S.C.C. File No.: 39350

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and -

RUSSELL STEVEN TESSIER

RESPONDENT
(Appellant)

-and-

ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF NEW BRUNSWICK and
CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF NEW BRUNSWICK PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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PART I: OVERVIEW AND FACTS

1. A criminal trial is not a tea party.[1] Nor is a murder investigation. Indeed, the culmination of this Court's jurisprudence reveals that kid gloves are not necessary nor sufficient when dealing with sophisticated criminals. It is thus no surprise that this Court has emphasized that the investigation of crime is not a leisurely activity governed by the Marquess of Queensberry Rules.[2] As a result, it is now beyond dispute that legitimate police investigative means are not only acceptable, they are necessary to properly resolve crime. Such investigations require sincere fairness and respect for an accused's rights. Nothing more.

2. The law recognizes a deep-seated concern for unreliable confessions. Those concerns play a fundamental role in the confession rule. Concerns regarding fairness to the accused equally underpin the rule. That said, fairness to the administration of justice and society as a whole mandates that police be given broad discretion to effectively investigate crime.[3] For that reason, the confession rule has become a delicate balancing act: the rights of an accused person must be vigorously guarded, yet leeway is given to police in order to allow them to properly and effectively investigate crime.[4] These are the twin goals of the confession rule. As such, the confession rule not only owes a duty to an accused person, but implicitly owes a duty to society. This appeal provides the Court with the opportunity to reaffirm that very principle.

3. The balancing of fairness concerns as well as the twin goals of the confession rule require that, in the early stages of a criminal investigation, police be entitled to cast a wide investigative net, gather information and interview non-suspect witnesses without needing to caution those individuals with whom they speak, even if one of them later becomes a suspect.

4. The Intervener takes no position on the facts of this case.

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[1] *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 3.
[2] *R v Oickle*, 2000 SCC 38 at para 66; *Rothman v R*, [1981] 1 SCR 640 at para 127.
[3] *Oickle* at *p,ara* 33; *R v Singh*, 2007 SCC 48 at paras 28 and 45; *R v Hebert*, [1990] 2 SCR 151 at paras 127-128.
[4] *Oickle* at para 33; *Singh* at paras 28 and 45.

PART II: INTERVENER POSITION

5. New Brunswick urges this Court to reaffirm that the absence of a caution is but a single factor in the voluntariness analysis.[5] Further, New Brunswick urges the Court to conclude that the weight to be given to the absence of a caution must operate on a spectrum. It should be given negligible, if any, weight in circumstances where an interviewee is a non-detained non-suspect who later becomes an accused person (such as occurred in this case). On the other hand, where police interview an individual who can objectively be branded a suspect and fail to caution them, the weight to be given to this factor increases on the spectrum but nonetheless cannot overwhelm the analysis. The absence of a caution must continue to be balanced contextually against all remaining voluntariness factors. Lastly, the Intervener proposes a workable framework which will assist trial judges in determining the status of an interviewee and what weight, if any, to afford to the absence of a police caution in the analysis.

PART III: LEGAL ARGUMENT

A) <u>The lack of a police caution raises fairness concerns, not reliability concerns</u>

6. As it relates to voluntariness, this Court has consistently emphasized that trial judges must be alert to the entirety of the circumstances when determining whether an accused exercised free will by *choosing* to make a statement.[6] The importance of free will is propelled by two independent legal concerns: the reliability of the statement (i.e. guarding against false and unreliable confessions) and the notion that statements should not be obtained in a manner that is unfair to the accused and offends the integrity of the justice system.[7] Although concerns regarding the reliability of statements have always been a dominant consideration,[8] a strong undercurrent of fairness has permanently injected itself into the analysis.[9]

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[5] *Boudreau v The King*, [1949] SCR 262 at 267; *R v Bottineau*, 2011 ONCA 194 at para 88; *R v Perry*, [1993] NBJ No. 479 at paras 14-15; *R v Oland*, 2018 NBQB 255 at para 42; *R v Joseph*, 2020 ONCA 73 at para 55.
[6] *Oickle* at para 68 and 71; *Singh* at para 53.
[7] *R v Whittle*, [1994] 2 SCR 914 at para 30; *Singh* at paras 21 and 34-35.
[8] *Singh* at paras 21 and 29; *Oickle* at para 47; *Hebert* at para 82; *Piché v R.*, [1971] SCR 23 at para 4.
[9] *Whittle* at para 30; *Singh* at paras 21 and 34; *Hebert* at paras 94-95.

7. In assessing free will and voluntariness, courts must consider whether the accused had the capacity to comprehend what was being said.[10] Traditionally, the capacity component of the operating mind analysis targeted reliability concerns.[11] In contrast, the "awareness of the consequences" and "choice" components of the analysis were governed by concerns for fairness in the criminal process as well as the right to silence, not reliability.[12] In fact, prior to *Hebert*, Canadian law, by and large, did not recognize the element of "choice" as a relevant factor in the voluntariness analysis.[13] The rule has since evolved and expanded.[14]

8. The broader approach to voluntariness now extends the rule beyond being an exclusionary one targeting only unreliable confessions, but one which additionally considers whether the reception of a statement would be unfair and tend to bring the administration of justice into disrepute.[15] For that reason, trial judges are now required to consider whether the conduct of the police *unfairly* deprived the suspect of their choice to speak to police.[16] As can be discerned, there are competing interests at play. Admitting *reliable* statements blends comfortably with the court's search for the truth. Yet, reliable statements taken in an *unfair* manner such that they risk bringing the administration of justice into disrepute may strongly weigh against a finding of voluntariness.[17]

9. Although reliability and fairness concerns under the confession rule are tightly intertwined, this appeal is exclusively concerned with fairness considerations under the confession rule. This conclusion stems from the fact that the lack of a police caution does very little to impact the reliability of a statement. Absent exceptional circumstances, the mere fact that an individual was not cautioned cannot raise concerns that a suspect provided an unreliable confession. Put simply, police cautions speak to fairness. Those fairness concerns must be balanced against society's fundamental right to the proper investigation of crime.

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[10] *Oickle* at paras 63-64.
[11] *Whittle* at para 40.
[12] *Whittle* at para 40; *Clarkson v The Queen*, [1986] 1 SCR 383 at para 18; *Hebert* at para 81.
[13] *Hebert* at paras 81-84; *Ibrahim v R*, [1914] AC 599 (PC) [Hong Kong].
[14] *Singh* at para 76.
[15] *Hebert* at para 85; *Singh* at para 76.
[16] *Whittle* at para 45; *Hebert* at paras 83 and 126.
[17] *Clarkson* at paras 20-22.

10. Having regard to the above, this appeal requires the Court to carefully balance the twin goals of the confession rule by weighing fairness concerns owed to the accused against society's right to the proper and thorough investigation of crime. In particular, the question before the Court is whether fairness concerns under the confession rule stretch *so far* that the absence of a police caution can credibly inform the voluntariness of a statement made by a non-suspect who was merely thought to have potentially relevant information when they were interviewed. Or, does a proper balancing of the confession rule, which takes into account society's interest in the investigation of crime, dictate that the absence of a caution carries little, if any, weight in the voluntariness analysis in those same circumstances? From New Brunswick's perspective, the former proposition must be rejected, and the latter accepted.

B) A police caution is intended to protect the rights of suspects, not mere witnesses

11. A standard police caution protects a suspect's "right to choose" whether to speak to police.[18] It is an informational protection. Not only is the standard police caution rooted in fairness, it directly addresses fairness concerns for *suspects*. It furnishes and equips the suspect who has been targeted by the state and who is sometimes even under control of the state with sufficient information to make a meaningful choice as to whether to speak to police. To that end, the law has continuously operated on the assumption that a caution is aimed at protecting the rights of a suspect, not a mere witness. As acknowledged in the Appellant's Submissions, the origins of the police caution go back to the English Judges' Rules of 1912. Those rules contemplated that a caution was only required where an individual was "in custody" or where "a police officer has made up his mind to charge a person with a crime."[19] Thus, since its inception, or at the very least since its infancy, the standard police caution has only targeted *suspects* or arrestable individuals, not mere witnesses.

12. When considering the fact that a police caution is the primary source of protection as it relates the "right to choose", it is apt to note that this Court has consistently referenced the "right to

[18] *Singh* at para 31.
[19] Appellant's Submissions, para 69.

choose" as applying to a "suspect", a "detainee", or someone in control of the state.[20] For example, as this Court has held, the choice whether to speak to police is reflected in the usual police caution "given to a suspect and the importance attached (even before the advent of the *Charter*) to the presence of a caution as a factor in determining the voluntariness of a statement made by a person under arrest or detention."[21] When advising on the timing of a police caution, this Court explained that "even if the suspect has not formally been arrested and is not obviously under detention", police should caution those suspects where they have grounds to detain or arrest.[22] Moreover, the "right to choose" aspect of the confession rule is inextricably linked to the right to silence protected by section 7, a right that is only triggered upon detention.[23] While there is no doubt the "right to choose" applies pre-detention under the confession rule, the purpose of a police caution and the protection it affords to those who have been targeted by the state is nonetheless informed by the section 7 jurisprudence.

13. Bearing the above in mind, while the confession rule applies to all accused persons who give a statement to a person in authority,[24] the evolution of the police caution and its protection of the "right to choose" has consistently been tailored to one basic assumption: the person with the right to choose who may benefit from a police caution has been targeted by the state. The use of the term "suspect" or "detainee" in this Court's jurisprudence is not mere nomenclature. Rather, it is a reflection of the Court's acknowledgement that failing to caution a suspect and *unfairly* depriving them of being able to make a meaningful choice militates against a finding of voluntariness whereas the failure to caution a mere witness does not trigger such fairness concerns. In other words, as a matter of fairness under the confession rule, the law has developed in such a manner that the failure to caution such a suspect may deleteriously weigh against a finding of voluntariness.[25] Naturally, on the other hand, it can only be said that the failure to caution a non-suspect means very little in the overall voluntariness analysis. As one

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[20] See for example *Hebert* at paras 95, 99, 112, 125, 126, 127; *Whittle* at paras 45 and 55; *Singh*, at paras 25 and 31-35; *Oickle* at paras 24-26.
[21] *Singh* at para 31.
[22] *Singh* at paras 32-33.
[23] *Hebert* at para 131; *Singh* at para 32; *Joseph* at para 50.
[24] *Piché* at para 40.
[25] *Oland* at para 42; *R v Smyth*, [2006] OJ No. 5527 (SCJ) at paras 80-81.

judge put it, "mere witnesses, who have no likelihood of becoming accused persons have no need for the protections afforded by the rule" because they are not in jeopardy of prosecution.[26]

14. This line of reasoning is consistent with the fact that i) a suspect's right to choose whether to speak to police is rooted in fairness[27] and ii) there is a fundamental difference between being detained, targeted and controlled by the state and merely being a witness thought to have relevant information.[28] That very distinction is of critical importance and this Court has consistently recognized that the stakes are much different once someone has been targeted by the state.[29] It is therefore no surprise that a police caution is intended to protect the rights and fairness owed to *suspects*. That is what is *fair* and what protects the rights of individuals targeted by the state as well as the integrity of the justice system. In contrast, fairness to the administration of justice and to society dictates that the absence of a police caution carry little weight in the voluntariness analysis relating to a non-suspect. While society's interests must yield to the rights and fairness owed to a suspect, a non-suspect's interest must yield to society's rights. That is what strikes the proper balance.

15. Based on the above, New Brunswick concedes that fairness concerns under the confession rule arise where a suspect targeted by the state has not been cautioned by police. Those same legal concerns must be balanced contextually against the undeniable need for police to effectively investigate crime in circumstances similar to the case at bar where a crime occurs, the police have no leads and need to cast a wide investigative net. In these circumstances, the law does not require that mere witnesses be cautioned. To do so risks unnecessarily and unfairly stifling police investigations in such a manner that offends and undermines the delicate balance the voluntariness rule seeks to achieve. The fact that a mere witness later becomes a suspect cannot, on its own, trump society's right to the proper investigation of crime. Accordingly, New Brunswick urges this Court to reaffirm that the absence of a caution is but a single factor

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[26] *R v Randall*, 2003 CanLII 2205 (ONSC) at para 18.
[27] *Whittle* at para 40; *Clarkson* at para 18; *Hebert* at para 81.
[28] *Singh* at para 32.
[29] *Singh* at para 32.

in the voluntariness analysis. In addition, New Brunswick asks this Court to adopt a spectrum analysis as it relates to the absence of a caution in the voluntariness analysis.

16. As part of the spectrum analysis, trial judges will have to place the weight to be given to the absence of a police caution on a spectrum. The absence of a caution should be given negligible weight in circumstances where an interviewee is, objectively viewed, a non-detained non-suspect who later becomes a suspect (such as occurred in this case). On the other hand, where a suspect who has been targeted by the state fails to receive a caution, the weight to be given to this factor increases, but nonetheless must be balanced against all remaining factors.[30]

17. Fairness concerns will inform the nature of the weight to be given to the absence of a caution on a spectrum. For example, an intentional and deliberate decision by the police to abstain from cautioning a suspect with the clear goal of unfairly extracting inculpatory concessions from them will evidently fall at the serious end of the spectrum. Where there is a short and inadvertent delay in cautioning a suspect, the weight to be given decreases. And, as observed, where the interviewee is merely a witness, the absence of a caution falls at the lower end of the spectrum.

18. The spectrum component of this exercise ensures that trial judges can carefully balance the facts and circumstances before them and accurately determine the extent to which fairness and the integrity of the justice system have been compromised. In many ways, the spectrum analysis would mirror the "police conduct" spectrum that this Court approved of in *R v Grant* as it relates to the exclusion of evidence pursuant to section 24(2) of the *Charter*.[31] The police conduct inquiry under *Grant* invites trial judges to assess the conduct of the police in determining the extent to which it informs the section 24(2) exclusionary remedy.

19. When considering the notion of a spectrum, judicial exclusion of statements based solely on the fact that a suspect was not cautioned, as occurred in *Worral* and *Garnier*,[32] is an intolerable result which offends and undermines this Court's instructions regarding the need for a trial

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[30] *Boudreau* at 267; *Bottineau* at para 88.
[31] *R v Grant* 2009 SCC 32 at para 74.
[32] *R v Worral*, 2002 CarswellOnt 5171 at para 106; *R v Garnier*, 2017 NSSC 338 at para 81.

judge to consider the entire context of a statement. In *Garnier*, despite the absence of factors which would undermine the reliability of the impugned statement, Justice Arnold concluded that Mr. Garnier was a suspect at the time of his interview and that "because Mr. Garnier was not cautioned, his statement cannot be said to be voluntary. It would undermine the integrity and repute of the trial process to admit a statement given in these circumstances."[33] Absent exceptional circumstances which reveal clear abuse by the police, a direct route to such a conclusion based solely on the absence of a police caution must be firmly rejected by this Court. Put bluntly, involuntariness does not flow from the absence of a caution alone.[34] The spectrum component merely assists in assessing what weight to give to the absence of a police caution. Nonetheless, all voluntariness factors must be contextually assessed – there is no room for hard and fast rules.[35]

C) A practical framework for determining the status of an interviewee is needed

20. The law is unambiguous in its agreement that the absence of a caution is but a single factor in the voluntariness analysis.[36] As indicated, although there is no constitutional obligation to caution a non-detained suspect,[37] the failure to caution a *suspect* may negatively influence the outcome of a voluntariness analysis.[38] In contrast, the failure to caution a *non-suspect* is a factor that should be given negligible weight and may even be considered a neutral factor. This is consistent with the spectrum analysis suggested above. As a result, determining the status of an interviewee assists in providing trial judges with a helpful goalpost in weighing the absence of a police caution. For that reason, it is important to determine "who is a suspect?".[39]

21. A myriad of different legal frameworks crafted in the courts below attempt to assist with the determination of "who is a suspect". They all have one distinct component in common: an

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[33] *Garnier* at para 81.
[34] *Joseph* at para 53.
[35] *Oickle* at para 47.
[36] *Boudreau* at 267; *Bottineau* at para 88; *Perry* at paras 14-15; *R v Pearson*, 2017 ONCA 389 at para 19; *Oland* at para 42; *Joseph* at para 55.
[37] *Joseph* at para 49; *Singh* at paras 32-33; *R v Morrison*, [2000] OJ No. 5733 (SCJ) at para 53.
[38] *Oland* at para 42; *Smyth* at paras 80-81.
[39] *Oland* at para 42.

objective test is required in order to determine whether an interviewee was a "suspect" at the time they gave a statement.[40] The requirement that an objective approach be taken is consistent with *Charter* values and properly protects the right to silence as well as fairness concerns under the confession rule. It ensures that police cannot simply avoid the obligation to caution a suspect based on their subjective belief. Rather, they must look at all the evidence known to them from an objective point of view.[41] Wilful blindness in these circumstances is unpalatable.

22. Although no clear and consistent test has emerged, a review of the law and the different tests applied relating to the determination of a suspect can be boiled down to one basic analytical question: were there objectively discernable facts that were known to the interviewing officer or the investigative team at the time of the interview which would lead a reasonably competent investigator to conclude that the interviewee is implicated in the criminal offence being investigated? New Brunswick proposes that this test be adopted by the Court.

23. Some qualifications to the above noted test are worthy of consideration. First, the suggested test imposes a higher threshold than merely having "reasonable grounds to suspect." Second, courts must embark on the suspect analysis based on what was objectively known to the interviewing officer or investigative team *at the time of the interview*. Hindsight is perilous in these scenarios and cannot be allowed to influence the determination of when someone has become a suspect.[42] Were it otherwise, after-the-fact information gathered by police would blur the analysis.

24. Third, asking probing, pointed, and even confrontational questions does not, on its own, render a person a suspect.[43] While perhaps relevant, the analysis must always return to the objectively known facts. To conclude that pointed questions and even confrontational questions brand someone a suspect risks entirely stifling legitimate police questioning. Police should not be afraid to ask pointed questions during an investigation. They are expected to.

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[40] *Worral* at para 104; *Morrison* at para 50; *R v Wong*, 2017 ONSC 1501 at paras 64-65; *R v Merritt*, 2016 ONSC 7009 at para 39; *Oland* at para 65
[41] *Smyth* at para 81.
[42] *Merritt* at paras 75 and 79; *Oland* at para 50.
[43] *R v Peterson (D.C.)*, 2013 MBCA 104 at para 52; *Merritt* at paras 75 and 79; *Oland* at para 50.

25. Last, some leeway must be given to police officers. A standard of perfection cannot be expected in the often-fast-moving and dynamic portions found in the early stages of a criminal investigation. In assessing whether an interviewee is a suspect, in addition to objectively discernable facts, courts may consider the conduct of the investigation. The following factors are relevant, none of which should overwhelm the analysis on its own:

    i. what the investigative team knew about the offence in general, including the stage of the investigation (where the investigation is in its infancy and police are casting a wide investigative net, this tends to support a finding that there were no suspects);
    ii. investigative steps taken by the investigative team generally as well as in relation to the specific interviewee (taking some investigative steps toward an interviewee does not, on its own, make that person a suspect. Police are entitled and expected to investigate with due diligence);
    iii. the nature of the questioning (as indicated, probing and pointed questions are not necessarily indicative of suspicion, rather, it is indicative of due diligence);
    iv. whether the investigative team was actively pursuing other leads or attempting to pursue other leads or whether they narrowly focused on the interviewee; and
    v. the entire circumstances surrounding the interview.

26. The "suspect test" carved out above and its qualifications provide a workable framework for judges, lawyers, and police officers. Most importantly, the result of the analysis will assist judges in applying proper weight to the absence of a police caution on a spectrum. A global and contextual analysis of all of the circumstances will still be required in order to properly determine voluntariness and the weight to be given to the absence of a police caution.[44] Assessing the weight to be given to the absence of a police caution on a spectrum allows this Court to strike the proper balance in protecting the rights of an accused under the common law confession rule while maintaining society's interest in the effective investigation of crime.

PARTS IV: SUBMISSION ON COSTS

27. The Intervener does not seek costs and asks that no costs be awarded against it.

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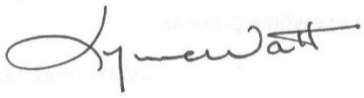
[44] *Oickle* at para 68 and 71; *Singh* at para 53.

All of which is respectfully submitted,

Dated this 24th day of August 2021 at the City of Fredericton, in the Province of New Brunswick.



for:

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PART VII: TABLE OF AUTHORITIES

Rothman v R, [1981] 1 SCR 640	1
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