Court File No. 39350

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT

- AND -

RUSSELL STEVEN TESSIER

RESPONDENT

- AND –

ATTORNEY GENERAL FOR ONTARIO, ATTORNEY GENERAL FOR NEW BRUNSWICK, AND CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW

1. The modern voluntariness rule protects evidential reliability *and* fairness. It works in tandem with other protections in the *Charter*. It seeks to ensure that individuals who speak to the police do so of their own free will, knowing what is at stake.

2. For the confessions rule to achieve its aims, individuals being questioned by the authorities need to understand they have a choice regarding whether to speak with the police, as well as the consequences of volunteering information. No statement is truly voluntary if the individual does not know that they can refuse to speak to the police or, if they decide to speak, anything they say can be used against them.

3. What then is the threshold for voluntariness? The Crown Appellant wants to limit the protection provided by the confessions rule and set the rule back to its narrow focus on reliability. The Crown is attempting to persuade this Court that the confessions rule does not care whether the individual knew that he did not have to speak to the police, and anything said could be used against him – that the individual's awareness of his or her rights is an unimportant part of the analysis. The Court should decline this invitation and confirm that an informed choice is a necessary aspect of a voluntary statement to the police.

4. An individual's knowledge of the right not to participate in an interview and the consequences of doing so is a condition precedent to voluntariness. This condition can be easily satisfied by requiring the police to provide a verbal caution to the individual before initiating questioning in the context of a criminal investigation. Whenever the police are investigating a crime and initiate contact with an individual to secure information about that crime a caution is required. The absence of a caution in these circumstances should be presumptively determinative of the statement's inadmissibility. Unless the Crown can prove that the defendant knew that they did not have to speak to the police and understood the consequences of doing so, the statement is legally involuntary. It is reasonable to put the burden on the state since law enforcement holds all the cards in citizen encounters.

5. The CCLA takes no position on the facts.

PART II – CCLA'S POSITION ON THE ISSUES ON APPEAL

6. The CCLA argues:

- Voluntariness is about more than the reliability of confessions – it is also about fairness;
- In order for a statement to be voluntary, the Crown must prove that the individual understood his or her right not to speak to the police, and the consequences of foregoing that right;
- The absence of a caution is presumptively determinative of the voluntariness analysis;
- In the absence of a caution, the state can prove voluntariness only with evidence that the individual understood his or her right against not to participate, and the consequences of foregoing that right.

PART III – STATEMENT OF ARGUMENT

1. Fairness and Reliability both Animate the Confessions Rule

a) The Transition from Reliability Alone to Fairness More Broadly Took Place 30 Years Ago

7. Over 30 years ago this Court's voluntariness jurisprudence shifted from a focus on the reliability of confessions alone, to include a focus on whether eliciting and admitting a confession would be fair. The traditional confessions rule from *Ibrahim* (1914) defined voluntariness negatively, in the sense that the absence of threats or promises meant the statement was voluntary. The individual's awareness of his rights, including the right against self-incrimination, was irrelevant – "he need not be told that he has a right to remain silent."[1] In 1990, however, this Court clarified that the contemporary confessions rule meant more than the absence of threats or inducements. In *Hebert*, this Court acknowledged that voluntariness was broader than its narrow conception set out in *Ibrahim* and encompasses values of fairness.[2]

8. As a result, whether or not the defendant had knowledge of the right not to provide evidence to the police and the consequences of doing so is now a necessary consideration in the voluntariness analysis. According to McLachlin J. (as she then was), voluntariness includes an ability to make an

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[1] *R v. Hebert*, [1990] 2 SCR 151 at para 81[*Hebert*].
[2] *Hebert*, *supra* at note 1, at paras. 85, 93, 99, 104, 113, and 124- 127.

effective choice between known alternatives.[3] There is a steady line of authority from this Court since *Hebert* confirming the rule that voluntariness is wider than *Ibrahim* and includes the individual's understanding of the consequences of speaking.[4] The confessions rule, then, is about the individual making a "meaningful choice" about whether or not to speak to the authorities.[5]

2. Since Voluntariness Requires a Meaningful Choice, it Must Also Require Access to Information

a) A Meaningful Choice Assumes the Defendant has Baseline Information about Speaking to the Authorities

9. The term "meaningful choice" implies that the decision maker understands the options between which they are choosing. A meaningful choice is an "informed choice".[6] Information of one's rights is therefore a foundational element to fairness in the voluntariness inquiry. Having an "overborne will" or responding to "threats and inducements" means that one has chosen to give something up in response to those threats or enticements. If the individual has no awareness of the choices at hand, including the consequences of one choice over the other, the concept of "choice" is empty. In other words, if fairness depends on meaningful choice, and meaningful choice depends on information, fairness too, depends on access to information.

10. Beyond the logic in the concept of choice – that information is necessary to make a decision meaningful – this Court's jurisprudence suggests that the state has an obligation to correct information asymmetry before a statement will be found voluntary. Neither *Whittle* nor *Hebert* support the Crown's position that the voluntariness inquiry is narrow and focused on the defendant's base level functioning. The Court in both cases placed emphasis on whether or not the individual understood their right to remain silent and was put in contact with counsel.[7] Therefore, conceptualizing access to information

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[3] *Hebert*, *supra* at note 1, para. 81-85, 124-125, and 137.

[4] Upheld in *R v. Singh*, 2007 SCC 48 at para. 30 [*Singh*], *R v. Oickle*, 2000 SCC 38 at para. 24-26 [*Oickle*] citing to *Hebert* – the confessions rule requires the necessary mental element of deciding between alternatives.

[5] *Hebert*, *supra* note 1, at paras. 124-125.

[6] *Hebert supra* note 1, at paras. 110, 111.

[7] In *Hebert*, for instance, although the Court confirmed that the test for voluntariness should be objectively defined, the first questions that courts are directed to ask of the authorities is "was the suspect accorded the right to counsel" (para. 126). Similarly, in *Whittle*, the Court was assessing the

about choosing to speak as a necessary but insufficient element of voluntariness is in line with these leading cases.

11. Understanding one's right to choose whether or not to participate in questioning is a condition precedent to voluntariness. Once the Crown proves that the individual knew that they did not need to speak and the consequences of doing so, judges still need to consider whether the defendant had an operating mind. Courts should still examine whether there were threats or inducements made by the police. The CCLA's position is that in order for courts to engage in a fair analysis of whether those threats or inducements made a statement involuntary, judges first must assess if the defendant was aware of his right to choose not to speak and the consequences of foregoing the same. There can be no fair assessment of whether the individual participated in an interview as a result of threats or inducements if that individual did not know he had a right not to participate in the first place.

b) Individuals Need to Understand that They Can Choose Not to Speak to the Police, Regardless of Whether or Not They are Detained

12. The circumstances of detention unquestionably create an atmosphere of oppression. The imbalance of power in a detention requires immediate access to counsel.[8] However, a pressure to speak still exists when people in authority, like the police, initiate contact with an individual for information about a crime. An individual engaged by the police to answer questions in response to a crime is still subject to the coercive power of the state. This is especially true for vulnerable communities who do not know the limits of police power – the UN Special Rapporteur on racism, freedom of religion, and education notes that Indigenous people, refugees, migrants, stateless people and people living in poverty might have difficulties understanding their rights and the judicial process.[9] Similarly, over-

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voluntariness of statements provided *after* Mr. Whittle spoke with counsel and was provided with a caution and opportunities to consult with counsel numerous times (*R v. Whittle,* [1994] 2 SCR 914 at paras. 3, 6, 8, and 9.) In *Whittle*, the Court relied on expert evidence that suggested Mr. Whittle knew the consequences of speaking and that any statement he gave could be used against him (See paras. 53-55).

[8] *Singh*, *supra* note 4, at para. 32.

[9] See Durban Review Conference Preparatory Committee, *Implementation of the Mandate of the Working Group as Contained in Preparatory Committee Decision PC.2/4 of 22 April 20008 Entitled 'establishment and Dates of the Intersessional Open-ended Intergovernmental Working Group*, 2nd session, UNGAOR, UN Doc A/CONF.211/PC/WG.1/5 (13 May 2018) para 32 at https://www.un.org/en/durbanreview2009/pdf/A.CONF.211.PC.WG.1.5_en.pdf

policed populations may feel as though the limits on state power do not apply to the police with whom they interact, and as a result may feel obligated to provide information.[10]

13. While there is some discussion in the case law as to whether the *Charter*'s s. 7 right to silence applies to individuals who are not detained,[11] this Court confirmed that the confessions rule applies "whether or not the subject is in detention."[12] Individuals who are not detained still have a broader right to choose whether or not to provide information to the authorities.[13] Detention is not what triggers a voluntariness analysis and the requirement of a caution.

14. *Worrall* provides an example of the voluntariness analysis divorced from the detention analysis. In *Worrall,* the police attended the defendant's home seeking information about his deceased brother. At that point, there was no evidence that the death was unlawful or the result of a criminal act or omission.[14] The police did not give Mr. Worrall an option of being interviewed at home, and instead, took him to the station in a police car. While there, Mr. Worrall mentioned to the police that he had given the deceased heroin the night before his death. After this information, the police continued to seek evidence from Mr. Worrall without providing him a caution or his right to counsel. Justice Watt excluded Mr. Worrall's statements as involuntary once the police engaged Mr. Worrall when they had

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[10] See, for example, *R v. Le*, 2019 SCC 34 at para. 97.

[11] Some case law suggests that the right to silence under s. 7 only arises upon detention (see, for example, *R v. Joseph,* 2020 ONCA 73 at para. 47). This is based on Justice McLachlin's statement at para. 131 of *Hebert*. This statement is made in the context of undercover operations. To the extent that this statement from *Hebert* is relied on for the proposition that there is no broader right, constitutionally and at common law, to silence in the absence of a detention, it is inconsistent with *Singh,* (*supra* note 4, paras. 27 and 32) and should be rejected. Individuals always retain the right not to speak with the police, except for those contexts in which a specific power compelling the provision of limited information (for example, licence and registration demands at RIDE stops) has been lawfully and constitutionally granted to police. One can easily imagine a situation where one's liberty is at stake if comments are made to a person in authority, regardless of whether or not an individual is detained (ex. being asked general questions about an offence which may then bolster an officer's suspicion).

[12] *Singh, supra* note 4 at para. 32.

[13] See *Singh supra* at note 4, at para. 27.

[14] *R v. Worrall*, [2002] OJ No 2711 at para. 29 [Appellant's Book of Authorities, Tab 1].

evidence of a crime, although the Court did not decide whether Mr. Worrall was detained throughout the entire evening. In excluding Mr. Worrall's further statements to the police, Justice Watt confirmed that individuals must have a base level understanding of the right to choose before any statement is admissible. He stated that "voluntariness implies an awareness about what is at stake in speaking to persons in authority, or declining to assist them."[15] This is true irrespective of whether or not an individual is detained.

15. While the structure of the *Charter* shows that an individual's s. 10(b) rights are not engaged unless detained, all people from whom the police seek evidence in the context of investigating a crime should be afforded a caution. The CCLA submits that a clear police caution is the simplest way of ensuring that those who are interacting with the police have an increased likelihood of making a "meaningful choice" to speak, and that their statements are truly voluntary.

3. The Absence of a Caution is Presumptively Determinative of the Voluntariness Analysis

16. The CCLA submits that in circumstances where **(a) police are investigating a crime** and **(b) police initiate contact with an individual to secure information**, a caution is required. A caution, in the above circumstances, is an objective indicator that the individual has been informed of their rights and what is at stake. Absent other evidence that casts doubt on voluntariness, courts can rely on the existence of a caution to infer that the individual has chosen to speak to the authorities knowing that the information can be used against them. Requiring a caution in these circumstances accords with the purpose of the voluntariness rule: it ensures fairness by fixing the informational deficit.

a) The Court Should Move Away from the Suspect/Witness Divide in Determining Who Requires a Caution

17. Instead of focusing on whether the individual is a suspect or a witness, mandating cautions in the circumstances set out above eliminates a fraught inquiry into the state of mind of the questioning police officer at the time of the interaction, and ensures that individuals who may initially be complainants or witnesses but could quickly become suspects are all afforded protection. As it stands, relying on the witness/suspect divide to determine whether a caution is required allows police to speak to individuals who are likely to become suspects based on their answers to questions without ensuring that those individuals know that they can choose not to engage or answer. The witness/suspect divide

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[15] *R. v. Worrall*, *supra*, at para. 106 [Appellant's Book of Authorities, Tab 1].

also allows for the police to ask pointed questions, as they did in this case, "did you kill the victim" or "prove to me you did not kill the victim" without providing a caution under the guise of "general police practice."[16] Finally, relying on the witness/suspect divide runs the risk of police downplaying their suspicion[17] or, as identified by the Court of Appeal in *Dunstan,* the risk that police will insulate the interviewing officer from the true facts of the case so that they could interview a potential suspect without a caution.[18]

18. Further, a police officer's level of suspicion towards an individual has no bearing on how that individual might respond to the police, or what they know about their rights and the potential consequences of foregoing them. Moving away from the witness/suspect divide as determinative of the necessary caution, and instead focusing on police initiating engagement in the context of a crime, ensures that all individuals in jeopardy, regardless of how the police see them, are able to make a meaningful choice and understand the consequences of making a statement. The focus on ensuring rights protection and fairness in the criminal justice process must remain on the needs of the individual, rather than the needs of law enforcement.

b) Case Law Suggesting that a Caution is Unnecessary is not Reflective of the Modern Values Underlying Voluntariness

19. The CCLA agrees that providing a caution is insufficient to ensure voluntariness, but asks that its *absence* be given determining weight in the analysis. In the 1949 case of *Boudreau,* the Court, relying on the narrow conception of voluntariness from *Ibrahim*, found that the absence of a caution did not necessarily render a statement involuntary. It decided that the caution was one factor to consider in the voluntariness assessment, and its absence alone was not conclusive of the inquiry.[19]

20. It is time to move away from *Boudreau*'s reasoning. This Court should confirm that a caution *is* determinative of involuntariness unless the Crown can prove the defendant was aware of his rights and chose to forego them. It is an understatement to say that our understanding of human factors (and values) has evolved in the last 70 years. (Mr. Boudreau was hanged after a trial.)

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[16] *R v. Tessier*, 2020 ABCA 289 at para. 21.
[17] See for example the case of *R v. MR*, 2019 ABQB 588 in which the police insincerely labelled an individual an "ordinary witness" in an attempt to facilitate an investigation (paras. 70-71).
[18] See *R v. Dunstan*, 2017 ONCA 432 at para. 86.
[19] *Boudreau v. R*, [1949] SCR 262 at para. 18.

21. *Boudreau* was decided when voluntariness was focused only on the reliability of the statement. Indeed, the conclusion about the disposableness of the caution came after the Court re-affirmed the rule in *Ibrahim*.[20] At that point, the integrity of the justice system was not an aspect of the voluntariness assessment. Fairness did not factor into the analysis. The Court has moved away from this narrow formulation. As this Court focuses more on fairness, along with reliability, the caution should take a more prominent place in the voluntariness analysis. As stated in *Hebert*, "it would be wrong to assume that the fundamental rights guaranteed by the *Charter* are cast forever in the strait-jacket of the law as it stood in 1982".[21] This statement has equal force as it applies to foundational common law doctrines applied in 1949.

22. Without a caution there will often be no evidence that the Crown can present to show that an individual understands that they have a right not to participate and understands that anything they say can be used against them. The caution is an easy tool for police to implement to assist in ensuring that people are making a meaningful choice. It fills an informational deficit. Fairness demands nothing less.

c) Crown Concerns Over Cautions are Overstated

23. The Crown raises concerns that increasing the prominence of the caution in the voluntariness assessment would require the "police to caution virtually everyone with whom they speak, just in case that person admits an offence."[22] On the CCLA's proposal this concern is overstated. The CCLA suggests that voluntariness only requires a caution when **(a) police are investigating a crime** and **(b) police initiate contact with an individual to secure information**. On this formula, 911 calls, complainant-initiated statements, and spontaneous admissions would not require cautions to be proven voluntary unless the individual throughout the course of the interaction subsequently becomes a suspect. The initial statements of individuals, like Mr. Turcotte, who walk into police stations and declare their guilt or certain inculpatory facts, could still be found voluntary without a caution.[23]

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[20] *Ibid.*
[21] *Hebert, supra* at note 1 at para. 73.
[22] Appellant's factum at para. 64, referring to *R v. Turcotte*, 2005 SCC 50.
[23] Appellant's factum at para. 65; To be clear if an individual becomes a suspect while engaging with the police, even if that engagement was initiated by the individual, the police should stop the interview and ensure the individual is properly informed of their constitutional rights.

24. Second, the Crown suggests that importing the standard from *Worrall* would make the voluntariness test subjective when *Hebert, Whittle* and *Oickle* confirm that it is to be objective in nature. This concern is similarly exaggerated. Even if the caution is given a prominent role in the analysis, the analysis can remain primarily objective. The questions will be: did the police seek information from an individual in relation to a crime and did the police initiate contact with that individual? If so, did the police provide a caution? Those questions do not require a subjective assessment of the state of mind of the suspect or witness. It is only if, in the absence of a caution, the Crown seeks to prove that the individual knew of their right not to participate and the consequences of speaking to the police that further inquiry may be required.

25. Finally, the Crown raises concerns that a focus on the caution will distract from the contextual analysis called for by *Oickle*.[24] The CCLA's proposed test does not eschew a consideration of all of the circumstances. Rather, the proposed test gives significant weight in all of the circumstances to a caution. This means that before considering further circumstances, such as an "operating mind" and "threats or inducements" the Court ensures that an individual knew and understood the consequences of speaking to the police. The CCLA argues in the vast majority of cases a caution will be a necessary, but not sufficient, requirement of the Crown proving the voluntariness of an individual's statement.

4. In the Absence of a Caution, the State Can Prove Voluntariness in Limited Circumstances

26. In the absence of a police caution prior to initiating questioning, the Crown can prove voluntariness by showing that the defendant knew he or she did not have to answer police questions and that his or her statements might be used by the prosecution to his or her detriment. There will be cases where the Crown will be able to establish that the individual made a meaningful choice to speak even in the absence of a caution.

27. This is not a far-fetched hypothetical. In *Pepping*, for instance, the Ontario Court of Appeal found that despite the absence of a caution the appellant "was aware of the legal consequences of giving a statement"[25], was eager to talk, and therefore the was statement admissible. Further, in *Boothe-Rowe*,[26] the trial judge found a statement admissible even in the absence of a caution on the basis that

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[24] Appellant's factum, at para. 80.
[25] *R. v. Pepping*, 2016 ONCA 809 at para. 6.
[26] *R v. Boothe-Rowe,*2014 ONSC 571.

the defendant elected to speak to the authorities and understood that her statement could be used to her detriment.[27] In other words, the court concluded that the defendant had enough information to make a "meaningful choice." [28] These cases show that even though a caution will be determinative of involuntariness in most cases, the Crown can still meet their burden of proof by demonstrating that the defendant made an informed choice.

28. The CCLA's proposed solution provides adequate protection to individuals who may not understand their rights, without unduly hampering law enforcement investigations. Requiring a caution is a simple solution to the problem of informational deficits in the voluntariness analysis. It allows for a more even playing field between the police and the individual being questioned. It is in line with the "complex of values"[29] that underpin voluntariness – especially fairness.

PARTS IV & V - ORDERS AND COSTS

29. The CCLA seeks no costs and asks that none be ordered against it. The CCLA was given permission to present oral argument in the Order granting leave to intervene.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF AUGUST, 2021.

Counsel for the Intervener

[27] *Ibid*., at para. 45, 48.
[28] *Ibid*., at para. 40-41, 48 aff'd 2016 ONCA 987 at paras. 18-21.
[29] *Singh*, *supra* at note 4, at para. 30.

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