Interviews with Vulnerable Adult Suspects' (Report No 21, Australian Institute of Criminology, Canberra, July 2011) (Austl.). This is in addition to children and young people, mentally disabled persons, those with "non-English speaking backgrounds" and those with other disabilities.

313. Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No 15, May 2011) (Austl.) [hereinafter *Tasmania*]. The report notes that imprisonment rates for Indigenous Peoples in Tasmania are 14 times higher than for non-Indigenous prisoners.

Peoples) who "are particularly vulnerable when in police custody and require special consideration."[314]

The Australian case of *R v. Anunga* was instrumental in bringing about these guidelines and the rules which were enacted in 1976. The *Anunga* Rules provide nine guidelines for interrogating Aborigine peoples specifically.[315] The rules include having an interpreter in addition to a "prisoner's friend" that can accompany the suspect, care in formulating questions that are not leading, finding independent proof of the commission of an offence, the suspect must not be ill, intoxicated, tired, the interrogation should not last a very long time, the interview must end if the individual no longer wishes to speak, and there should be an offer of water, additional clothing and use of the bathroom.[316] In 2000 these rules were made into a five-stage protocol to allow the interviewee to determine vocabulary used, environmental factors, and language and cultural factors like eye contact are to be noted.[317] Another Australian report, Recognition of Aboriginal Customary Laws (ALRC Report 31), June 12, 1986, found that statements could be thrown out of court if they were involuntary, but also if it was voluntary but the judge "considered that it would be unfair to the accused to receive it in evidence."[318]

I. Gratuitous Concurrence and Communication

Australian researchers have also done linguistic research that shows that if an inappropriate question is asked of some Indigenous peoples, an answer of "I don't know" or "I don't remember" is the answer for different reasons than one might imagine. Eades states the response is not

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314. *Tasmania*, *supra* note 313, at 45.

315. Bartels, *supra* note 312.

316. *Id*. *See also* Heather Douglas, *The Cultural Specificity of Evidence: The Current Scope and Relevance of the Anunga Guidelines*, (1998) 21 U. OF NEW SOUTH WALES L.J. 27, 30 (1998) (Austl.).

317. Bartels, *supra* note 312. *See* Les Samuelson, *Canadian Aboriginal Justice Commissions and Australia's '*Anunga *Rules:' Barking up the Wrong Tree*, 21 CAN. PUB. POL'Y 187, 205 (1995).

318. Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report 31, June 12, 1986) s. 22 (See section titled "The Law Relating to Interrogation and Confessions") (Austl.). Although a full discussion of the *Anunga* Rules is beyond the scope of this paper, it is notable that Australia has found this important enough to be used throughout Australia.

about memory but a commentary on the "communicative strategy" which actually can translate into, "this is not an appropriate way to provide information of this nature."[319] Thus, the person being interrogated is not being obstructive but simply communicates in a different way than a Detective may have been trained. As a part of this category of concern in the Tasmanian Law Reform Institute, the report identifies language skills may play a factor. "Gratuitous concurrence" was identified as an issue for some Indigenous peoples as they "freely say 'yes' in response to a yes/no question, regardless of their understanding of the question or their belief in the truth or falsity of the proposition," which the author notes could have life-changing implications in an interrogation setting.[320] Many communications experts have discussed gratuitous concurrence and its forms, but "[b]y far the most common are such speech acts as 'Yes,' 'Uh-hum,' 'I see,' nodding the head, and so forth . . . [but] [i]t is important to remember that in gratuitous concurrence no real confirmation takes place."[321] Reading a transcript of such an interaction will look quite differently.

With modern legal devices such as transcripts, the use of words to indicate concurrence even where there is no real agreement can be extremely dangerous. Kenneth Liberman notes the "confirmation bears no semantic content but is a structural feature designed to encourage the development of the conversation or included to reduce the risk which any party might fear," and he notes it is a "common strategy of oppressed peoples" and some Aboriginal peoples in general rely on gratuitous concurrence to a great extent and to their great detriment.[322] Research shows that the party experiencing powerlessness "is likely to adopt a style of speech perceived by observers as less credible, a phenomenon that may again feed into uninformed officers' preconceptions."[323] Liberman notes that nowhere are the premises of gratuitous concurrence more on display than in a courtroom. He notes it is "typical for

319. Diana Eades, *A Case of Communicative Clash: Aboriginal English and the Legal System*, *in* LANGUAGE AND THE LAW 234, 342 (J. Gibbons ed., 1994) [hereinafter Eades, *Communicative*].

320. Bartels, *supra* note 312.

321. Kenneth B. Liberman, *The Hermeneutics of Intercultural Communication*, 26 ANTHROPOLOGICAL LINGUISTICS 53, 74 (1984).

322. *Id*.

323. Taslitz, *supra* note 16, at 130.

Aboriginal persons to willingly answer 'Yes' to any question put to them, in the hopes of satisfying what(ever) the Euraustralian might want." It is also important to note gratuitous concurrence may be done deliberately or completely without reflection.[324]

Some Indigenous peoples may have a "strategy for dealing with interviews, particularly in situations of serious power imbalance," particularly when subjected to a series of "yes-no" questions "in an intimidating situation, is to invite contradictory answers, regardless of the subject matter."[325] Australia has also been very forward thinking in discussing these issues in the course of various cases, but particularly in the case of *R v. Condren*, heard by the High Court of Australia in Canberra in 1989. In *Condren*, linguistic evidence was proffered on Aboriginal dialects and linguistics regarding the accused's "confession" of murder. Although the linguistic evidence is still legally inadmissible, it was an interesting foray into the understanding of linguistic differences.[326]

Going back to our case study, Mr. George does say "yes" frequently, but this does not necessarily mean that he agrees with the statement, and this could be gratuitous concurrence. These elements should be re-examined under the lens of an Aboriginal person in an interrogation setting. This reality is noted by Cathy Prowse who says that in an Aboriginal worldview "'yes' does not necessarily mean agreement but rather that you have been heard. As observed by Ross it may also mean 'no' but that the listener does not want to contradict the speaker as a person in authority."[327] There are several times on the videotape that the "yeah" response is more of a question than an answer as it is recorded in the transcript.[328]

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324. Liberman, *supra* note 321, at 68. Liberman makes the argument that gratuitous concurrence is not necessarily used for any type of deception but many times it is "the most direct route to communication." *Id.* at 70.

325. Watson, *supra* note 256, at 11–12.

326. For further details, *see* Diana Eades, *The Case for Condren: Aboriginal English, Pragmatics and the Law*, 20 J. OF PRAGMATICS 141 (1993). Mr. Condren alleged that he had been "verballed" or that the police had provided a statement of the accused which he did not make. Evidence in his Aboriginal dialect was entered to show that the statement made was not what the accused meant. *Id.*

327. Prowse, *supra* note 262, at 255.

328. *January 9 Transcript*, *supra* note 133, at 43.

One possible solution could be what Eades advocates. She notes that a translator should be used in the justice system when it comes to Indigenous suspects. However, she argues that a flat transcript is not appropriate with Indigenous individuals, but there must be an "interpreter" to "translate the concepts or ideas express in one language to those expressed in another."[329] Eades notes that a certain amount of paraphrasing needs to be done when two speakers are from diverse cultures, but in a situation like the justice system, interpreters are needed beyond just words and this is where she advocates for a "cross-cultural interpreter."[330] However, it has been noted in Australia that despite the emphasis through the *Anunga* Rules on having an interpreter, there is some evidence that they are rarely called by police even when English is the second language of the suspect.[331]

6. Caselaw on Application of Specific Vulnerabilities of Indigenous Offenders and False Confessions – A Subtle Change?

The overall track record with recognizing the particular vulnerabilities of Canadian Aboriginal suspects in recent case law is scant, and that is only if the vulnerabilities of these individuals are even mentioned at all. However, it is hopeful that the recent appeal of a *voir dire* in *R v. Camille* is indicative of possible change.[332] Mr. Gordon Camille was a sixty-six-year-old First Nations person who had suffered horrendous treatment at the hands of those at a residential school. He struggled with addiction, physical disabilities and was economically disadvantaged. He was charged with the second-degree murder of his friend Dennis Adolph. Police took statements from Camille on three separate occasions. The first lasted four hours and ten minutes, the second lasted two hours and eighteen minutes, and the third lasted just under three hours.[333]

Although the lower Provincial Court in *Camille* quoted the *Oickle* test and stated that background characteristics must be taken into

329. Eades, *Communicative*, *supra* note 319, at 254.

330. *Id.*

331. Douglas, *supra* note 316, at 36. Often an interpreter is not available.

332. R. v. Camille, 2018 BCSC 301, 2018 CarswellBC 679 (Can.) (WL) [hereinafter *Camille*, BCSC].

333. R. v. Camille, 2017 BCPC 437, 2017 CarswellBC 3869, ¶ 23 (Can.) (WL) [hereinafter *Camille*, BCPC].

consideration, these factors needed to be weighed against the fact that he was "intelligent and articulate, college-educated, well connected with resources . . .and has family supports."[334] However, this seems particularly short-sighted when there was evidence, largely unchallenged by the Crown, that:

> Mr. Camille is not only a residential school survivor but that he went to St. Joseph's. He also described in his interviews that he had been raped by a priest and that he had witnessed others being raped. This is largely unchallenged by the Crown. However, while courts are entitled to take judicial notice of the deplorable circumstances suffered by generations of First Nations people in this country, it must be the individual impact on Mr. Camille that I take into consideration on the issue of voluntariness.[335]

Despite this finding by the lower court that Mr. Camille had "horrendous" experiences in his background, the Court concluded that Mr. Camille did not suffer "from post-traumatic stress disorder or that he is in any way made more vulnerable or compliant to a police interview as a result of his experiences. I have insufficient evidence before me to reach such a conclusion . . . I simply do not have adequate evidence before me to assess the negative impact his experiences had on the voluntariness of his statements in these circumstances."[336] Because the questioning of the police was not "emotionally intense" and there was no anger and no "confrontational tone"[337] the Court found that "[i]t cannot be said that any of the interviews created an environment so intolerable that Mr. Camille was compelled to make a confession."[338] The Court found that although Mr. Camille had "clearly suffered consequences of his residential school experience throughout his life," the statements were voluntary and thus admissible.[339]

However, this finding was overturned on appeal in 2018. The Court again explored the powerlessness that Mr. Camille experienced subject to sexual abuse by a priest and that he knew others were also being abused.

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334. *Camille*, BCSC, ¶¶ 8–10.
335. *Camille*, BCPC, ¶ 26.
336. *Id.* ¶ 27.
337. *Id.* ¶ 24.
338. *Id.* ¶ 44.
339. *Id.* ¶ 73.

He also recounted the gang rapes of several close family members on reserve, the death of several of his former partners from addiction and the loss of other family members to drugs and violence. The British Columbia Supreme Court ("BCSC") also acknowledged that the police treated Mr. Camille with "respect and courtesy,"[340] but that the conditions for the interrogations remained "uncomfortable and disorienting" and many times his hearing loss and understanding was in question as he would "lean[] forward" and his responses "revealed that he had not heard or understood the question or statement, even though he evidently believed he had."[341] The Court noted that it was difficult to count how many times Mr. Camille had said he wished to remain silent, but the Court was concerned about "some subtle messages the police gave Mr. Camille that, taken together, and in light of his numerous vulnerabilities, may have overridden his will to remain silent."[342] The BCSC found that Mr. Camille may have admitted his guilt not because he knew he had killed the victim but because the police had "convinced him that this was the inevitable conclusion that Mr. Camille needed to acknowledge."[343]

The court cited *R v. Gladue* in that courts "must take account of different cultural values and experiences that may shape the world views of Indigenous peoples and their responses as individuals in the criminal justice system"[344] In a hopeful turn, the Court found that:

> In all the circumstances, I cannot conclude beyond a reasonable doubt that Mr. Camille's admissions on February 7 were voluntary. Factors which contribute to the doubt include Mr. Camille's repeated assertions of his right to silence in the face of persistent and continued questioning; the subtle inducement that underlay the interview; and the overstatement of evidence said to show that only he could have caused Mr. Adolph's death. The effect of these factors is compounded by Mr. Camille's particular vulnerabilities, including the psychological and other consequences of his appalling life experiences and his problems

340. *Camille*, BCSC, ¶ 43.

341. *Id.*

342. *Id.* ¶ 45.

343. *Id.* ¶ 61. It is interesting to note, at para 65, that the court identifies that Mr. Camille used terms like "I probably flipped out because" and "yeah, probably what happened, yeah" much like the statements seen in false confessions.

344. *Id.* ¶ 61 (citing R. v. Gladue, [1999] 1 S.C.R. 688 (Can.)).

> with memory, hearing, and physical pain. The task in the *voir dire* is not to assess the reliability of Mr. Camille's admissions. However, the nature and the limited scope of his admissions, which amounted to little more than an acceptance of responsibility for the killing, reinforce the concern arising from other factors that the admissions may have proceeded not from Mr. Camille's free choice but rather from acquiescence in what appeared to be an unavoidable process and an inevitable result.[345]

The confession was excluded from trial, but it is notable that even without the hard fought exclusion of the "confession" of Mr. Camille, the accused was still found guilty and sentenced to 9.5 years incarceration.[346] However, even though this was simply a *voir dire*, perhaps this is indicative of the change that needs to come when Indigenous individuals are recognized for particular vulnerabilities when it comes to interrogation.[347]

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345. *Camille*, BCSC, ¶¶ 86–88.

346. R. v. Camille, 2018 BCSC 1585, 2018 CarswellBC 2473, ¶ 45 (Can.) (WL). This sentence was reduced to 5 years and 8 months with time served.

347. The case of *R. v. Alec*, 2016 BCCA 282, [2016] B.C.J. No. 1345 (Can.) attempted to raise the issue of "Aboriginal fatalism" within the Gladue Report filed with the court. *Id.* ¶¶ 48, 50. This concept was based on Dr. Bruce Miller's work in anthropology at the University of British Columbia. Through the Gladue Report filed for Mr. Alec, discussed at para 50 of the case, Dr. Miller asserts that, "Aboriginal peoples encounter a steady stream of negative interactions with social institutions, government ministries and are subjected to levels of surveillance, observation and control. The Criminal Justice System and other social services face an overrepresentation of people of First Nations descent. According to Dr. Miller, this perpetuates the societal stigma and an ongoing personal sense of doom. Colonialism and its machinations created the problems Aboriginal populations face today and the current mechanisms aimed at alleviating the symptoms of post-colonialism do no such thing, but instead lead to Aboriginal Fatalism and a sense of hopelessness. Dr. Miller noted that this hopelessness is uniquely present amongst those individuals involved in the Criminal Justice System, as they feel powerless to overcome the stigma(s) crafted through the impact of colonialism. . . . The experience of Aboriginal Fatalism and the manifestation of social consequences related to such an experience relate directly to the life of Torbin Alec. As discussed above, he was impacted by the intergenerational trauma experienced by his ancestors and their experience with governmental entities such as Indian Residential School. He was immediately disconnected from his Tl'azt'en Heritage, becoming a victim of the struggles faced by his mother and his grandparents. He went on to be supervised by the Ministry of Children and Family Development, exacerbating this disconnection. He was exposed to addiction, mental health issues, physical violence, psychological abuse and an ongoing experience of instability. His socialization contributed to his long-term drug addiction, his mistrust of

There is very little information about how the Reid Technique specifically impacts an Indigenous person. There are serious questions as to whether a statement elicited using the Reid Technique on an Indigenous person should be excluded because of improper techniques which could potentially lead to a false confession. What is clear from various sources is that many Indigenous groups see looking someone in the eye as a sign of disrespect and a "way to send a signal of respect was to look down or to the side, with only occasional glances up to indicate attention."[348] This flatly contradicts how Canadian police are trained today.

The Reid Technique ignores that many Indigenous cultures believe in "consensus decision making" and may "find our adversarial system foreign and inappropriate."[349] Some Indigenous communities have different relationships to "confessions" as well. In the very recent case of *R v. Ippak*, there is an interesting discussion of Inuit culture and confession.[350] The Court discusses that the primary purpose of Inuit law is to "preserve the community and avoid negative consequences for the individual and the group as a whole."[351] Because of this central tenant in Inuit culture, "individuals are encouraged to confess any wrongdoings, as

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both Aboriginal and non-Aboriginal people, in addition to government ministries or any perceived source of authority. Moreover, as expressed throughout this report, Torbin possesses an emotional fatalism, one that has contributed to his ongoing search for escape through drug use and short-term living arrangements. Due to his socialization and the stigmatization he experienced from an early age, he has never felt a sense of control over his circumstances. His behaviour has been an expression of this emotional state, one that has been learned and experienced by many First Nations individuals. Finally, Torbin has a feeling of hopelessness in his life and the lingering mistrust of the institutions with which he has been involved from an early age. Mistrust creates a belief that regardless of one's actions, the Criminal Justice System will continue to stigmatize and judge unfairly. In that frame of mind, in a fatalistic emotional state, there is a tendency to seek to expedite proceedings with the idea that one is powerless to have an impact on the future." The case has been mentioned several times in subsequent caselaw but not in any detail. The court in *Alec*, found the plea to be informed and voluntary and that the "Specifically, there is not a sufficient link in this case between 'aboriginal fatalism' and the appellant's state of mind when the plea was entered. It follows that, when taken with the other evidence, the proposed fresh evidence could not reasonably be expected to have affected the result." *Id.* ¶ 112.

348. ROSS, *supra* note 107, at 4.

349. *Id.* at 9.

350. R. v. Ippak, 2018 NUCA 3, 2018 CarswellNun 18 (Can.) (WL).

351. *Id.* ¶ 87.

harbouring a secret transgression can cause illness in the person or community . . . The Inuit believe that it is dangerous to fail to disclose wrongdoings, and are socialized within their culture to confess to them . . . Upon confession, the community engages with the offender to reconcile and reintegrate them into the community as each individual is a 'potentially valuable' member of society."[352] These concepts may be at odds with our traditional notion of confession.

The 2015 British Columbia Court of Appeal case of *R v. Viszlai*, is representative of many of the cases that deal with the Reid Technique and confessions.[353] Justice Stromberg-Stein states that, even though the trial judge found that there were some aspects of the Reid Technique used in building a rapport with the individual, discussing his background, and minimizing his moral culpability, there was no atmosphere of oppression. Justice Stromberg-Stein adopted the reasoning of past cases saying that there was no evidence that "the use of aspects of the Reid Technique in this case were oppressive" and that the Reid Technique is "but one factor to consider in the contextual analysis under the *Oickle* test to determine the voluntariness of a statement."[354] Similarly, Justice McFayden of the Alberta Court of Appeal similarly dismissed an analysis of the Reid Technique in the 2012 decision of *R v. T(PD)* for a suspect who alleged to suffer from Fetal Alcohol Spectrum Disorder (FASD).[355] The Court made no analysis whatsoever of the Reid Technique for vulnerable populations and found that the trial judge found the statement voluntary and rightly allowed the statement into evidence. These cases are representative of the current discussion of the Reid Technique —there is almost no discussion. This is true even in cases where vulnerabilities may be present. From a survey of case law there seems to be a judicial awareness of the problems of the Reid Technique, but a blithe acceptance of the police technique as it stands.

A prime example is a 2014 case of a nineteen-year-old Indigenous male in *R v. Johnny* who had made a statement to police in British Columbia. When the officer was cross-examined on the technique, the officer said that if the technique had ever been used it was "before his

352. *Id.* ¶ 88 (internal citations omitted).
353. R. v. Viszlai, 2015 BCCA 495, 380 B.C.A.C. 133 (Can.).
354. *Id.* ¶¶ 39–40.
355. R. v. T. (P.D.), 2012 ABCA 68, 522 A.R. 297, ¶¶ 8, 18 (Can.).

time."[356] Although the officer claimed that the department did not use the system "per se" there was a set structure to interrogation because the "more we know about a subject's background, the better."[357] Thus, there is even a possible misconception about using the techniques as they are so ingrained in the police process. Even though the accused says, "[w]ell what do you want me confess 'cause I really don't 'member everything" the police take his "confession."[358] However, this case is one of the few examples where the court, through Justice Maisonville, says that in:

> [A]ccordance with the direction of Iacobucci J. in *Oickle*, I must also consider the circumstances of the accused. He is a 19-year-old member of the Tsulquate/Gwa'sala Nakwaxda'xw Nation. Throughout the interview he appeared on many occasions to have his head straight down on the desk, to the extent that the officers often had to ask him to look up. Also, on a number of occasions he said he would say whatever the officers wanted, and again I note was also of such concern to the officers that they in fact stopped the interview because, despite stressing to the accused that they only wanted the truth, they believed they would not get a reliable statement. It must be stressed this is a unique situation involving an accused apparently quite susceptible to suggestion and information the officers believed to be reliable. I find the police, through no fault of their own, in using the false MSN chat evidence, together with other techniques, nonetheless created a situation where the statements were not voluntary. In all the particular circumstances, I am left with doubt regarding the voluntariness of the accused's statements. I find in all the circumstances that the statement has not been shown to be voluntary beyond a reasonable doubt.[359]

This is one of the very few case examples where these factors have been taken into account, but perhaps these few examples provide a glimpse of a more hopeful future.

7. Conclusion

> [I am] swamped with memories of countless Native victims and witnesses who, almost without exception, had taken the witness stand

356. R. v. Johnny, 2014 BCSC 811, 2014 CarswellBC 1264, ¶ 20 (Can.) (WL).
357. *Id.*
358. *Id.* ¶ 34.
359. *Id.*

> and refused to look anyone in the eye. Instead, they alternated between staring off into the distance and giving us only the most fleeting of glances. In doing so, they had meant to send messages of attention and respect. The messages received by the non-Native court personnel, however, were exactly the opposite ones. Within our culture (and especially the culture of the courtroom) we are trained to see such behaviour as evasive. We discount what people say when they won't hold our eyes, concluding most often that they are insincere and untrustworthy as witnesses. I wondered how many true stories we had dismissed simply because we saw those people through the lens of our own culture, never once suspecting that the act of turning away the eyes might mean something entirely different in another culture.[360]

Since 1783 courts have recognized that involuntary confessions are unreliable saying a "free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given it; and therefore it should be rejected."[361] It is a basic element of our fundamental rights that involuntary confessions must be excluded because they are inherently unreliable. Police training should include training on differentiating Aboriginal suspects from non-Aboriginal suspects with respect to cultural norms, traditions, and body language. Expected responses to grief, or anger, or trauma can be culturally misread and need real intervention and sometimes accommodation before a false confession occurs. Determining what makes an individual "look" guilty, may be to condemn the innocent, and the Reid Technique is doing just that.

Throughout the Reid method of interrogation, the interviewer is given false confidence in applying these techniques without the benefit of research on psychology, false confessions and social psychology.[362] It is now very clear false confessions are not a new phenomenon and occur "on a regular basis in all parts of the world and in criminal justice,

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360. ROSS, *supra* note 107, at 4. Ross notes that when told that direct eye contact was considered rude in many Indigenous cultures. *Id.*

361. Kassin et al., *Police-Induced*, *supra* note 7, at 11 (citing R. v. Warrickshall (1783) 168 Eng. Rep. 234; 1 Leach 263 (Eng.)).

362. Buffie Brooke Merryman, *Arguments Against Use of the Reid Technique for Juvenile Interrogations*, 10 COMM. L. REV. 16, 24 (2010).

military, and corporate settings."[363] Given the plethora of academic literature showing police need to be aware of the dangers of: (1) convincing the suspect of the hopelessness of the situation and the certainty of their conviction through the infallibility of evidence and distortion of key facts (what the accused said in the first interrogation); (2) manipulating the individual's emotional state including feelings of guilt and remorse as this was a constant theme throughout the interrogations; and (3) pressuring the accused to consider the advantage of an immediate confession and the potential for less severe punishment if there is sufficient remorse playing off of the accused's fear of repercussions and wish for less severe punishment, more attention is warranted. Add to this situation different communication styles, different languages, and different cultures and the landscape is rife for abuse.

It has been theorized that "*innocence* itself may put *innocents* at risk . . . people who stand falsely accused tend to believe that truth and justice will prevail and that their innocence will become transparent to investigators, juries and others. As a result, they cooperate fully with police, often failing to realize that they are suspects not witnesses."[364] The veracity of the accused's admissions need to be critically examined to determine the weight of his statements which is in serious doubt after balancing the above factors. Investigators need to be trained that these techniques do sometimes cause the innocent to confess and that techniques like "maximization and minimization strategies – lead to the decision to confess, from the guilty as well as the innocent."[365]

When dealing with a suspect who is developmentally delayed, young, or otherwise vulnerable they may be in need of other techniques.[366] Although there has been very little work in Canada about sociolinguistics and cultural differences in the courtroom, this is a very important area of study. Interpreters rather than translators might recognize some of the linguistic and cultural context that is being missed. Perhaps this is an alternative method of analysing social inequality in the legal system and

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363. Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOL. 431, 432 (2012).

364. Kassin et al., *Police-Induced*, *supra* note 7, at 23 (citing Saul M. Kassin, *Does Innocence Put Innocents At Risk?*, 60 AM. PSYCHOL. 215, 224 (2005) (emphasis in original)).

365. *Drizin & Leo*, *supra* note 13, at 1002.

366. *Id.* at 1003–04

"by examining widely held assumptions about language and communication, and the working of these assumptions in both the facilitation of problematic interactional practices and the evaluation of witness and their stories" we will finally find a way to treat all of those who come before system with the utmost respect.[367] In a joint project by the Law Society of Ontario, the Advocates' Society, and the Indigenous Bar Association released a report in May 2018 underscoring the need to examine the work of lawyers with Indigenous Peoples. The report flagged as an area of concern when addressing cultural competency as, "[r]ecognizing that behaviours and body language may have different meanings in different cultures (e.g. eye contact, handshakes, speaking in turn, value of silence, decision making processes, vocalizing for understanding vs vocalizing for agreement, time management, language barriers, other communication differences or barriers.)"[368] We need to pay more than lip service to these important differences. White suggested in 1997 that when a vulnerable suspect is interrogated, age and mental capacity should be determined immediately.[369] He suggests that if the suspect if found to be particularly vulnerable, "police should not be allowed to use the nine-step process described by the *Inbau Manual*. With these suspects, the police should be limited to asking nonleading questions and prohibited from insinuating that they believe the suspect is guilty."[370] The same can be said for those suspects who might have cultural vulnerabilities.

Mr. George served a significant amount of time in jail awaiting trial for something that he likely falsely confessed to. If not for the dedicated counsel who sought to bring this to the Court's attention (at significant expense to himself on a legal aid file), this issue likely would not have come before the Court. Mr. George was ultimately freed through a plea

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367. Diana Eades, *The Social Consequences of Language Ideologies in Courtroom Cross-Examination*, 41 LANGUAGE IN SOC'Y 471, 493 (2012).

368. The Advocates' Society, The Indigenous Bar Association, & The Law Society of Ontario, *Guide for Lawyers Working with Indigenous Peoples*, 25 (May 8, 2018), https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Guide_for_Lawyers_Working_with_Indigenous_Peoples_may16.pdf (last visited May 29, 2019). The report seeks to honour the, "growing recognition in Canada, across all sectors and regions, of the need for a deeper understanding and more meaningful inclusion of the Indigenous Peoples of Canada." *Id.* at 3.

369. White, *supra* note 34, at 142.

370. *Id.* at 143.

negotiation. Cultural issues need to be acknowledged, sometimes accommodated and always respected within each step of the judicial process. Recognizing the inherent difference in tradition and communication when dealing with Indigenous suspects specifically, is paramount. It has been over thirty years since the wrongful conviction of Donald Marshall Jr. and it is time for contextual and cultural factors to be considered during interrogation. All these years later we must hear the Royal Commission in that we cannot ascribe guilt based on interpersonal responses that are not universal cultural norms.[371] We must train our police to interrogate responsibly and with a level of cultural awareness. Developing and implementing a similar set of guidelines as implemented in Australia in Canada would not only ensure Indigenous suspects are given the protections they are owed under the *Charter,* it would promote Canada's goals for reconciliation amongst one of its most vulnerable groups of citizens and shield those who may be most susceptible to falsely confess.

371. *Royal Commission, supra* note 251.